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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Judgment delivered on:29.05.2023

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FAO (OS)(COMM) No.31/2023

FLOWMORE LIMITED

..... Appellant

Through: Mr. Arvind Nigam, Sr. Advocate with
Mr. Abhinav Mukerji and Ms.
Pratishtha Vij, Advocates

versus

M/S SKIPPER LIMITED

..... Respondent

Through: Mr. Nikhil Nayyar, Sr. Advocate with
Mr. Neveen Kumar, Mr. Nitesh
Bhandari, Ms. Stuti Bisht, Mr.
Shourajeet Chakarvarty, Ms.
Aprajita Bharadwaj,
Mr. Prabhat Kumar Rai, Mr. Sankalp
Suman, Mr. Saurav Gupta, Mr.
Naveen Hegde and Ms. Sugandha
Batra, Advocates.

CORAM:**HON'BLE MR. JUSTICE NAJMI WAZIRI****HON'BLE MR. JUSTICE SUDHIR KUMAR JAIN****J U D G M E N T****NAJMI WAZIRI, J.**

1. This appeal under section 37 of the Arbitration and Conciliation Act, 1996 ('the Act') impugns the order dated 02.02.2023 passed by



the learned Single Judge in OMP (COMM) No. 391/2022 on the ground that it has erred in not appreciating the issues raised in the aforesaid petition.

2. Mr. Arvind Nigam, the learned Senior Advocate for the appellant submits that though the impugned order has discussed the law, however, even without discussing any of the points of facts raised in the section 34 petition, it has come to the conclusion that Flowmore has failed to corroborate with evidence how the Arbitrator's finding regarding the breach of the Purchase Order ('PO') dated 02.03.2019 is contrary to the Public Policy of India. It goes on to hold as under:-

"...62. In light of the facts, submissions and contentions in the pleadings, this Court find that the Petitioner has failed to corroborate with evidence how the Learned Arbitrator's finding regarding the breach of the Purchase Order is contrary to the Public Policy of India. Even if the submissions of the Petitioner qua patent illegality in the Impugned Arbitral Award is accepted, then also no ground has been made out to set aside the Award inasmuch as the threshold to interfere and set aside an Arbitral Award has not been met.

63. It is settled law that the ground of Patent illegality gives way to setting aside an Arbitral Award with a very minimal scope of intervention. A party cannot simply raise an objection on the ground of patent illegality if the Award is simply against them. Patent illegality requires a distinct transgression of law, the clear lack of which thereof makes the petition simply a pointless effort of objection towards an Award made by a competent Arbitral Tribunal.

64. The Court is unable to subscribe to the submissions made by the learned counsel for the Petitioner. The Petitioner has failed to show that the arbitral award has been passed by the Learned Arbitrator by misappreciating evidence. Further, the petitioner has not been able to prove that the impugned



Arbitral Award is patently illegal, and contrary to the fundamental policy of Indian Law, and hence is liable to be set aside.

65. The Court is of the view that on the application of the rule of contra proferentem, the Purchase Order was fittingly interpreted by the Learned Arbitrator, leaving no scope for the interference of this Court on the Award. The Learned Arbitrator rightfully found the Petitioner to be guilty of breach of contract, which resulted in the Respondent incurring losses, and hence validates the award of a sum of Rs, 8,15,05,674/- to the Respondent.

66. The Court disagrees with the Petitioner's submission that the Respondent had shown no proof of any loss caused to it and that the Respondent was attempting to make unjust gains from the Petitioner. The Learned Arbitrator has accurately considered the documents on record to conclude that the Respondent has indeed incurred loss due to the Petitioner's actions, and hence is liable to be compensated..."

