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

+ **O.M.P. (COMM) 418/2016**

BHARAT SANCHAR NIGAM LIMITED Petitioner

Through: Mr. Arvind K. Nigam, Sr.
Advocate with Mr. Samdarshi
Sanjay, Mr. Ashish Kumar
Sharma, Advocates
(M:9811585062,email:samdars
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versus

CANARA BANK & ANR. Respondents

Through: Mr. Pradeep Dewan, Sr. Adv.
with Ms. Anupam Dhingra,
Advocate for R-1
(M:9811422603,email
:dewanandco@gmail.com)
Mr. Shashank Garg, Ms.
Nishtha Jain, Advocates for R-2
(M:9599290860)

CORAM:
HON'BLE MS. JUSTICE MINI PUSHKARNA

J U D G M E N T
27.09.2023

MINI PUSHKARNA, J:

Facts of the case:

1. The present petition under Section 34 of the Arbitration and Conciliation Act, 1996 ("Arbitration Act") has been filed by the petitioner against the Arbitral Award dated 28th June, 2016 ("Third Award") passed by the learned Sole Arbitrator in the third round of arbitration proceedings



between the parties.

2. Pursuant to Tender Notification issued by the petitioner/Bharat Sanchar Nigam Limited (“BSNL”), earlier known as the Department of Telecommunication (“DoT”), Government of India, respondent no. 2/ Renewable Energy Systems Limited (“RESL”) was declared as a successful bidder for manufacture and supply of 9070 units of Solar Power Generating Systems (“SPGS”). In order to carry out the contract, the respondent no. 2 approached the respondent no. 1/Canara Bank for grant of finance and credit facilities in order to procure the material for supplying to petitioner the requisite 9070 SPGS.

3. Subsequently, a Tripartite Master Lease Agreement (“MLA”) was executed among respondent no. 1/Canara Bank, respondent no. 2/ RESL and the petitioner on 19th February, 1998. As per the MLA, petitioner was the lessee, respondent no. 1 bank was the lessor and respondent no. 2/RESL was the supplier. In terms of the said MLA, the SPGS were to be sold to respondent no. 1, who in turn was to supply 9070 SPGS on lease to the petitioner/BSNL for a fixed period of 5 years and thereafter, the same were to be owned by the petitioner. The delivery of SPGS was to be made as per consignee details giving destination of the SPGS. The SPGS were to be installed by RESL at different stations, after the destination details were provided by BSNL. The petitioner as lessee, had agreed to pay to Canara Bank, Quarterly Lease Rental (“QLR”).

4. The respondent no. 1 and respondent no. 2 independent of the aforesaid Master Lease Agreement, entered into and executed an Agreement dated 11th March, 1998 for opening Inland Irrevocable Letters of Credit, a



Deed of Hypothecation of Goods dated 04th March, 1998 and an Agreement to Indemnify dated 27th February, 1998, which provided for disbursal of credit facilities and the rights and obligations of the parties therein.

5. The petitioner provided consignee details only for 1000 units of SPGS, which were delivered. A Supplementary Agreement dated 19th April, 2000 was executed between the parties in respect of the 1000 units that had been commissioned. This agreement recorded the amount of the QLR, the date of commencement of QLR and other charges payable by BSNL to Canara Bank. The petitioner, despite reminders by respondents failed to give destination details for the remaining 8070 units of SPGS. Vide its letter dated 2nd February, 2000, the petitioner/BSNL called upon the respondent no.2/RESL to extend the Performance Bank Guarantee (“PBG”) and accordingly a fresh PBG was submitted on 7th April, 2000.

6. However, pursuant to an order passed by DoT dated 22nd May, 2001, on account of change of policy by the government, the SPGS were not required. Resultantly, the petitioner withdrew from the contract and failed to provide destination details of the remaining 8070 units of SPGS, thereby committing breach of contract. Thus, disputes arose between the parties.

7. As per respondent no.1/Canara Bank, it was deprived of the lease rental for the entire quantity of 9070 units besides lease management fees and additional fees of QLR for each completed month of delay in respect of the remaining 8070 units. In respect of the 1000 units that had been installed, the lease management fees was not paid to Canara Bank. RESL took the stand that BSNL had committed a default by refusing to accept the delivery of 8070 units. Further, Canara Bank’s case was that RESL failed to



repay the outstanding amount to Canara Bank.

First Round of Arbitration:

8. Pursuant to the disputes having arisen between the parties, RESL invoked the arbitration clause, following which Mr. H.P. Mishra, DDG (TRF), BSNL (First Arbitrator) was nominated by BSNL as the sole arbitrator. Respondent no. 1/Canara Bank claimed QLR in respect of 1000 installed units of SPGS as well as loss of profit on account of failure of petitioner to take the delivery of remaining 8070 SPGS. Respondent no. 2/RESL claimed cost of manufacturing the SPGS, loss of profit and other damages.

9. The First Arbitrator passed an Arbitral Award dated 24th February, 2004 ("First Award"). By the said Award, the First Arbitrator held that the petitioner was in breach of contract, however, did not quantify the damages for lack of evidence. Para 31 of the First Award dated 24th February, 2004 is reproduced as under:

"31. I end this part of the discussion by concluding that the relief sought by RESL at 9(a) and 9(b) above cannot be determined with the available information. I also propose that the matter may be investigated in detail by an expert committee comprising of a nominee each of RESL, CB, BSNL and an independent body like the Institute of Chartered Works Accountants of India, and in case the said expert committee after examining various evidence (including records of the Lessor Canara Bank) concludes that a certain number of sets of SPGS equipments & VRLA batteries (other than the 1000 already delivered) were actually ready (manufactured and procured by RESL) and only waiting for destination details for inspection and dispatch as on 31.7.98, the liability of the Respondent-DOT/BSNL towards RESL can be determined as



indicated in paragraphs 24 and 29 above, with due consideration of the contents of paragraph 20 above as well.”

10. Both petitioner and respondent no. 1 filed objections under Section 34 of the Arbitration Act, being *OMP No. 174/2004* and *OMP No. 184/2004*, assailing the First Award dated 24th February, 2004 by filing two separate petitions.

Judgment dated 06th July, 2009 in *OMP No. 174/2004* and *OMP No. 184/2004*

11. By common judgment dated 06th July, 2009 in *OMP No. 174/2004* and *OMP No. 184/2004*, this Court set aside the First Award dated 24th February, 2004 and remitted the matter back to the arbitrator with directions to render an Award of the compensation payable by BSNL for breach of contract.

