IN THE HIGH COURT AT CALCUTTA
Civil Appellate Jurisdiction
Original Side

Present :- **Hon'ble Mr. Justice I. P. Mukerji**
Hon'ble Mr. Justice Biswaroop Chowdhury

APO 60 OF 2020

With

AP 26 OF 2004

The Board of Trustees of the Port of Kolkata

Vs.

M/s Marino Dredgeco Limited

For the Appellant	**:-**	**Mr. Tilak Kr. Bose, Sr. Adv.,** **Mr. Pratik Shanu, Adv.**
For the respondent	**:-**	**Mr. Amitava Mukherjee, Adv.,** **Mr. Sandipto Bose , Adv.,** **Ms. Ankita Ghosh, Adv.**
Judgment On	**:-**	**23.09.2024**

I. P. Mukerji, J.:-

This is an appeal from a judgment and order dated 13th January, 2020 in an application under Section 34 of the Arbitration and Conciliation Act, 1996, made by the appellant, refusing to set aside an arbitral award dated 3rd November, 2003 made and published by one Bachaspati Goswami, Chartered Engineer and Regime and Marine Consultant.

In the said award the learned Arbitrator awarded to the respondent Rs.2,16,68,844/- against claim No.1 for alleged extra work done by them for which bills were raised and against claim No.2 for refund of the security deposit of Rs.22,45,848/- aggregating to Rs.2,38,14,692/- together with interest at the rate of 10% per annum from 8th February, 2002 till the date of the award. If the payment was not made within three months from the date of the award further interest at the rate of 18% per annum on the aforesaid sum was payable by the appellant.

The claim was ready by a letter dated 19th October, 2001 by the respondent asking for reference of this dispute to arbitration.

The reasons given in the impugned judgment and order for rejecting the Section 34 application and upholding the award are indeed very short. They are as follows:

> "Certification in prescribed form was a situation contemplated by the General Conditions. Bills, meriting award, remained unpaid. Award-holder was working out the contract. Disputes arose on award-holder refusing to continue to dredge on not being paid therefore. As such it is apparent that completion of contract, being certified as contemplated, did not happen. The Tribunal has dealt with the question. Enquiry into merits thereof is thus far and need not be any further.
>
> The Tribunal having found completion of work, also awarded on refund of security. It was empowered to and awarded on interest as well. Petitioner was unable to demonstrate before the Tribunal that contract work was incomplete. Hence, the Tribunal's rejection of its counter-claims.
>
> In view of aforesaid, the petition is found to be without merit and the same is dismissed."

The appellant took a decision to construct a shore based pilot station complex in Sagar island. It involved dredging/excavation of an approach channel and basin and construction of an embankment near the Calcutta Port Trust light house. For this purpose they entered into an agreement with the respondent on 25th June, 1999. The work had to be completed in 18 months which would end in December, 2000. The total volume of materials to be involved in dredging and excavation was 2,40,000 cubic metres and paid at the rate of Rs.57 per cubic metre. The total amount payable for the work was Rs.2,86,56,200/- out of which Rs.2,79,32,865/- has been paid by the appellant to the respondent contractor. On 13th August, 2001 the appellant served the respondent with a letter dated 10th August, 2001 stating that the incomplete work would be entrusted to another contractor at the risk and cost of the respondent. The respondent asserted that the pilot station was in operation before 17th April, 2001 when the Chairman came to the site to inaugurate it. Hence the work was complete prior to that date and completed within the scheduled time. However, I find in paragraph 5 of their letter dated 27th August, 2001 written by them to the Chairman of the Port Trust, they admitted that the work could not be completed by 30th December, 2000 and that the appellant had granted them six months' extension to complete it.

On 3rd January, 2002 Mr. Bachaspati Goswami, Chartered Engineer and Regime and Marine Consultant was appointed as arbitrator.

The following claim was made before the arbitral tribunal.

SCHEDULE OF CLAIM

Sl. No.	Description of Items	Amount demanded
1.	Amount payable for works done as per pending bills of the Claimant.	Rs.2,16,68,844.00
2.	Refund of Security Deposit	Rs. 22,45,848.00
3.	Damages and compensation payable On account of wrongful and illegal Actions by the Respondent.	Rs.30,00,000.00
	Total	Rs.2,69,14,692.00
4.	Interest on the due amount @ 18% P.A from 10.08.2001 till payment	as accrued
5.	Any other amount the Claimant is Entitled to payment under the contract and/or in the facts and circumstances of the case.	as may be decided by the Ld. Arbitrator

The bone of contention between the parties is brought out from what is said in the following paragraphs.

The appellant says that this alleged excess work had neither been ordered by them nor done by the respondent contractor. Joint measurement certifying this extra quantity had never been made. The work had never been completed. The respondent contractor however alleges joint measurement to have been done. They were unable to produce any evidence to substantiate this extra work done, according to the appellant.

What is pointed out by the appellant is that out of the seven allegedly unpaid bills two are for Rs.16,03,617/- and for Rs.6,49,452/- dated 2nd August, 2001 and the ohter for Rs.1,02,28,282 dated 24th August, 2001 when no work was done.