3. He further submits that the scope for judicial review under sections 34 and 37 of the Act is rather narrow. In the latter, proceedings the scope is even lesser. However, not all, examination of the records or the reasons for or the manner of arriving at the decision/Award is excluded from judicial review. In support of his submission, he relies upon the dicta of the Supreme Court in *Delhi Airport Metro Express Private Limited vs. Delhi Metro Rail Corporation Limited* (2022) 1 SCC 131, in particular, upon the following observations:-

*".....27. For a better understanding of the role ascribed to Courts in reviewing arbitral awards while considering applications filed under Section 34 of the 1996 Act, it would be relevant to refer to a judgment of this Court in *Ssangyong Engg. & Construction Co. Ltd. v. NHAI* [*Ssangyong Engg. &**



Construction Co. Ltd. v. NHAI, (2019) 15 SCC 131 : (2020) 2 SCC (Civ) 213] wherein R.F. Nariman, J. has in clear terms delineated the limited area for judicial interference, taking into account the amendments brought about by the 2015 Amendment Act. The relevant passages of the judgment in Ssangyong [Ssangyong Engg. & Construction Co. Ltd. v. NHAI, (2019) 15 SCC 131 : (2020) 2 SCC (Civ) 213] are noted as under : (SCC pp. 169-71, paras 34-41)

“34. What is clear, therefore, is that the expression “public policy of India”, whether contained in Section 34 or in Section 48, would now mean the “fundamental policy of Indian law” as explained in paras 18 and 27 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] i.e. the fundamental policy of Indian law would be relegated to “Renusagar” understanding of this expression. This would necessarily mean that Western Geco [ONGC v. Western Geco International Ltd., (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12] expansion has been done away with. In short, Western Geco [ONGC v. Western Geco International Ltd., (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12] ,as explained in paras 28 and 29 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , would no longer obtain, as under the guise of interfering with an award on the ground that the arbitrator has not adopted a judicial approach, the Court's intervention would be on the merits of the award, which cannot be permitted post amendment. However, insofar as principles of natural justice are concerned, as contained in Sections 18 and 34(2)(a)(iii) of the 1996 Act, these continue to be grounds of challenge of an award, as is contained in para 30 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] .

35. It is important to notice that the ground for interference insofar as it concerns “interest of India” has since been deleted, and therefore, no longer obtains.



Equally, the ground for interference on the basis that the award is in conflict with justice or morality is now to be understood as a conflict with the “most basic notions of morality or justice”. This again would be in line with paras 36 to 39 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , as it is only such arbitral awards that shock the conscience of the court that can be set aside on this ground.

36. Thus, it is clear that public policy of India is now constricted to mean firstly, that a domestic award is contrary to the fundamental policy of Indian law, as understood in paras 18 and 27 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , or secondly, that such award is against basic notions of justice or morality as understood in paras 36 to 39 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] . Explanation 2 to Section 34(2)(b)(ii) and Explanation 2 to Section 48(2)(b)(ii) was added by the Amendment Act only so that Western Geco [ONGC v. Western Geco International Ltd., (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12] , as understood in Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , and paras 28 and 29 in particular, is now done away with.

37. Insofar as domestic awards made in India are concerned, an additional ground is now available under sub-section (2-A), added by the Amendment Act, 2015, to Section 34. Here, there must be patent illegality appearing on the face of the award, which refers to such illegality as goes to the root of the matter but which does not amount to mere erroneous application of the law. In short, what is not subsumed within “the fundamental policy of Indian law”, namely, the contravention of a statute not linked to public policy or public interest, cannot be brought in by the backdoor when it comes to setting aside an award on the ground of patent illegality.



38. Secondly, it is also made clear that re-appreciation of evidence, which is what an appellate court is permitted to do, cannot be permitted under the ground of patent illegality appearing on the face of the award.

39. To elucidate, para 42.1 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , namely, a mere contravention of the substantive law of India, by itself, is no longer a ground available to set aside an arbitral award. Para 42.2 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , however, would remain, for if an arbitrator gives no reasons for an award and contravenes Section 31(3) of the 1996 Act, that would certainly amount to a patent illegality on the face of the award.

40. The change made in Section 28(3) by the Amendment Act really follows what is stated in paras 42.3 to 45 in Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , namely, that the construction of the terms of a contract is primarily for an arbitrator to decide, unless the arbitrator construes the contract in a manner that no fair-minded or reasonable person would; in short, that the arbitrator's view is not even a possible view to take. Also, if the arbitrator wanders outside the contract and deals with matters not allotted to him, he commits an error of jurisdiction. This ground of challenge will now fall within the new ground added under Section 34(2-A).