12. Thus, vide judgment dated 06th July, 2009, this Court dismissed the *OMP No. 174/2004* filed by the petitioner, while allowing the *OMP No. 184/2004* of respondent no. 1. The finding of the learned Arbitrator to the extent that the loss suffered by the respondents was left undetermined, was set aside.

13. This Court by its judgment dated 06th July, 2009 also held that it was not mandatory that the goods required to be supplied were to be kept in readiness. It was held that all that the law requires is that the party claiming compensation on account of breach ought to prove that in the absence of the breach it was ready to perform its part of the agreement. Para 20 of the said judgment is reproduced as under:



“20. However, the objection of the Bank to the observations/finding of the arbitrator of the claim against BSNL being limited to the extent of actual number of equipments manufactured and kept ready is contrary to law. There is no such requirement in law. If Bank/RESL by evidence or otherwise are able to establish before the arbitrator that but for the breach by BSNL they were in a position to perform their part of the agreement, Bank/RESL would be entitled to compensation for breach as also held by the arbitrator. The award to that effect is set aside.”

14. Accordingly, by judgment dated 06th July, 2009, this Court directed the petitioner to appoint a new Arbitrator, who shall render an award of compensation payable by petitioner for breach of contract. It was further held that the parties shall be entitled to adduce further evidence on the quantum to be determined by the arbitrator.

Second Round of Arbitration

15. Pursuant to the aforesaid order dated 06th July, 2009, Second Arbitrator, Mr. Rajiv Singh was appointed who passed an Award dated 22nd November, 2012 (“Second Award”) thereby rejecting the claims of the respondents.

16. The Second Award dated 22nd November, 2012 was challenged by respondent no. 1 in *OMP No. 169/2013*. By judgment dated 26th March, 2015, this Court set aside the Second Award also. This Court appointed Sh. Lal Singh, a former ADJ as the sole Arbitrator in exercise of power under Section 11(6) of the Arbitration Act. The said sole Arbitrator was requested to determine the specified issue as to compensation and consequently interest and costs which the respondents were entitled to on the basis of existing material, by calling upon the parties to make submissions both oral



and in writing.

17. The petitioner filed an appeal against the aforesaid judgment dated 26th March, 2015 in *FAO (OS) No. 241/2015*. Vide judgment dated 08th December, 2015, this Court reiterated the directions given by the learned Single Judge in judgment dated 26th March, 2015. However, the Division Bench replaced the sole arbitrator by appointing Justice Manju Goel, a former Judge of this Court (Third Arbitrator) as a sole arbitrator and directed that the arbitrator will also consider the claims of respondent no. 2. The Division Bench requested the Third Arbitrator to decide the claims of respondent nos. 1 and 2 on the basis of the existing material, as directed by learned Single Judge vide judgment dated 26th March, 2015.

Third Round of Arbitration:

18. Hence, third round of arbitration commenced upon appointment of Justice Manju Goel (Retd.), a former judge of this Court by the Division Bench in its judgment dated 08th December, 2015 in *FAO (OS) NO. 241/2015*.

19. During the third arbitral proceedings, on 13th April, 2016, counsel for respondent no. 1 apprised the Tribunal that respondent no. 1 had entered into 2 One Time Settlement (“OTS”) with respondent no. 2. One OTS was with respect to Working Capital Limit and second was for Lease Financing Limit. It was informed by learned counsel for respondent no. 1/Canara Bank that the settlement in respect of Lease Finance Limit was at 1/5th of the dues for which the bank had made a sacrifice of nearly 20 crores. In view thereof, petitioner claimed before the Tribunal that the OTS had altered the position, amounting to variation in the contract. Thus, it was claimed that



petitioner/BSNL was discharged from any liability of damages under the statements of claim originally filed.

20. Subsequent thereto, the petitioner filed an application before the Division Bench of this Court in *FAO (OS) No. 241/2015* seeking directions qua OTS. The same was, however, disallowed by the Division Bench thereby holding that admissibility of the said OTS was within the sole purview of the Arbitrator. Order dated 11th May, 2016 passed by Division Bench in *FAO (OS) No. 241/2015* is reproduced as below:-

“CM 17617/2016

- 1. Order dated December 08, 2015 decided the appeal which laid a challenge to an order dated March 26, 2015 deciding OMP No. 169/2013. The award under challenge was set aside and matter was referred to fresh arbitration of one Mr. Lal Singh.*
- 2. In appeal consent was recorded that the dispute may be referred to the sole arbitration of a retired Judge of this Court.*
- 3. In the application issues concerning claim before the arbitrator are sought to be pleaded with a prayer made that Renewable Energy Systems and Canara Bank be directed to produce complete facts related purported one time settlement.*
- 4. Production of record before the arbitrator is a domain of the learned arbitrator and any decision by the arbitrator cannot be interdicted by filing a civil miscellaneous application in an appeal which was disposed of on a consent.*
- 5. The application is dismissed.*
- 6. No cost.”*

21. By Award dated 28th June, 2016 (“Third Award”), the Third Arbitrator held that it stands conclusively proved that out of 9070 units of SPGS required to be supplied under the MLA dated 19th February, 1998, the petitioner took delivery of only 1000 units of SPGS. It was held that for the



balance 8070 units of SPGS which the respondent no. 2 was in a position to deliver, the same could not be delivered because of the breach on the part of the petitioner. Thus, by the Third Award dated 28th June, 2016, learned sole Arbitrator Awarded the following:-

- (i) Rs. 12,23,65,410/- together with interest @12% per annum in favour of respondent no. 2/RESL pendente lite till date of Award and thereafter till payment of the said amount.
- (ii) Rs. 4,27,71,000/- together with interest @12% per annum w.e.f. 26th March, 1999 in favour of respondent no. 1/Canara Bank pendente lite till date of Award and thereafter till payment of the said amount.
- (iii) A sum of Rs. 6,00,000/- and Rs. 8,00,000/- respectively towards cost in favour of respondent nos. 1 and 2 in respect of the proceedings before the Third Arbitrator.
- (iv) Cost of Stamp Paper on the Award was also allowed in favour of respondent nos. 1 and 2.

