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IN THE HIGH COURT OF DELHI AT NEW DELHI

Pronounced on: 07.07.2023

+ FAO(OS) (COMM) 14/2021, CM APPL. 15614/2021 & CM APPL. 42606/2021

INDEEN BIO POWER LTD

..... Appellant

Through: Mr. Hiroo Advani, Mr. Navdeep Dahiya, Ms. Aditi Shrivastava and Mr. Karandeep Dahiya, Advocates.

versus

EFS FACILITIES SERVICES INDIA PVT LTD

..... Respondent

Through: Mr. Dayan Krishnan, Senior Advocate with Mr. Vasanth Rajasekaran, Mr. Sukrit Seth, Mr. Saurabh Babulkar and Mr. Harshvardhan Korada, Advocates.

+ FAO(OS) (COMM) 111/2021

INDEEN BIO POWER LTD

..... Appellant

Through: Mr. Hiroo Advani, Mr. Navdeep Dahiya, Ms. Aditi Shrivastava and Mr. Karandeep Dahiya, Advocates.

versus

EFS FACILITIES SERVICES INDIA PVT LTD

..... Respondent

Through: Mr. Dayan Krishnan, Senior Advocate with Mr. Vasanth Rajasekaran, Mr. Sukrit Seth, Mr. Saurabh Babulkar and Mr. Harshvardhan Korada, Advocates.

+ FAO(OS) (COMM) 56/2021



EFS FACILITIES SERVICES (INDIA) LIMITED ... Appellant

Through: Mr. Dayan Krishnan, Senior Advocate with Mr. Vasanth Rajasekaran, Mr. Sukrit Seth, Mr. Saurabh Babulkar and Mr. Harshvardhan Korada, Advocates.

versus

INDEEN BIO POWER LIMITED

..... Respondent

Through: Mr. Hiroo Advani, Mr. Navdeep Dahiya, Ms. Aditi Shrivastava and Mr. Karandeep Dahiya, Advocates.

CORAM:

HON'BLE MR. JUSTICE NAJMI WAZIRI

HON'BLE MR. JUSTICE VIKAS MAHAJAN

NAJMI WAZIRI, J

1. In FAO(OS) (COMM) 14/2021 and FAO(OS) (COMM) 111/2021, Indeen Bio Power Limited ('Indeen') has impugned under section 13(1) of the Commercial Courts Act, 2015 ('CCA') read with section 37 of the Arbitration and Conciliation Act, 1996 ('the Act') the order of the learned Single Judge dated 04.01.2021 passed in O.M.P. (COMM.) No 440 of 2020, allowing the respondent's petition under section 34 of the Act which set aside the Arbitral Award dated 20.05.2020.
2. Mr. Hiroo Advani, the learned Advocate for Indeen submitted that the impugned order has erred inasmuch as i) it has re-appreciated the evidence led before the learned Arbitrator; and ii) the delay in preparation of the Final Business Plan ('FBP') was occasioned entirely because of M/s EFS Facilities Services (India) Pvt. Ltd. ('EFS'), (earlier



known as Dalkia India Private Limited ('DIPL')). A Project Development Agreement ('PDA') was entered into between DIPL and Indeen on 02.05.2010 for setting up an 8 MW Master Residue Biomass Plant at Chandli, Tehsil Devli, District Tonk, Rajasthan. A Synchronization and Coordination Agreement ('SCA') was signed between DIPL and Indeen on 08.09.2011. It along with some other documents such as a Supply Contract Agreement, a Service Contract Agreement and a Works Contract Agreement, all undated, became the subject of interpretation.

3. The controversy revolves around the aforementioned five documents. Dispute arose between the parties regarding the project, which got referred to Arbitration. A claim was brought forward by Indeen. By the Arbitral Award dated 20.05.2020, Indeen has been awarded the following reliefs:-

"Claim 1 – Loss of revenue in power generation – INR 11.37 crores

Claim 2 – Costs for Price Escalation– INR 4,33,57,100/- along with pendente lite interest @ 8% per annum and post pendente lite interest @9% per annum."