41. What is important to note is that a decision which is perverse, as understood in paras 31 and 32 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , while no longer being a ground for challenge under “public policy of India”, would certainly amount to a patent illegality appearing on the face of the award. Thus, a finding based on no evidence at all or an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside on the ground of patent illegality. Additionally, a finding



based on documents taken behind the back of the parties by the arbitrator would also qualify as a decision based on no evidence inasmuch as such decision is not based on evidence led by the parties, and therefore, would also have to be characterised as perverse.”

28. This Court has in several other judgments interpreted Section 34 of the 1996 Act to stress on the restraint to be shown by Courts while examining the validity of the arbitral awards. The limited grounds available to Courts for annulment of arbitral awards are well known to legally trained minds. However, the difficulty arises in applying the well-established principles for interference to the facts of each case that come up before the Courts. There is a disturbing tendency of Courts setting aside arbitral awards, after dissecting and reassessing factual aspects of the cases to come to a conclusion that the award needs intervention and thereafter, dubbing the award to be vitiated by either perversity or patent illegality, apart from the other grounds available for annulment of the award. This approach would lead to corrosion of the object of the 1996 Act and the endeavours made to preserve this object, which is minimal judicial interference with arbitral awards. That apart, several judicial pronouncements of this Court would become a dead letter if arbitral awards are set aside by categorising them as perverse or patently illegal without appreciating the contours of the said expressions.

29. Patent illegality should be illegality which goes to the root of the matter. In other words, every error of law committed by the Arbitral Tribunal would not fall within the expression “patent illegality”. Likewise, erroneous application of law cannot be categorised as patent illegality. In addition, contravention of law not linked to public policy or public interest is beyond the scope of the expression “patent illegality”. What is prohibited is for Courts to reappraise evidence to conclude that the award suffers from patent illegality appearing on the face of the award, as Courts do not



sit in appeal against the arbitral award. The permissible grounds for interference with a domestic award under Section 34(2-A) on the ground of patent illegality is when the arbitrator takes a view which is not even a possible one, or interprets a clause in the contract in such a manner which no fair-minded or reasonable person would, or if the arbitrator commits an error of jurisdiction by wandering outside the contract and dealing with matters not allotted to them. An arbitral award stating no reasons for its findings would make itself susceptible to challenge on this account. The conclusions of the arbitrator which are based on no evidence or have been arrived at by ignoring vital evidence are perverse and can be set aside on the ground of patent illegality. Also, consideration of documents which are not supplied to the other party is a facet of perversity falling within the expression “patent illegality”.

30. Section 34(2)(b) refers to the other grounds on which a court can set aside an arbitral award. If a dispute which is not capable of settlement by arbitration is the subject-matter of the award or if the award is in conflict with public policy of India, the award is liable to be set aside. Explanation (1), amended by the 2015 Amendment Act, clarified the expression “public policy of India” and its connotations for the purposes of reviewing arbitral awards. It has been made clear that an award would be in conflict with public policy of India only when it is induced or affected by fraud or corruption or is in violation of Section 75 or Section 81 of the 1996 Act, if it is in contravention with the fundamental policy of Indian law or if it is in conflict with the most basic notions of morality or justice.

31. In *Ssangyong [Ssangyong Engg. & Construction Co. Ltd. v. NHAI]*, (2019) 15 SCC 131 : (2020) 2 SCC (Civ) 213, this Court held that the meaning of the expression “fundamental policy of Indian law” would be in accordance with the understanding of this Court in *Renusagar Power Co. Ltd. v. General Electric Co.* [Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCC 644]. In *Renusagar [Renusagar Power Co. Ltd. v. General Electric*