22. The present petition has been filed assailing the Third Award dated 28th June, 2016 passed by the learned Arbitrator in the third round of arbitration between the parties.

23. It may be noted herein that respondent no. 2 filed *OMP (ENF) (COMM) 114/2018* seeking recovery of amounts under the Third Award dated 28th June, 2016. The said petition was disposed of by this Court vide its order dated 14th January, 2019 directing the petitioner to deposit 50% of the amount awarded to the respondents. Accordingly, the petitioner



deposited Rs. 21.88 crores in this Court in February, 2019.

Submissions on behalf of petitioner/BSNL

24.1 On behalf of the petitioner, it is submitted as follows:

24.2 While allowing the claims of the respondents vide impugned Award dated 28th June, 2016, the Third Arbitrator has ignored the terms of the agreements executed between the parties, the defense taken by the petitioner that breach was on account of delay on the part of respondent no. 2 by not keeping the equipment ready and supervening impossibility as there was change in government policy. The learned Arbitrator failed to appreciate the fact that there was no evidence on record to substantiate that the equipment was ready for delivery or for that matter even raw materials were purchased.

24.3 Objections raised by BSNL to the application filed by respondent no.1/Canara Bank under Section 17 of the Arbitration Act cannot be the basis to presume that the 8070 systems of SPGS had been manufactured by RESL and were ready for delivery. Merely on the premise that petitioner had objected to the aforesaid applications, presumption cannot be drawn that the equipment was actually ready for supply. Further, failure on part of the First Arbitrator to pass an order on the said applications could have been assailed by the respondents. Hence, the finding of the Third Arbitrator that 8070 SPGS were actually ready, is based on presumptions and not on appreciation of evidence on record. Hence, the said finding of the Third Arbitrator is contrary to law and evidence on record. Therefore, the impugned award by the Third Arbitrator is illegal, perverse, against public policy and liable to be set aside.

24.4 The Third Arbitrator completely failed to appreciate the fact that OTS



had been arrived at between respondent no. 1 and 2 as to the credit facility availed by respondent no. 2. Award of loss of profit to respondent no.1 for undelivered SPGS, would amount to giving premium over and above what respondent no. 1 is entitled and/or already received under the OTS. Since petitioner has already paid QLR for 1000 SPGS to respondent no. 1, no further claim survives, as balance equipment was not ready for delivery nor supplied.

24.5 On 13th April, 2016 during the third arbitral proceedings, counsel for respondent no. 1 had apprised the Tribunal that it had entered into 2 OTS with respondent no. 2. The petitioner immediately apprised the Tribunal that the OTS had altered the situation for BSNL and this amounts to variation in the contract, thereby discharging any liability of damages under the Statements of claim originally filed.

24.6 The petitioner filed an application under Section 27 of the Arbitration Act before the Third Arbitrator for placing on record the OTS before the Arbitral Tribunal. However, the said application was dismissed by the Arbitral Tribunal vide order dated 14th May, 2016. It is submitted that the said order dated 14th May, 2016 passed by the Arbitral Tribunal vitiates the impugned award. It is submitted that the balance 8070 SPGS were never supplied. Respondent no. 1 was entitled to enforce the Deed of Hypothecation and exercise its right thereunder, which entitled it to sell the hypothecated goods, materials and realize the credit facility advanced to respondent no. 2.

24.7 The impugned award is contrary to the terms of the contract between the parties, and as such contravenes the provisions of Section 28 of the



Arbitration Act. Therefore, the same is liable to be set aside. It is further submitted that the party claiming damages must prove the damages suffered by it.

24.8 The First Arbitrator did not quantify the damages in favour of respondents for lack of evidence. The First Award was set aside with direction to the petitioner to appoint a new arbitrator, and permitted the parties to adduce further evidence on the quantum of damages that was to be determined by the arbitrator. It is submitted that the respondents failed to lead any credible evidence for assessment of the damages except the insurance policy. Thus, it is contended that the award of compensation by the Third Arbitrator is based on presumption and on erroneous interpretation of Section 33 of the Indian Contract Act, 1872. There was no conclusive evidence before the learned arbitrator that 8070 SPGS were actually ready for supply or the raw materials were purchased. The award being based on presumption is contrary to law and is liable to be set aside.

24.9 On behalf of the petitioner, the following judgments have been relied upon:-

- (i) ***Hindustan Zinc Limited Vs. Friends Coal Carbonisation, 2007 (1) Scale 1.***
- (ii) ***Thyssen Stahlunion Gmbh Vs. SAIL, AIR 2002 DELHI 255.***
- (iii) ***Central Warehousing Corporation Vs. M/s Kwaliti Manufacturing Corporation, AIR 2002 NOC 10 (Calcutta).***
- (iv) ***Kailash Nath Associates Vs. DDA, MANU/SC/0019/2015.***



(v) ***Engineering and Constructions Limited Vs. Oil India Limited***, MANU/SC/0441/2020.

Submissions on behalf of respondent no. 1/Canara Bank

25.1 On behalf of respondent no. 1, it is submitted as follows:

25.2 The learned arbitrator rightly rejected the objections raised on behalf of the petitioner. There was conclusive finding against petitioner/BSNL holding it to be guilty of breach of contract and liable to compensate both the respondents herein.

25.3 The learned arbitrator rightly rejected the arguments of the petitioner that it was liable to pay only the QLR and not the loss of profit claimed by the bank. It is submitted that the learned arbitrator has rightly held that the loss of profit was merely a part of the QLR, and that had it asked for the entire QLR, Canara Bank would have asked for the price of the units which were actually not paid to RESL.

25.4 While passing the impugned award, the learned sole arbitrator took into consideration the settled law governing the grant of compensation. The learned sole arbitrator made a broad evaluation of damages as permitted by the law and decided the claim/compensation of the parties with regard to their expected profits depending upon the facts and circumstances of the present case.

25.5 The award passed by the learned sole arbitrator rests on sound principles of law governing the award of compensation. The learned sole Arbitrator has correctly relied upon the findings that it is the petitioner who is guilty of breach of contract and is liable to compensate both the respondents. The learned Arbitrator has assessed the loss of profit suffered



by respondent no. 1 based on the profit it would have earned by way of interest on the lease rentals.