4. The reason for the learned Arbitrator to award loss of revenue in power generation to the tune of ₹11.37 crores was based on a Reference Business Plan ('RBP'), which was a part of the Project Development Agreement ('PDA') but not part of SCA. EFS contended that there could be no reason for granting the award because RPB was not included in the 'Entire Agreement Clause' of SCA dated 08.09.2011. No finding was rendered by the learned Arbitrator on this ground. The learned Arbitrator had come to the finding that the exception in Clause 11.4 of the SCA will apply. EFS had argued before the learned Single Judge that great



prejudice had been caused to it by referring to a document, which was not a part of the 'Entire Agreement Clause'.

5. On being impugned under S.34 of the Act, the award was quashed and set it aside, with liberty to Indeen to re-agitate its claims before the Arbitral Tribunal and in case it is so re-agitated, the Arbitral Tribunal would reconsider the claims of Indeen, in accordance with law, keeping in view the observations made in the impugned order.

6. EFS says that reference was made by the learned Arbitrator to the RBP, but the said document could not be relied upon because the SCA represented the 'Entire Agreement.' Indeen says that RBP and FBP have not lent any weight to the claim. The claim was not posited on them, there are only individual pieces of evidence, the said documents were merely referred to; there was no cross-examination of the two witnesses of the claimants who deposed apropos quantification of claims; it was never Indeen's case that either the RBP or the FBP was part of the SCA. Therefore, the argument of 'Entire Agreement' has no application to the facts of this case.

7. The impugned judgment has referred to the dicta of High Court of Singapore in *CRW Joint Operation v. PT Perushaan Gas Nagara (Persero)* TBK, (2011) SGCA 33, which has held as under:-

“The significance of the issues that were not dealt with has to be considered in relation to the award as a whole. For example, it is not difficult to envisage a situation in which the issues that were overlooked were of such importance that, if they had been dealt with, the whole balance of the award would have been altered and its effect would have been different.”



8. Indeen says that *albeit* the learned Single Judge has observed the said principle but apropos whether prejudice has resulted to the parties aggrieved by the failure to decide the issue, it is silent. There is no opinion if prejudice has actually been caused to EFS. The test of *CRW Joint Operation (supra)* is whether the whole balance of the award would have been altered and its effect would have been different, had the undealt issues been dealt with. Nevertheless, the impugned judgment has gone ahead and quashed the award and findings of facts. It has held as under:-

“ If these issues have been addressed by the learned Arbitral Tribunal, the very reliability of the Reference Business Plan, as evidenced in favour of Indeen, may possibly have become questionable.”

9. The court is of the view that this argument is untenable because the aforesaid observation sees the tilt of balance of equities in favour of Indeen, on the basis of the referred RBP and FBP. Therefore, it was questionable to refer to them before determining whether the said documents could be referred to or were part of the ‘Entire Agreement Clause’. Indeen says that apropos the adjudication on its claim for escalation of price, the learned Arbitrator has based his finding upon the material on record and the formula used for quantification was also in the public domain. It is on this basis that he came to the conclusion that there was 10% escalation. Relying upon the dicta in *ITD Cement vs. NHAI* OMP No.27/2010 and *Dwarkadas v. State of MP* (1999 (1) SCR 524), Indeen submits that once there is sufficient material on record, an Arbitrator can use some guess work to arrive at the quantum to be



awarded and the usage of any formula for determining quantum of damages is an accepted proposition (*Mcdermott International v. Burn Standard and Co.* (2006) 11 SCC 181).

10. Indeen submits that i) the substantive evidence led before the learned Arbitrator included two documents i.e. RBP and FBP, which, in effect, detailed the final expenses incurred by the parties and the profit contemplated as per the project, ii) when these two documents were led as admissible documents in evidence, the same was neither disputed nor was any cross-examination held; the reason why the learned Arbitrator has accepted the said two documents as credible evidence is because of the fact that they were prepared with the consent of DIPL, therefore, there could have been no dispute about the same.

11. Indeen says that the delay occasioned was quantified with reference to the IMF Inflation Index, 2012. What is to be seen from the preceding argument is that fundamentally, the Award has taken elements of documents forming part of the PDA and awarded benefits to Indeen. However, the agreement between the parties was limited to the term 'Contract Agreements' as defined in clause 1.2 of the SCA dated 08.09.2011. The said term is defined as under:

"Contract Agreements" shall mean Works Contract Agreement, Service Contract Agreement and Supply Contract Agreement proposed to be executed between Indeen and Dalkia in a mutually agreed form."