Co., 1994 Supp (1) SCC 644] , this Court observed that violation of the Foreign Exchange Regulation Act, 1973, a statute enacted for the “national economic interest”, and disregarding the superior Courts in India would be antithetical to the fundamental policy of Indian law. Contravention of a statute not linked to public policy or public interest cannot be a ground to set at naught an arbitral award as being discordant with the fundamental policy of Indian law and neither can it be brought within the confines of “patent illegality” as discussed above. In other words, contravention of a statute only if it is linked to public policy or public interest is cause for setting aside the award as being at odds with the fundamental policy of Indian law. If an arbitral award shocks the conscience of the court, it can be set aside as being in conflict with the most basic notions of justice. The ground of morality in this context has been interpreted by this Court to encompass awards involving elements of sexual morality, such as prostitution, or awards seeking to validate agreements which are not illegal but would not be enforced given the prevailing mores of the day. [Ssangyong Engg. & Construction Co. Ltd. v. NHAI, (2019) 15 SCC 131 : (2020) 2 SCC (Civ) 213]

(emphasis supplied)

4. He says that the points and grounds raised now are the same which have been canvassed before the learned Single Judge under section 34 proceedings but the same were never considered; the conclusion arrived at by the Arbitrator in the Award dated 05.07.2022 is not a view which was a plausible one in the facts of the case; that the view taken is a patent illegality and the manner in which the documents and the clauses have been interpreted is not a view which a fair minded or reasonable person would take; the conclusions of the Arbitrator are not supported by evidence and/or otherwise have been arrived at by ignoring vital evidence. Therefore, the conclusions are



perverse and can be set aside in these proceedings. In support of foundational basis for maintenance of this appeal, he refers to the following facts:-

(i) That Skipper was engaged by the Flowmore for manufacturing and supply of customized towers and erection of eight electricity transmission lines and other ancillary goods as per the specifications and other details for the appellant's client Jharkhand Urja Sancharan Nigam Limited ('JUSNL'). Subsequently, these eight transmission lines were reduced to five transmission lines. As per the PO dated 02.03.2019, Flowmore was to provide all structural drawings, shop sketches, BOM of items to the respondent and the latter was to get all drawings/documents and/or prototype approved directly from JUSNL. Reference is made to Clauses 12 and 38 of the PO, which read as under:-

“12. DOCUMENTS/DRAWING SUBMISSION: The Drawings, Data Sheets, OAP, Type Test Certificates & Technical details shall be submitted within 05 days in 5 sets to our Ranchi Branch office under copy to us for the onward submission to our client for approval from the date of receipt of this purchase order. Also send soft copy to Ahmedabad Office. You will have to submit the drawing/documents as TITLE BLOCK given below.

...