25.6 The impugned award has been passed in accordance with law and does not afford any ground to challenge the same.

Submissions on behalf of respondent no. 2/RESL

26.1 On behalf of respondent, no. 2, it is submitted as follows:

26.2 The sole arbitrator while passing the award has arrived at a fair and just conclusion based on the material on record and in terms of the directions of this Court vide order dated 26th March, 2015 in *OMP No. 169/2013*.

26.3 The assertion of the petitioner that there was no evidence placed on record to enable the Arbitrator to come to calculation of the amount of compensation to be awarded, is totally incorrect. The award has been passed after considering the evidence on record.

26.4 The petitioner never objected to the finding in the First Award holding the petitioner to be in breach of contract and holding the petitioner liable for the losses suffered by respondent no. 1 and 2.

26.5 The learned sole arbitrator was right in holding that clause 12 and 13 of the Tripartite Agreement cannot be attracted to resolve the dispute before the Tribunal, as the respondent no. 2 had sought damages for breach of contract, and have not raised any claim of dues against the price of goods supplied. It is submitted that it is well settled in law that party in breach has to compensate those who have suffered damages on account of breach.

27. On behalf of respondents, the following judgments have been relied upon:-



- (i) ***Dwaraka Das Vs. State of M.P. and Another, AIR 1999 SC 1031.***
- (ii) ***Delhi Airport Metro Express Private Limited Vs. Delhi Metro Rail Corporation Limited, (2022) 1 SCC 131.***
- (iii) ***State of Jharkhand and Others Vs. HSS Integrated SDN and Another, (2019) 9 SCC 798.***
- (iv) ***Associate Builders Vs. Delhi Development Authority, (2015) 3 SCC 49.***
- (v) ***Ssangyong Engineering and Construction Company Limited Vs. National Highway Authority of India (NHAI), (2019) 15 SCC 131.***
- (vi) ***Mc. Dermott International Inc. Vs. Burn Standard, (2006) 11 SCC 181.***
- (vii) ***Sumitomo Heavy Industries Ltd. Vs. Oil and Natural Gas Corporation Limited, (2010) 11 SCC 296.***
- (viii) ***JG Engineers Pvt. Ltd. Vs. Union of India and Another, (2011) 5 SCC 758.***
- (ix) ***PR Shah Shares and Stock Brokers Private Limited Vs. BHH Securities Private Limited and Others, (2012) 1 SCC 594.***
- (x) ***Smita Conductors Ltd. Vs. Euro Alloys Ltd., (2001) 7 SCC 728.***
- (xi) ***K.V. Mohammed Zakir Vs. Regional Sports Centre, (2009) 9 SCC 357.***
- (xii) ***Mecon Limited Vs. Pioneer Fabricators (P) Ltd., 2008 (100) DRJ 112: (2007) 4 Arb. LR 323 (Delhi).***



(xiii) *National Highway Authority of India Vs. ITD Cementation, (2015) 14 SCC 21.*

(xiv) *Sineximco Pte. Ltd. Vs. M.M.T.C. Limited, 2009 SCC OnLine Del 1394.*

Findings and Analysis of the Court

28. I have heard learned counsel for the parties and have perused the record.

29. At the outset, it is noted that by First Award no compensation was actually determined to be paid to either Canara Bank or RESL, though it was held that the BSNL was in breach of contract. Thus, in the First Award dated 24th February, 2004, it was held as follows:

“SUMMARY

To sum up, the Respondent DOT/BSNL is held guilty of breach of contract, and hence liable to pay damages to the other two parties. Quantification of these damages being not possible at present in the absence of authentic data, certain modalities to ascertain the same have been suggested. The Respondent is also liable, under the Lease Agreements of 19.2.98 and 19.4.00, to pay the Lease Management Fee and Quarterly Lease Rentals to the Claimant Canara Bank. These have been quantified. No costs for arbitration have been awarded, except reimbursement of expenditure on stamp duty incurred by Canara Bank. ”

30. Consequently, by judgment dated 06th July, 2009 in *OMP Nos. 174/2004 and 184/2004*, this Court set aside the First Award and remitted the matter back to a newly appointed Arbitrator. As held by this Court in judgment dated 06th July, 2009, the only question to be decided by the Arbitrator was the amount of compensation payable by the petitioner for breach of contract. By way of the said judgment dated 06th July, 2009, it was



observed that BSNL had not objected to the finding in the First Award in so far as holding BSNL to be in breach of the contract and holding BSNL liable for losses suffered by RESL/Canara Bank. It was held that the First Arbitrator had found the equipment to be specific for use of BSNL and did not find RESL/Canara Bank guilty of not mitigating losses.

31. Accordingly, by its judgment dated 06th July, 2009, this Court held as under:-

“11. A perusal of the objections of BSNL shows that BSNL has not objected to the finding in the award insofar as holding BSNL to be in breach of the contract and holding BSNL liable for losses suffered by RESL/Bank. The main contention of BSNL/its counsel is that the arbitrator having held RESL/Bank not to have placed sufficient material before the arbitrator to prove the losses suffered or the compensation to which they had become entitled, the arbitrator ought not to have given directions for appointment of a committee and award to which extent only is sought to be set aside by BSNL.

12. I am however unable to accept the aforesaid contention of BSNL. It is not as if the arbitrator has gone through the evidence and held that RESL/Bank has not proved to have suffered any loss. On the contrary, the arbitrator has left the said question undetermined. The loss to the Bank which has released finance even for the remaining 8070 units of equipment to RESL is res ipsa loquitor. The arbitrator has also found the equipment to be specific for use of BSNL and not found RESL/Bank guilty of not mitigating losses. The arbitrator himself has in the award noted that during the sitting of the arbitrator at Hyderabad both RESL and the Bank had offered inspection of the remaining 8070 units which RESL was averring it had already manufactured and kept ready for delivery to BSNL. BSNL opposed the said



request. The arbitrator has not given any reason whatsoever as to why said inspection was not undertaken. The arbitrator has not given enough weightage to the said offer. The said offer lends one to believe that RESL was in a position to give inspection of balance units. Moreover, I find that law does not require the goods required to be supplied to be kept in readiness. All that that the law requires is that the party claiming compensation on account of breach ought to prove that in the absence of the breach it was ready to perform its part of the agreement so as to be entitled to a claim for loss of profit. All the said aspects have not been gone into by the arbitrator and for the reason that the arbitrator did not contemplate the award to be the culmination of the proceedings but intended a further inquiry in this respect. The award to the said extent is found to be against law and public policy.