12. It is evident that PDA is not a part of the aforementioned definition. Therefore, any award seeking to go beyond what has been agreed by the parties to be the basic/foundational documents which could



be referred to, apropos their relationship, would be a patent irregularity and an incurable anomaly.

13. Mr. Dayan Krishnan, the learned Senior Advocate for EFS submits that the arbitral award had erred inasmuch as it travelled beyond the Contract Agreements and this error was rightly set aside in the impugned order. The agreement limits the documents which could be referred to between the parties in terms of clause 13.4 which reads as under:-

“Entire Agreement: Contract Agreements along with this Agreement constitutes the entire agreement between the Parties and sets out a full statement of the contractual rights and liabilities of Indeen and Dalkia.”

14. He further contends that the imperative to limit the arbitral proceedings to the ‘Entire Agreement Clause’ was raised before the learned Arbitrator but it did not find any adjudication. This anomaly was noticed in the impugned order of the learned Single Judge and formed one of the reasons for setting aside the Arbitral Award. The law on the matter is settled that the relationship of the parties is governed by the terms of the agreement. Insofar as the agreement restricts itself to certain documents to become a final agreement, nothing more is to be looked into. In effect, all additional documents or prior documents are deemed to have been subsumed in the final agreement, which in this case is the Synchronization and Co-ordination Agreement. Reliance is placed on the dicta of the Supreme Court in *Thyssen Krupp Materials AG v. The Steel Authority of India* 2017 SCC OnLine Del 7997, has held as under:-

“71. With respect to the second lot, admittedly, no such formal modification or amendment to the agreement was made by the



*parties. The learned arbitrator found that Clause 9 of the agreement had been waived by conduct of the parties and in any event, it would not have any impact on the existence of a concluded contract between the parties in relation to the second lot. He relied on the negotiations between the parties and exchange of letters to find that there was in existence a concluded contract between the parties in relation to the second lot. Such kind of clauses in commercial contracts are known as “entire agreement” clauses, the intention of which is to preclude parties from adducing evidence of a collateral contract or agreement between the parties governing the same issue. The English law in relation to such kind of clauses has been aptly laid down in the case of *Inntrepreneur Pub Co Ltd v East Crown Ltd*, [2000] 2 Lloyd’s Rep. 611:*

“The purpose of an entire agreement clause is to preclude a party to a written agreement from threshing through the undergrowth and finding in the course of negotiations some (chance) remark or statement (often long forgotten or difficult to recall or explain) on which to found a claim such as the present to the existence of a collateral warranty. The entire agreement clause obviates the occasion for any such search and the peril to the contracting parties posed by the need which may arise in its absence to conduct such a search. For such a clause constitutes a binding agreement between the parties that the full contractual terms are to be found in the document containing the clause and not elsewhere, and that accordingly any promises or assurances made in the course of the negotiations (which in the absence of such a clause might have effect as a collateral warranty) shall have no contractual force, save insofar as they are reflected and given effect in that document.

*Entire agreement clauses come in different forms. In the leading case of *Deepak v. ICI* [1998] 2 Lloyds*



Rep 140, 138, affirmed [1999] 1 Lloyds Rep 387 the clause read as follows:

“10.16 Entirety of Agreement

This contract comprises the entire agreement between the PARTIES ... and there are not any agreements, understandings, promises or conditions, oral or written, express or implied, concerning the subject matter which are not merged into this CONTRACT and superseded thereby ...”

Rix J and the Court of Appeal held in that case (in particular focusing on the words “promises or conditions”) that this language was apt to exclude all liability for a collateral warranty. In Alman & Benson v. Associated Newspapers Group Ltd 20 June 1980 (cited by Rix J at p.168), Browne-Wilkinson J reached the same conclusion where the clause provided that the written contract “constituted the entire agreement and understanding between the parties with respect to all matters therein referred to” focusing on the word “understanding”. In neither case was it necessary to decide whether the clause would have been sufficient if it had been worded merely to state that the agreement containing it comprised or constituted the entire agreement between the parties. That is the question raised in this case, where the formula of words used in the clause is abbreviated to an acknowledgement by the parties that the Agreement constitutes the entire agreement between them. In my judgment that formula is sufficient, for it constitutes an agreement that the full contractual terms to which the parties agree to bind themselves are to be found in the Agreement and nowhere else and that what might otherwise constitute a side agreement or collateral warranty shall be void of legal effect.”