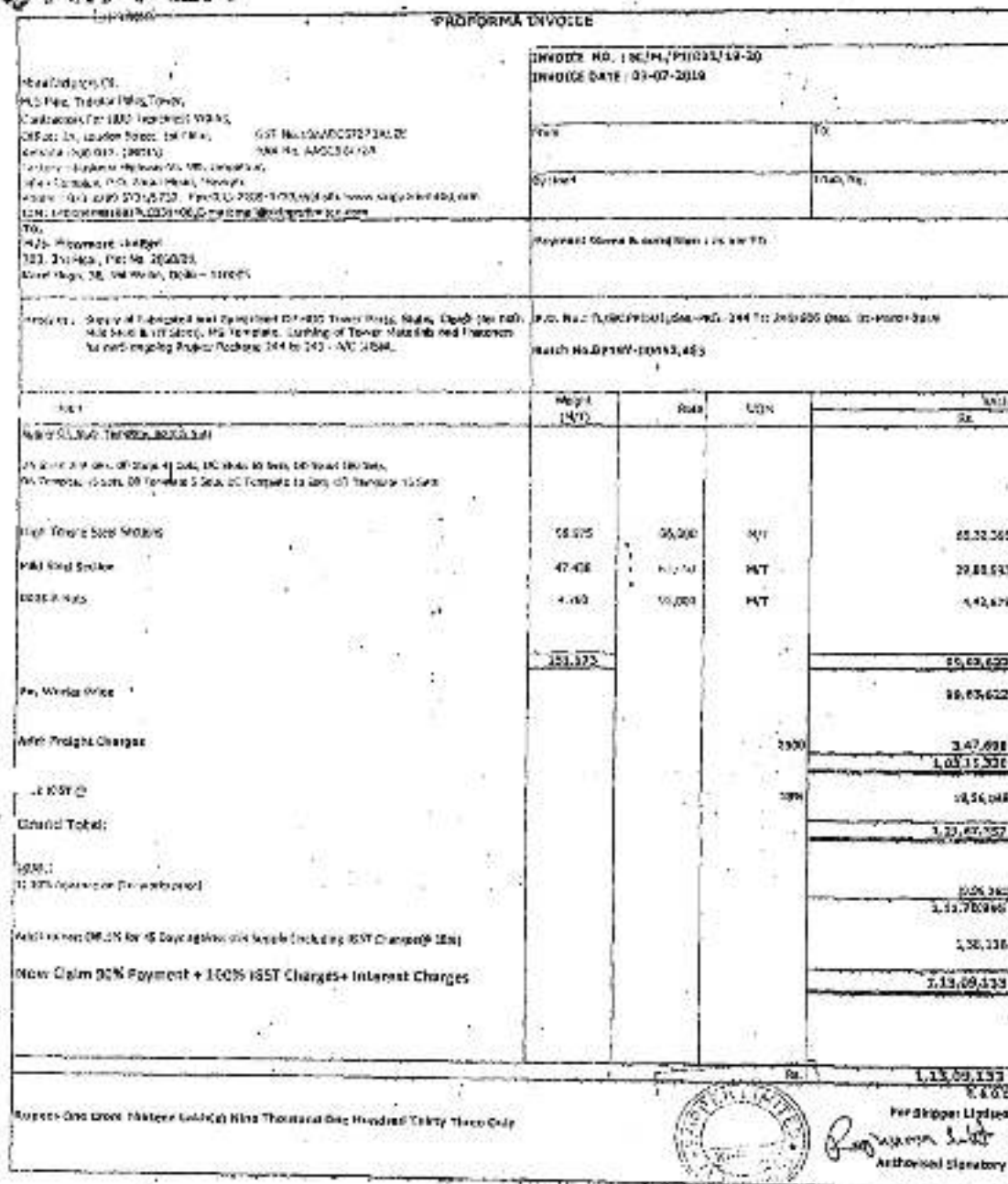
“38. MANUFACTURING CLEARANCE: The Supplier shall start the manufacture of material only after getting written Manufacturing Clearance (MC) from Buyer. The quantity cleared in MC shall only be manufactured by Supplier. Any material manufactured without getting the MC fro Buyer shall be rejected.”



5. According to the appellant, correspondence in this regard shows that Skipper would ultimately have to ensure that the structural drawings and documents were to be approved by JUSNL. Reference is made to various correspondences between the parties from March to July, 2019. It is admitted by Flowmore that there was a clear go ahead for the manufacture of stubs and templates, therefore, if Skipper had manufactured it, the monies will be payable as per the invoice raised for these products.

6. The Proforma invoice raised for this Order reads as under:







7. As per clause 16 of the PO, Skipper had asked for 10% advance. However, that was not paid, instead the contract was terminated on 25.07.2019. The said Clause 16 reads as under:

“16. PAYMENT TERMS”

10% Advance payment of basic amount against submission of Advance Bank Guarantee During Manufacturing Clearance of equivalent amount of advance payment along with Proforma Invoice incorporate HSN code and bank details.

90% Payment of basic amount + GST and freight as actual payment shall be made through L/C for 180/120 days. 45 days interest will be borne by you and beyond 45 days interest will be borne by us.

L/C will be issued after completion of inspection and before issuance of DI from JUSNL which shall be forwarded to you for dispatch. You will have to submit the following documents with L/C for negotiation:

- (a) Commercial Invoice- 2 sets*
- (b) Photo copy of LR against materials dispatched*
- (c) Delivery Challan duly signed accepted & against materials certified by us.*
- (d) LC credit period will start after reconciliation of all materials reached at sites.”*

8. The learned Senior Advocate for the appellant further contends that for the Award to grant Rs. 8,15,05,674 on the erroneous conclusion that the towers had been manufactured, cannot be sustained because of the clear admission by Skipper that prototype of the towers had not been made. Consequently, there could possibly be no case for mass production of the towers.