.....

16. In the present case also I find that several disputed questions of fact will be entailed in quantification of damages losses and determination thereof is in sole domain of arbitrators and cannot be left to the committee proposed. From the findings of the arbitrator as summarized herein above and to which there is no challenge, it cannot be said that the present is a case of no losses having been suffered by RESL/Bank. In the aforesaid circumstances the objections of BSNL are not found sustainable and accordingly OMP No. 174/2004 is dismissed. Consequently, OMP.No.184/2004 insofar as seeking remission of the matter to the arbitrator is concerned has to be allowed.

.....

22. Thus the award to the extent aforesaid is set aside and remitted back to the arbitrator. Since the arbitrator was an officer of BSNL and may not now be in a position (sic) to arbitrate, it is clarified that in the event of the same arbitrator being unavailable for arbitration the arbitration be held by the



present incumbent in office. BSNL to intimate the particulars of arbitrator to other parties within 30 days of today. The arbitrator to render an award of the compensation payable by BSNL for breach of contract. In consonance with the law laid down by the Division Bench of this court (supra) the parties shall be entitled to adduce further evidence on the quantum to be determined by the arbitrator.”

(Emphasis supplied)

32. Reading the aforesaid judgment dated 06th July, 2009, manifests that this Court was unequivocal in upholding the finding in the First Award that BSNL was in breach of the contract. Subsequently, the Second Arbitrator entered upon the reference in the second round of arbitration. Second Award dated 22nd November, 2012 came to be passed wherein it was held that the claim of RESL and Canara Bank against BSNL was not established and the same was rejected.

33. The Second Award was challenged in this Court by way of *OMP No. 169/2013*. Thus, by its judgment dated 26th March, 2015 in *OMP No. 169/2013*, this Court held that the scope of second reference was for determination of the compensation payable to Canara Bank/RESL. It was held that the Second Arbitrator had failed to deal with the evidence before him. Consequently, a Third Arbitrator was appointed by this Court itself. It was directed that the learned Arbitrator will determine the specific issue as to compensation which respondents are entitled to on account of breach of contract by petitioner/BSNL on the basis of existing material. Thus, in its judgment dated 26th March, 2015, this Court held as follows:-

*“40. What flows from the above discussion of the findings of this Court is that **(i) it was unnecessary to examine the question whether 8070 units of SPGS were in fact kept***



ready for dispatch/installation. That finding of this Court in its order dated 6th July 2009 attained finality with there being no challenge to that order;

(ii) that BSNL was in breach of contract, was found by the learned first Arbitrator in the first Award and that was upheld by the Court in the order dated 6th July 2009. The challenge by the BSNL to the Award was rejected with the Court dismissing the OMP No. 174 of 2004 filed by the BSNL;

(iii) the Court was clear that “the question of determination of compensation is to be determined irrespective of whether 8070 units were lying ready for delivery or not”. The Court was also clear about what the scope of the second reference was. It was for determination of the compensation payable to Canara Bank. It was observed “if Bank/RESL by evidence or otherwise are able to establish before the arbitrator that but for the breach by BSNL they were in a position to perform their part of the agreement, Bank/RESL would be entitled to compensation for breach”.

xxxxxxx

51. However, given that on two occasions the Arbitrators appointed by BSNL have been unable to perform their tasks in accordance with law, the Court is not inclined to require the third round of adjudication for the limited purpose as mentioned hereinbefore to take place before another BSNL nominee. Consequently, this Court appoints Mr. Lal Singh, a former Additional District Judge, residing at MM-24, DLF Ankur Vihar, Loni Ghaziabad, U.P.-201102 (Mobile No. 9910384617) as sole Arbitrator to determine the specific issue as to the compensation and consequential interest and costs which Canara Bank is entitled to on account of the breach of contract by BSNL. The learned Arbitrator will determine the said issue question on the basis of the existing material. The learned Arbitrator will



call upon both the parties to make their submissions both oral and in writing on the issue and endeavor to deliver an Award within a period of six months from the date he enters upon the reference pursuant to this order. The arbitration will take place under the aegis of the Delhi International Arbitration Centre ("DAC"). The fees of the learned Arbitrator will be in terms of the Delhi Arbitration Centre (Arbitrator's Fees) Rules. The Registry is directed to send, within four weeks, the entire arbitral record to the DAC. "

(emphasis supplied)

34. The directions as aforesaid passed by the learned Single Judge were upheld by the Division Bench in its judgment dated 08th December, 2015 in *FAO (OS) No. 241/2015* by substitution of a former Judge of this Court as the Third Arbitrator. Further, the Division Bench directed that the compensation claimed by respondent no. 2/RESL shall also be examined by the learned Arbitrator. Division Bench of this Court in its judgment dated 08th December, 2015 in *FAO (OS) No. 241/2015*, thus, held as follows:

"Consequently, with this modification in the impugned judgment, the appeals are disposed of. It is also made clear that the consequential compensation claimed by Renewable Energy Systems Limited would also be examined by the learned Arbitrator. But, the said issues would be decided, as directed by the learned Single Judge, on the basis of the existing material. The other directions of the learned Single Judge, as contained in paragraph 51, are reiterated. Another modification in the impugned order is to the effect that the learned Arbitrator shall fix her own fees."

35. In view of the aforesaid, it is evident that the Third Arbitrator was only required to determine the specific issue as to the amount of compensation payable by the petitioner/BSNL for breach of contract on the



basis of the existing material.