72. While there is hardly any case law or jurisprudence by Indian courts on such concepts, this court is of the opinion



that the above ruling in the context of English law, would apply with equal force to the Indian context. The object of insertion of such a clause is the parties" resolve to prevent either of them from raising any claim based on a collateral contract, entered into by the parties during negotiations or after conclusion of the contract. The very purpose of such a stipulation would be defeated in case parties were allowed to raise a claim based on a collateral agreement, entered between them during negotiations. In the present case, Clause 9 of the agreement between the parties is of such nature; it would necessarily preclude the parties from raising any claims based on collateral agreements that are not encompassed within the present contract or are not expressly stated as being amendments to the main agreement. That being the case, we are of the view that the learned arbitrator fell into error by not giving Clause 9 its full intended effect. Indeed by finding that the parties through their conduct had impliedly waived Clause 9, the arbitrator in effect defeated the very purpose of inserting Clause 9- that to prevent parties from raising such claims based on collateral agreements entered into between the parties, not specifically encompassed by the contract nor specifically stated to be amendments to the agreement. Therefore, we set aside the arbitrator's award in relation to the second lot of CRC and find that there was no concluded contract entered into between the parties in relation to the second lot."

15. Furthermore, section 28 of the Arbitration and Conciliation Act, 1996 makes it incumbent upon the Arbitrator to take into account the terms of contract and trade usages. It reads as under: -

*.. "28. Rules applicable to substance of dispute.—(1)
Where the place of arbitration is situate in India,—*

(a) in an arbitration other than an international commercial arbitration, the arbitral tribunal shall decide the dispute submitted to arbitration in accordance with the substantive law for the time



being in force in India;

(b) in international commercial arbitration,—

(i) the arbitral tribunal shall decide the dispute in accordance with the rules of law designated by the parties as applicable to the substance of the dispute;

(ii) any designation by the parties of the law or legal system of a given country shall be construed, unless otherwise expressed, as directly referring to the substantive law of that country and not to its conflict of laws rules;

(iii) failing any designation of the law under clause (a) by the parties, the arbitral tribunal shall apply the rules of law it considers to be appropriate given all the circumstances surrounding the dispute.

(2) The arbitral tribunal shall decide ex aequo et bono or as amiable compositeur only if the parties have expressly authorised it to do so.

[(3) While deciding and making an award, the arbitral tribunal shall, in all cases, take into account the terms of the contract and trade usages applicable to the transaction.]”

16. The learned Single Judge has considered this issue and reasoned as under:-

“53. I have considered the submissions of both sides. The learned Arbitral Tribunal has itself acknowledged, correctly, the fact that the Reference Business Plan was part of the PDA. This is also apparent from Clause ‘E in the recitals with which the PDA commences. Mr. Dayan Krishnan has contended that Clause 13.2 of the SCA states, unambiguously, that the SCA, read with the Contract Agreements, constituted the “entire agreement” between the parties. He has also invited my attention to the judgments



which, in his submission, proscribe reliance on material outside the agreement which contractually constitutes the “entire agreement”. Whether the submission is right, or wrong, is not for me to opine upon, as the learned Arbitral Tribunal would first have to take a view thereon. The jurisdiction of this Court, under Section 34 of the 1996 Act, does not include the authority to act as an arbitrator, qua issues which have not been decided in the arbitral award under challenge. Para 58 of the impugned Award specifically records this submission, as having been advanced before the learned Arbitral Tribunal, thus, by EFS:

“According to the learned counsel for the Respondent the alleged reference business plan was not part of the SCA. This being the position, the Reference Business plan cannot be relied upon as SCA represents the entire agreement between the parties. The alleged assurances given during the course of negotiation have no contractual force and cannot be acted upon. He also expressed grave doubt about the authenticity of the Reference Business plan relied upon by the Claimant.”