9. On 30.05.2019, Flowmore had sought inspection of the prototype towers. Skipper sought waiver of the same. The Award itself records that that there was no waiver. Interestingly, on 23.07.2019, Skipper admitted that the prototype was still under production whereas, in the cross-examination dated 05.12.2020, Skipper stated that the production of towers had already been completed on 04.07.2019. This is an evident anomaly, which cannot be ignored. The correspondence in this regard reads as under:-

“

From: DS Shekhawat - Skipper Ltd.
 Sent: Tuesday, July 23, 2019 11:39 AM
 To: Mahesh.patel@flowmoregroup.co.in
 Cc: santanu.dutta@skipperlimited.com; tiendra.singh@skipperlimited.com; sudip.sarma@skipperlimited.com; Dhaval Panchal; Rajkumar Sett - Skipper Ltd.; Rajeev.kumar@flowmoregroup.co.in; flowmoreprojects@gmail.com
 Subject: RE: Reply - we are awaited your inspection call.

Dear Sir,

We do not understand what fairness you are talking about. Our bank guarantee for advance was given more than a month back and we have all the raw material lined up for stubs.

The proto of towers is also under production without getting the advance. We will raise the inspection call immediately on receipt of advance payment. Please call up if you have any issue.

Best Regards,

D.S. Shekhawat*
 V.P. (Tower)



Cross-Examination:

Q.20 On which date did the Claimant complete the production of the towers?

Ans. We completed production of the towers on 04.07.2019.”

10. Furthermore in its affidavit of evidence, Skipper admits as under:

“11. I say that the contractual advance was as per standard practice whereby the Advance Payment made by buyer would be used by the Supplier to procure primary raw materials for starting manufacturing process. Again such clause recognizes the well established practice in the highly customized Transmission & Distribution Structures (Towers & Poles) industry where the goods and services are provided as per specification of the buyer

...

16. I say that the Claimant in terms of the agreement between the parties by email dated 11.03.2019 submitted proforma invoice amounting to 10% of the contract value being 2,34,94,200/- against release of advance payment as per terms of the purchase order. I say that in the natural sense of business and as per contract, advance payment is to be released by the buyer of the materials at the first instance so as to facilitate the seller of the materials to buy the required primary raw materials for production of finished goods and to take action for timely delivery. A true copy of the claimant's email dated 11.03.2019 to respondent is already exhibited as Ex. CW1/10 {See SOC, Annexure C10, pgs 135-136},...”

11. The PO was for a total remuneration of about Rs.27 crores. It is reproduced hereunder:-



ANNEXURE - I - TOWER STRUCTURAL MATERIALS AND FASTENERS - A/C. IUSNL PROJECTS PACKAGE 244 TO 249

DATE: 25/07/2019

DATE: 25/07/2019													
Sr. No.	Material Description	Unit	MT NO.							Total Qty.	Unit Rate	Total	
			244 SIMARIA	245 Gola	246 Dugda	247 MAHUBA	248 Nirsa	249 Purki					
A	For Transmission Line Fabrication, Galvanizing and supply of various type of tower & Tower Parts, Tower extensions (Complete) As per IUSNL Tender Specification & latest amendments Only												
1	HT Steel	MT	99.86	133.74	113.51	101.00	164.47	37.58	86.63	120.67	857	65000	55592765
2	Mild Steel	MT	277.12	382.44	323.38	284.82	463.50	106.88	243.25	337.01	2417	63080	152245205
B	Fabrication, Galvanizing and supply of stubs & cleats for various type of towers, tower extensions (complete) As per IUSNL Tender Specification & latest amendments Only												
1	HT Steel	MT	14.765	19.510	17.058	14.793	23.421	5.788	12.558	18.395	126	66000	8328468
2	Mild Steel	MT	2.162	2.900	2.567	2.180	3.392	0.884	1.8216	2.728	14	63000	1173923
C	Supply of S.B Gr.bolts & nuts (M16) including step bolts and spring washers As per IUSNL Tender Specification & latest amendments Only												
1	Hexagonal bolts and nuts including step bolts	MT	20.11	26.83	21.06	19.42	37.84	5.88	19.46	22.21	173	93800	16870658
2	Bolts and nuts for stubs	MT	0.66	0.89	0.75	0.65	1.33	0.24	8.60	0.79	6	93400	538971
G. Total											3597		234942000
Plus GST@18%													42285550
G. Total		Rs. Twenty Seven Crores Seventy Two Lacs Thirty One Thousand Five Hundred Sixty Only											277231560