36. The learned Arbitral Tribunal while making assessment of compensation has placed reliance on the judgment of Hon'ble Supreme on the case of *Dwaraka Dass Vs. State of MP*¹, which lays down the law to the effect that Court is required to make broad evaluation of damages instead of minute details. Thus, the learned sole arbitrator also made a broad evaluation of damages, as permitted by law in accordance with the facts and circumstances of the present case. The Arbitral Tribunal has noted that the application moved by respondents for inspection of SPGS at Hyderabad in the first round of arbitration was opposed by BSNL and thus, the arbitrator did not carry out any inspection. Opposition to inspection by the petitioner shows that goods were ready with the respondents for being delivered. Thus, learned arbitrator held as follows:-

“Did RESL produce 8070 units of SPGS

30. It will be proper to state at the outset the settled principles of assessment of damages in cases of breach of contract. The guidance in the matter can be taken from the judgements of the Supreme Court of India and it will suffice to refer Dwarka Das Vs. State of Madhya Pradesh AIR 1999 SC 1031 in which earlier judgments on the point were also referred to. Two basic principles laid down in the judgment are:

- 1. Court should make broad evaluation of damages instead of going into minute details and*
- 2. Claim of expected profit is legally admissible and the measure of profit would depend upon facts and circumstances of each case.*

31. The first Arbitrator did not assess the actual damages as he found that there was no sufficient evidence to hold how many

¹ AIR 1999 SC 1031



SPGSs had actually been manufactured and kept ready for delivery as the computation of damages would depend on this number. The Hon'ble High Court, as discussed above, found that RESL and Canara Bank had made an application to the Arbitrator for inspection of SPGS units kept ready in Hyderabad while the proceedings were actually being held there. On account of opposition from BSNL, the learned first Arbitrator did not carry out any inspection as desired by the two claimants. The High Court concluded that the application of the two claimants and the opposition thereto by BSNL indicated that 8070 units of SPGS were actually available for delivery.

32. The learned first Arbitrator has categorically mentioned the proposal for inspection of the SPGS units available for inspection in the part V of the award. The learned first Arbitrator has stated in Para 5.4 that four days before the hearing at Hyderabad, the bank filed an application u/S 17 and 31(6) of the Arbitration and Conciliation Act 1996 praying for interim measures. In clause 5.7 the learned first Arbitrator goes on to say that pursuant to the application made by Canara Bank u/S 17 and 31(6) of the Arbitration and Conciliation Act 1996 both the claimants proposed a joint inspection of 8070 SPGSs said to be lying in the premises of RESL. The learned first Arbitrator then records that BSNL strongly opposes this proposal on the ground, inter alia, of lack of arbitral jurisdiction and submitted eight court judgements in support of its contention that the arbitration must function strictly in the ambit of the agreement and general law. Thus it is clear that BSNL did not want evidence to be collected reporting the existence of 8070 units. The presumption that can be raised against BSNL is that 8070 units were actually available for inspection and BSNL opposed the prayer because BSNL did not want this fact to come on record. The present tribunal therefore can proceed safely on the presumption that 8070 systems of SPGSs had been manufactured by RESL and were ready for delivery. This immediately leads to the conclusion that RESL is



entitled to the cost of manufacturing as well as expected profit and Canara Bank to its claim of profit being part of QLR.”

37. There is a clear finding by the Third Arbitrator that both the parties have relied upon documentary evidence which have not been disputed and can be read in evidence. Thus, in the Third Award, it has been held as follows:-

“35. Before proceeding further with the other propositions of Mr. Chandan Kumar one can refer to condition 3 and 12 of the tripartite agreement laying down the responsibility of BSNL for payments to be made to the claimants. It can be recalled at the cost of repetition that the arrangement made in the tripartite agreement was that RESL, named as supplier, would manufacture the SPGSs and deliver them to BSNL at the designated sites on which the equipments would stand sold to Canara Bank and leased out to BSNL. On this arrangement BSNL was to make payment of Quarterly Lease Rental (QLR) to Canara Bank referred to as the lessor and Canara Bank was deemed to have purchased the SPGSs on the invoice value of Rs. 21,200/- payable to the supplier RESL. Mr. Chandan Kumar draws the attention of the tribunal to clause 3.4 of the agreement which says that the lessee undertakes payment of lease rentals alone. He also refers to clause 12.2(a) in which it is said that the release of QLR is not linked to the release of payment by the lessor to the supplier and clause 12.2(b) in which it is said that the supplier understands that the lessee does not assume the responsibility for timely and due payments for the supply of the equipments in pursuance to this agreement. Mr. Chandan Kumar submitted that the terms are clear to the effect that BSNL has no responsibility of any kind to RESL and hence the claims of RESL should be dismissed.

36. The plea of Mr. Chandan Kumar would have been perfectly valid if RESL raised any claims of dues against price of goods supplied i.e. if the goods had been supplied and price remained due. RESL is seeking damages of breach of contract. The



breach has already taken place. The party in breach has to compensate those who have suffered damages on account of the breach. Neither clause 12 nor clause 3 can be attracted to resolve the dispute before this tribunal.

37. So far as Canara Bank is concerned Mr. Chandan Kumar does not dispute the liability of BSNL to pay the QLR. However Mr. Chandan Kumar submits that Canara Bank instead of asking for the QLR, has asked for other dues namely loss of profit and other expenses which were payable under the contract. The fallacy in this argument is clear since what Canara Bank is claiming is merely one fraction of QLR. QLR represented the damages payable by BSNL for the units supplied for a period of 5 years. It is obvious that the bank would have recovered through QLR in this period of 5 years the price paid for each unit as well as the profit that the bank envisaged to earn from this investment. Apparently if Canara Bank had asked for the entire QLR it would have asked for price of the units also which were actually not paid to RESL, as the stage for payment did not ever arise. The loss suffered by Canara Bank was therefore only limited to the profit as claimed by Canara Bank. BSNL, which admits its liability for cost and profit, cannot dispute its liability for profit alone.”

38. On the basis of the evidence on record, the Third Arbitrator has held that it stands conclusively proved that out of 9070 units of SPGS required to be supplied under the Master Lease Agreement dated 19th February, 1998, the petitioner took delivery of only 1000 units of SPGS. The balance 8070 units of SPGS could not be delivered by respondent no. 2 on account of breach on the part of the petitioner. Thus, it has been held that the damages claimed by respondents are *Res Ipsa Loquitor*”. In this regard, the Third Arbitrator has held as follows:

“41. Neither party has produced any witness. Both parties have relied upon documentary evidence. Documents



produced by the parties have not been disputed. Hence they can be read in evidence. The relevant documents have already been mentioned above. That in the case in hand the supplier RESL and lessor Canara Bank would suffer damages is obvious. The principles of Res Ipsa Loquitor will apply to these facts. No proof is required to be produced to show that RESL and Canara Bank suffered damages. 'How much' is the question left to be decided by the Arbitrator on the basis of facts on record."