17. EFS further contends that the basis for awarding Rs.4.33 crores to Indeen is misplaced and erroneous because it refers to a document called the Inflationary Index of the International Monetary Fund in 2012. This document was never put to the EFS (Dalkia India Pvt. Ltd.) as a factor or rationale which could be looked into. Therefore, placing reliance upon the same was unfair and has caused prejudice to the respondent. The impugned judgment has found this unfairness in the Arbitral Award reason to disagree with it. The learned Single Judge has reasoned as under:-



“ 55. Mr. Dayan Krishnan, on behalf of EFS, has questioned the correctness of the award of Rs.4,33,57,100/–, by the learned Arbitral Tribunal, towards escalation, on three grounds; firstly, that the learned Arbitral Tribunal had found the offer is obtained by Indeen, on the basis of which it claimed escalation, not to inspire confidence, and had awarded escalation on the basis of mere presumption based on inflation figures of the International Monetary Fund in 2012, which was impermissible, secondly, that Indeen had failed to establish having taken any steps to mitigate the damage is, pursuant to the alleged repudiation of the contract by DIPL, and thirdly, that Indeen had abandoned the project, and could not, therefore, claim escalation.

56. Mr. Advani contends, per contra, that the learned Arbitral Tribunal did not conclusively reject the offer as submitted by Indeen, on the basis of which it claimed escalation, and that, in any event, the learned Arbitral Tribunal was well within its jurisdiction to have awarded escalation on a reasonable basis, which is all it did. Reliance was placed, for this purpose, on the judgment of the Supreme Court in McDermott International Inc. v. Burn Standard Co. Ltd.

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59. To my mind, such a course of action was not open to the learned Arbitral Tribunal. Even assuming Indeen was entitled to escalation, awarded escalation would have to be based on materials provided by Indeen, or otherwise emanating from the record, and not on any other basis. This would amount to “wandering”, by the learned Arbitral Tribunal, outside the covenants of the agreement between the parties, the pleadings on record, and even the case set up by Indeen itself. It was not open, with greatest respect to the learned Arbitral Tribunal, to so peregrinate. It is nobody’s case that the material, on the basis of which the learned Arbitral Tribunal awarded escalation to



Indeen, was ever relied upon, by Indeen itself, or cited by Indeen as a basis to claim escalation. The material cited was found to be lacking in credibility, by the learned Arbitral Tribunal. Mr. Dayan Krishnan submitted that the learned Arbitral Tribunal effectively extended charity to Indeen, which it was not competent to do. I do not propose to express any opinion regarding whether Indeen was, or was not, entitled to escalation, as the award of escalation, in my view, deserves to be set aside as being premised on material outside the contract between the parties, which was never pleaded by Indeen before the learned Sole Arbitrator. The judgment in McDermott International, on which Mr. Advani sought to place reliance, does not advance the case of Indeen to any substantial extent. All that is stated, in the said decision, is that “different formulae can be applied in different circumstances and the question as to whether damages should be computed by taking recourse to one or the other formula, having regard to the facts and circumstances of a particular case, would eminently fall within the domain of the arbitrator”. There can be no cavil with this proposition. The formula adopted by the learned Arbitral Tribunal has, however, to emanate from some material on record. In case the learned Arbitral Tribunal seeks to decide on public knowledge, to award any particular sum to the claimant, the proposal to do so has to be put to the respondent, and both sides have to be heard on that aspect. Else, the learned Arbitral Tribunal would, additionally, be proceeding in violation of the principles of natural justice and fair play.

18. EMF contends that the evidence led by the Indeen did not inspire confidence. Logically, the said Agreement was to be rejected. Once the claim is rejected, there would be no occasion to refer to the IMF Inflation Index, for awarding damages.

19. There can be no dispute that reference to material beyond the ‘Entire Agreement’ was a fundamental anomaly which would vitiate any



finding of fact. If the basis for entitlement of damages is founded upon or emanates from documents which cannot be referred to then such conclusion is a patent illegality. Such finding would have to be set aside under section 34 of the Act.

20. On the scope for judicial review under sections 34 and 37 of the Act, Indeen 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)

21. Reliance by the Arbitrator on the IMF Inflation Index for awarding the escalation cost of 10% was without putting the said Index before EFS. The latter never had occasion to rebut the said Index. This denial results in violation of the principles of natural justice and fair play. An unfair procedure was adopted which vitiated the Award. It has been so held by the learned Single Judge.

22. The Court finds no reason to interfere with the detailed reasoning and findings of the impugned judgment, the appeal, along with pending applications, is without merit and is accordingly dismissed.

NAJMI WAZIRI, J.

VIKAS MAHAJAN, J.

JULY 7, 2023/sb