Signature Not Verified

Digitally Signed By: KAMLESH KUMAR

Signing Date: 14.06.2023
13:04:12

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12. The claim was of Rs.15,13,77,660, of which Rs.5,89,09,519 was deducted against an assumed scrap sale value of the newly manufactured products and Rs.1,09,62,467 was deducted against nuts and bolts that were kept aside by Skipper to be used for some other project. Notably, nobody from Flowmore saw or was called to see the scrap sale neither was the said sale verified. Resultantly, an amount of Rs.8,15,05,674 was awarded.

13. Quite evidently, as noted above, once there is an admission by Skipper that the towers were still under production then to come to the conclusion that 100% of the towers had been manufactured, is not a plausible view which could have been taken. This vital evidence could not be ignored or overlooked. The conclusion is *prima facie* erroneous. It would warrant re-look by this Court in the proceedings under section 37 of the Act. There is also evidence on the record to lead to the conclusion that according to the proforma invoice, as referred to hereinabove, the raw material was first to be procured by Skipper for Flowmore. However, there is no record to show that the raw material was procured specifically for Flowmore to serve the said contract.

14. Flowmore further submits that it had never given a Manufacturing Clearance (MC) for manufacture of towers because the prototypes thereof had to be first inspected, which as noted above, was stated to be under production. Therefore, for the Award to accept Skipper's claim that it had the MC to manufacture all towers is erroneous and vitiates the Award. With reference to the communication dated 30.05.2019, Flowmore submits that MC for



mass production was given only with respect to stubs and templates. Whereas for manufacturing of towers, the prototype had to be first shown to the Flowmore by Skipper and if approved, the same would then be permitted for mass production. The aforesaid correspondence in this regard clearly show that MC was given only for production of stubs and templates, therefore, the Award is erroneous insofar as it has concluded that the aforesaid MC was extended to mass production of towers as well. It is argued that this is not a conclusion which a fair minded or a reasonable person would conclude apropos production of towers.

15. Insofar as a Performance Guarantee had already been furnished by Skipper to Flowmore, the former would ordinarily not be expected to expend large sums of money and definitely not an amount of Rs.15 crores, without even receiving a single rupee as advance payment, towards procurement of raw material and manufacture of the various items or towards meeting its obligations under the contract. Furthermore, Skipper's case is that it had on its own by itself done everything including i) having suffered the costs and Bank charges for furnishing Performance Guarantee, ii) *suo moto* waived the 10% requisite advance payment towards mass production of stubs and templates, and iii) paid the entire amount of GST and gone ahead to procure raw materials worth over Rs.15 crores for the manufacture of towers. All this huge expense was incurred without receiving even a single rupee from Flowmore. To any fair minded or reasonable person this would defy business prudence. No business entity is likely to expose itself to such a large financial risk. It has been admitted by



Skipper in its Statement that ordinarily the 10% advance money is utilized to procure raw materials, therefore, it defies logic and common sense as to why would a business enterprise expend Rs.15 crores or more for the purchase of raw materials, without there being any security or assurance that the said money would be recovered. Furthermore if Skipper had manufactured goods worth Rs.15 crores, it would not make sense to refuse to show the manufactured products to Flowmore, merely on the ground that 10% advance had not been paid by it. The reasonable and prudent objective would be that the monies expended towards procurement of raw materials and manufacturing of goods worth Rs.15 crores, be recovered from Flowmore as soon as possible. If the goods were manufactured, they should have been shown. There was nothing secretive about it. There cannot be ego in business transactions.