39. Further, the Third Arbitrator rejected the arguments of the petitioner that on account of One Time Settlement entered between respondent no. 1/Canara Bank and the respondent no. 2/RESL, its liability towards respondent no. 2 was reduced. Admittedly, the respondent no. 1 bank and respondent no. 2 had entered into a OTS for liquidating loan amount at its 1/5th book value on the ground. By the impugned award, the Third Arbitrator held that the OTS was a dealing only between respondent no. 1 and 2 and that the petitioner was always liable to pay the Quarterly Lease Rental. The finding by the learned Arbitrator in this regard reads as under :

"42. This takes us to the next submission of Mr. Chandan Kumar that RESL and Canara Bank have mutually agreed on a settlement in respect of the debts of RESL towards the bank and this will affect the liability of BSNL. It is the admitted position that the bank and RESL have entered into a One Time Settlement for liquidating the loan at one-fifth of the book value. Mr Chandan Kumar says that if at all RESL has suffered any loss its claim for the damages has to be reconsidered, in view of the settlement in which RESL has made major gains. On behalf of Canara Bank and RESL it is submitted by learned Counsel Mr. Pradeep Dewan Sr. Advocate and Mr. Sunil Sabharwal Advocate that the liability of BSNL cannot be linked to mutual settlement between Canara Bank and RESL. According to them BSNL would have been liable for dues towards QLR



irrespective of what was the deal between RESL and Canara Bank. If RESL had failed to pay any part of its dues towards Canara Bank, could BSNL say that it would not pay the QLR to Canara Bank? In the same way, if it is said that Canara Bank decided not to recover its dues from RESL, could BSNL be exempted from paying the QLR to Canara Bank? Or if RESL had raised funds from other sources and not from Canara Bank in view of the tripartite agreement could BSNL say that it would not pay the QLR to Canara Bank?

43. Mr. Chandan Kumar says that the cost incurred by RESL should be deemed to have been reduced to one-fifth and, therefore, what RESL could claim from BSNL would only be one-fifth. This is another argument which again cannot succeed on rational analysis.

44. RESL produced the SPGSs as per the contract in the year 1998 and immediately became entitled to recover the stipulated invoice value i.e. Rs. 21,200/- for each of these units. These were to be delivered at the designated site on which RESL was to become entitled to recover this amount from the bank. This part of the transaction is between RESL and the bank. RESL became entitled to recover this amount from Canara Bank although the ultimate beneficiary/purchaser is BSNL. Since the breach has been caused by BSNL, RESL became entitled to recover this amount by way of damages from BSNL. The subsequent agreement between RESL and the bank cannot reduce the liability of BSNL. BSNL being the purchaser/lessee had to pay the QLR which included the price of the commodity. It follows that in the eventuality of BSNL failing to take delivery of the SPGSs, it became liable to pay damages to Canara Bank and RESL to the extent of QLR.

45. If the argument of Mr. Chandan Kumar is taken further, Canara Bank has suffered further loss to the extent of 4/5th of the amount recoverable from RESL and in that eventuality this loss of Canara Bank is required to be compensated for by BSNL which BSNL has not offered to do.



46. *It will not be correct to say that entire finance for manufacturing the equipments came from Canara Bank. The debts of RESL towards Canara Bank which was subject matter of OTS is likely to be different from the debts incurred from the project in the question. That will be one more reason for not accepting the argument of Mr. Chandan Kumar.*

47. *So far as Canara Bank is concerned it has suffered some loss by entering into the OTS with RESL. The bank cannot be made to suffer the loss all over again by exempting BSNL from paying the QLR or any part of it to the bank on account of the OTS.*

xxx xxx xxx

Assessment of damages

Cost and Profit

49. *BSNL says that its liability is limited to the QLR that it was required to pay to Canara Bank. The two claimants are willing to accept this proposition since the claim of RESL towards the invoice value and the claim of Canara Bank towards the profit margin together add up to the total QLR. The QLR for the 8070 units for 5 years has to be based on the formula of Rs 62.50 for every Rs. 1000/- of the invoice value. The invoice value for 8070 units @ Rs. 21,200/- works out to Rs. 17,10,84,000/-. Thus the QLR for 5 years i.e. for 20 quarters works out to Rs. 21,38,55,000/-. Canara Bank has asked for Rs. 4,27,71,000/- by way of profit margin. The invoice value of Rs. 17,10,84,000/- claimed by RESL together with the profit margin claimed by Canara Bank i.e. Rs. 4,27, 71,000/- adds up to the total QLR. Therefore Canara Bank can be granted the claim of interest @ 13.5 % which it would have earned if the contract had been fulfilled, amounting to Rs. 4,27,71,000/- and RESL can be granted the invoice value of Rs. 17,10,84,000/- subject to the deductions mentioned below. ”*

40. Perusal of the aforesaid makes it apparent that the transaction of loan/ credit extended by the respondent no. 1 to respondent no. 2 was an



independent transaction. It is manifest that the said settlement does not impact the liability owed by BSNL to RESL or Canara Bank under the Master Lease Agreement. The loss is to be determined on the date of breach and any subsequent adjustment of the losses by the parties inter-se cannot be used by the BSNL to claim reduction of its liability.

41. There is an unequivocal finding by the Third Arbitrator that the subsequent agreement between RESL and the Canara Bank cannot reduce the liability of BSNL. Cogent reasons have been given by the learned Arbitrator in this regard. The reasoning given by the learned Arbitrator is a plausible reasoning and this Court finds no basis to interfere with the award on this aspect.

42. It is further to be noted that the petitioner has failed to prove that the delay has been caused by respondent no. 2. It is evident that the delay has been caused due to non-furnishing of destination details for the 8070 units of SPGS by the petitioner. Therefore, the respondents have been rightly held entitled to award of compensation by the impugned Award. Even otherwise, the petitioner cannot raise this objection at this stage inasmuch as the present Award has been passed for the limited purpose of ascertaining the damages payable to the respondents. The issue pertaining to delay, breach, inspection, etc, were dealt with by the First Arbitrator in his Award dated 24th February, 2004, which findings have attained finality.

43. There is a positive finding by the Third Arbitrator that the SPGS units were custom made to suit the requirement of the petitioner. The respondent no. 2 had not only manufactured the units, but had also retained them for a very long time in the expectation of them being actually supplied to the



petitioner for some value. Para 63 of the Award in this regard is reproduced hereunder:-

“63. Mr. Chandan Kumar has repeatedly submitted that assuming that RESL actually manufactured SPGS units and BSNL did not purchase them, RESL must have disposed them of and the earnings out of such disposal should be deducted from the claim of RESL. From the foregoing discussion it is clear that RESL not only manufactured the articles but retained them for long in the expectation of them being actually supplied to BSNL for some value. The learned counsel for RESL has submitted that the SPGSs were electronic goods which lose value fast and cannot be sold long after their production. Further the SPGS units were custom made to suit the requirement of BSNL. It is not claimed by BSNL that there could be many buyers in the market for these goods. Therefore, it can safely be held that the goods could not be sold in the market.”