16. In support of his submissions, the learned Senior Advocate for Flowmore relies upon section 41 of the Sale of Goods Act, 1930 which reads as under:-

“41. Buyer’s right of examining the goods.

(1) Where goods are delivered to the buyer which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract.

(2) Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, he is bound, on request, to



afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract.”

17. There can be no dispute about the purchaser's right to inspect the goods. As per the Contract, Flowmore had a right to inspect the prototype of the towers and then accept the manufactured products. However, since the prototype towers had not been shown to Flowmore, it could not be assumed that the same had been manufactured or were ready for delivery to it.

18. The learned Senior Advocate for the appellant submits that these are important issues which the impugned order has erred in not referring to.

19. While in a section 37 appeal, we would refrain from re-appreciating the evidence, we are of the view that for the reasons aforementioned, the view taken by the Arbitrator was, on the face of it not a plausible one and would require to be seen again. *Ex facie* it suffers from patent illegality or has ignored vital evidence and admission of Flowmore that there was no MC given for manufacturing of the towers. In the absence of any apparent evidence, to conclude as the Award does, is to make the Award suffer from patent illegality and render it liable for being set aside.

20. The learned Senior Advocate for the appellant submits that there is a distinction between a proforma invoice and a final invoice. The proforma invoice of Rs.15 crores at page 331 of the paper book is



only indicative of the amount which can be put in the final invoice. Indeed, the GST amount is not quantified in the said document. Therefore, for the Award to conclude that this was the amount which was payable is *ex facie* not a view that a fair minded or reasonable person could take. The “proforma billed amount” is not borne out from the records and it is based on no evidence. Therefore, the Award is perverse and needs to be set aside.

21. While the Courts would be mindful of the proviso to section 34(2) (a) of the Act that an Award shall not be set aside merely on the ground of an erroneous application of the law or by re-appreciation of evidence, nevertheless, in proceedings under sections 34 and 37 of the Act, if it is evident that the conclusions arrived at in the Award by the Arbitrator are based on no evidence or have been arrived at by ignoring vital evidence, such Award will be deemed as perverse and it can be set aside on ground of patent illegality. Furthermore, the conclusions in the arbitral Award that the raw material had been procured specifically for Flowmore or that the towers had been manufactured, are both not based on evidence and *ex facie* ignores vital evidence of Skipper itself which categorically admitted that no MC was given for manufacture of towers.

22. This is a case in which nobody has seen any of the material procured or manufactured or it having been sold as scrap yet only on the basis of some documents and proforma bills, an Award has been passed imposing a huge liability upon Flowmore. The



commonsensical approach in business relationship and transactions cannot be lost sight of.

23. The logical question would be that whether there was any basis to conclude that the raw material had been purchased merely on the basis of the PO, without receipt of even 10% advance or for that matter without receiving any monies from Flowmore and that Skipper went ahead to manufacture all the towers as was required. Therefore the claimed amounts were payable. The documentary evidence regarding procurement of raw material specifically for Flowmore's project; the lack of any evidence that the various items had actually been manufactured; the lack of any visual proof or record of the same or of even anybody from Flowmore having witnessed the disposal of the same as 'scrap', points to the view that the conclusion in the Award is based on no evidence. On the face of it, it is not a plausible view which could reasonably be taken. The impugned order is silent on these vital issues which needed to be addressed. The findings for the conclusion reached in the Award is either missing or otherwise do not support the conclusion.

24. The court would note that while the impugned order has recorded Flowmore's submissions but it has refrained from considering the same. The writ petition was dismissed by recording the limited scope of section 34 of the Act, however, the specific errors, which the appellant called the 'patent errors' and as discussed above have not been dealt with.



25. In view of the above, the appeal is allowed and the case is remanded to the learned Single Judge for fresh adjudication on the contentions raised by the appellants in the section 34 petition.

NAJMI WAZIRI, J.

SUDHIR KUMAR JAIN, J.

MAY 29, 2023

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