44. It is also relevant to note here that this Court in its order dated 26th March, 2015 in *OMP 169/2013* had categorically held that it was unnecessary to examine the question whether 8070 units of SPGS were in fact kept ready for dispatch/installation. BSNL was found to be in breach of the contract by the First Arbitrator that was upheld by this Court in its order dated 6th July, 2009 in *OMP Nos. 174/2004 and 184/2004*. The finding of the Court in the said order dated 6th July, 2009 had attained finality, as there was no challenge to the said order.

45. The contention of the petitioner with respect to supervening impossibility cannot be accepted. The said contention was rejected by the Third Arbitrator in the following terms:

“48.....By the time the letter was written, BSNL had given no indication that MARR system was going to be abandoned



altogether. In fact BSNL continued to assure that the destination details would be provided and it continued to ask for extension of the bank guarantee. In fact BSNL on deciding that MARR system would be abandoned should have immediately stopped RESL from going ahead with manufacturing and should have mitigated the losses. Thus the lack of vigilance is on the part of BSNL and not RESL. Further, there is no law that a party to a contract should take steps to mitigate the losses in anticipation of a breach by the other party. Hence this part of the plea of Mr. Chandan Kumar cannot be accepted... ”

46. Hence, it is seen that the Third Award has been passed by the learned Arbitrator after considering all the relevant facts and material on record. The decision was to be rendered on the basis of existing material before the Arbitral Tribunal. On the basis of documents on record, it is established that BSNL was at fault for non-delivery of the remaining 8070 units of SPGS, and having committed breach of contract, it was liable to compensate the respondents. It is further established that the respondent no. 2 was ready to perform its part of contract and that the 8070 SPGS units could not be supplied as petitioner failed to give the destination details.

47. The impugned Award dated 28th June, 2016 passed by the Third Arbitrator is well-reasoned, based on the material and documents on record before the Arbitral Tribunal. The damages have been determined by the learned Arbitrator on the settled principles of assessment of damages as laid down by Supreme Court. It cannot be said that there were no documents on record on the basis of which findings were given by the learned arbitrator. It is relevant to note here that while referring the matter to the Third Arbitrator, this Court vide its order dated 26th March, 2015 in *OMP No. 169/2013* with



regard to evidence on record, held as follows:

“46. Apart from the above, as rightly pointed out by Mr. Dewan, the evidence already on record and that filed after remand were overlooked by the second Arbitrator. This included the statement of account of RESL and debit vouchers drawn on Canara Bank to show the disbursement of finance to RESL. Importantly, the second Arbitrator did not refer to the endorsement in the insurance policy that the value of the goods insured was Rs. 7.25 crores and further the noting therein that the said goods stood hypothecated to Canara Bank.”

48. In view of the aforesaid, the contention of the petitioner that the impugned Award is based on presumption is found to be entirely flawed. As noted by the Coordinate Bench in its judgment dated 06th July, 2009 while setting aside the First Award, all that the law requires is that the party seeking compensation on account of breach proves that in the absence of breach, it was ready and willing to perform its part of the agreement so as to claim compensation. Arbitrator is the master of evidence. Therefore, it will not be for this Court to take upon itself the task of being a judge on the evidence that was before the arbitrator (**See: *Union of India Vs. Peekay Industries*, (2009) 160 DLT 735**).

49. The judgments as relied upon on behalf of the petitioner do not come to its aid and do not apply to the facts and circumstances of the present case.

50. It is to be noted that the scope of judicial interference under Section 34 of Arbitration Act is very narrow. Re-appreciation of evidence, which is what an Appellate Court is permitted to do, is not permitted under the ground of patent illegality appearing on the face of the Arbitral Award.



Patent illegality refers to such illegality as goes to the root of the matter. Mere erroneous application of the law or every error of law committed by the Arbitral Tribunal would not amount to patent illegality. (*See: Ssangyong Engineering and Construction Company Limited Vs National Highways Authority of India (NHAI), (2019) 15 SCC 131*).

51. Law is well settled that view taken by an Arbitrator, if plausible, does not call for interference. A possible view expressed by the Tribunal cannot be substituted by courts. Thus, Supreme Court in the case of *Delhi Airport Metro Express Private Limited Vs. Delhi Metro Rail Corporation Limited*², has held as follows:-

“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.

² (2022) 1 SCC 131



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”.

... ..

49. Even assuming the view taken by the High Court is not incorrect, we are afraid that a possible view expressed by the Tribunal on construction of the terms of the Concession Agreement cannot be substituted by the High Court. This view is in line with the understanding of Section 28(3) of the 1996 Act as a ground for setting aside the arbitral award, as held in Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] and thereafter upheld in Ssangyong.....”



52. Likewise, it is well settled that an Arbitrator is the master of evidence and findings arrived on the basis of evidence on record are not to be scrutinized as if the court was sitting in appeal. (**See: *State of Jharkhand and Others Vs. HSS Integrated SDN and Another*, (2019) 9 SCC 798**).

53. The court cannot substitute its views with the view taken by the Arbitral Tribunal merely for the reason that view of the Court appears to be better. Further, in case of reasoned award, “the reasonableness of the reasons” given by the Arbitrator is not open to scrutiny by courts. (**See: *K.V. Mohammed Zakir Vs. Regional Sports Centre*, (2009) 9 SCC 357**).

54. As noted above, Court hearing the objections to an arbitral award is not sitting as a court of appeal and cannot re-assess and re-examine the material produced before the Arbitrator. The court cannot substitute its own views with the view taken by the Arbitral Tribunal. The jurisdiction of the court while exercising its authority under the Arbitration Act is supervisory in nature and cannot be converted into appellate jurisdiction.

55. In view of the aforesaid detailed discussion, no merit is found in the present petition. The same is accordingly dismissed.

**(MINI PUSHKARNA)
JUDGE**

SEPTEMBER 27, 2023/c