The respondent's version is that the entire work had been completed by the stipulated date on 31st December, 2000 and that thereafter suo moto the appellant had granted extension of time to them for the purpose of maintaining the site.

In April, 2001 the Chairman of Calcutta Port Trust had inaugurated the pilot station. At that point of time the channel was both operational and functional. Through it pilot vessels could enter the station and dock there, according to the respondent.

The award has been seriously attacked on the ground that it has proceeded to allow the above additional claims of the respondent contractor without an iota of relevant evidence. Hence the award is perverse, and against the public policy of India and liable to be set aside. Moreover, Mr. Tilak Kr. Bose, learned senior advocate appearing for the appellant submitted that the fact that an extra claim of clearly 70% of the original contract amount had been allowed after payment of more or less the whole contract amount should shock the conscience of the court and for that reason the award should be set aside.

The Award & Contentions:-

Let us examine the reasons given by the learned arbitrator in support of his award of claim No.1. In paragraph 11.1.1 of the award the learned arbitrator has referred to "Clause 2.7 of General issues page-7 of 27". It is set out by us in the same way it has been set out by the learned arbitrator:

> "However, additional dredging caused due to force majeure or non compliance of soil character with data supplied by the Kolkata Port Trust will be paid for".

The respondent claims that additional dredging had to be done by them as the actual soil description did not match the data supplied by the appellant regarding its characteristics. The learned arbitrator has also recorded that measurement of the dredging work was made on 29th June, 2001, one day before the expiry of the extended period. Measurement sheets were jointly endorsed by the parties. The learned arbitrator accepted the bills of the respondent contractor on the evidence that “measurement sheets were jointly endorsed by KOPT and MDPL”. (Paragraph 10.5 of the award). The quantum of dredging computed on the basis of joint recording of pre-work and post-work levels. The claimant agreed that the quantum of dredging was as per log-sheet.

The pilot station was in operation. In fact, the learned arbitrator noted that the chairman had inaugurated the pilot station in April, 2001. These facts establish, according to the learned arbitrator, that the work under the contract had been completed by the respondent contractor and only maintenance work as claimed by them was being done. Further extra quantity of work had been done by them as recorded in the joint record of the pre-work and post-work levels of water. The appellant had received the bills for which payment was claimed in the arbitral proceedings in terms of the above Clause and were liable to pay them.

The learned arbitrator relied on Clause 2.7 “joint issues page-7 of 27” to entertain the claim for additional dredging”.

Mr. Tilak Kumar Bose, learned senior advocate for the respondent contended that according to the general conditions of contract, under Clause 6.1 no sum under the contract was payable to the contractor till final completion of issuance of certificate of final completion under Clause 5.12 to 6.1. Payment was to be made strictly according to the measurement of actual work under Clause 6.2. Under Clause-6.5 the bill of the contractor could only be prepared and processed for payment if made in terms of the measurement book and in terms and conditions of the contract. No joint measurement was made. No extra work as claimed by the respondent was done by them. The original bills of which payment was claimed were not on record. Learned counsel argued that the learned arbitrator was required to follow Section 28(3) of the Arbitration and Conciliation Act which enjoined the arbitral tribunal with a duty to "take into account the terms of the contract". Learned counsel emphasized that without following the above procedure the learned arbitrator had acted contrary to the agreement. He also committed a serious error by relying on documents he ought not to rely on. The arbitrator could be said to have been acting on no evidence. Hence, the award could be said to be perverse, patently illegal and liable to be set aside.

THE LAW

The Supreme Court judgment in Ssangyong reported in (2019) 15SCC 131 has extensively relied upon its earlier judgments in the case of **Associate Builders vs. Delhi Development Authority** reported in **(2015) 3 SCC 49** and **Renusagar Power Co. Ltd. vs. General Electric Co.** reported in **1994 Supp (1) SCC 644**. In paragraph 66 in **Renusagar Power Co. Ltd. vs. General Electric Co.** reported in **1994 Supp (1) SCC 644**, the Supreme Court opined that a foreign award would be contrary to public policy if it was against – (i) the fundamental policy of India, (ii) the interest of India or (iii) Justice or morality. We should remember that Associate Builders was pronounced before amendment of the Arbitration and Conciliation Act, 1996 in 2015. It needs to be pointed out that in that judgment while classifying awards which were against the Public Policy of India, the Supreme Court categorized four categories of awards namely, those (i) against the fundamental policy of Indian law, (ii) against the interest of India, (iii) against justice or morality and (iv) awards which were patently illegal.

In Associate Builders, the Supreme Court held that the following errors in the award would render it liable to be set aside.

A) When the award was opposed to the fundamental policy of Indian law. It would be so if it contained:-

(i) An error in appreciation of any substantive law;

(ii) The arbitrator not following the rules of natural justice;

(iii) The arbitrator following judicial precedent.

(iv) The award not satisfying the test of Wednesbury reasonableness i.e. to say, no reasonable person would arrive at the conclusion arrived at by the arbitrator.

B) Against the interest of justice.

C) Against justice or morality.

D) An award with patent illegality on the face of the award.

Patent illegality would vitiate the award when it was in contravention of the substantive law of India, when it was in contravention of the Arbitration and Conciliation Act, 1996, there was contravention of the terms of the contract.

In the 2015 amendment the two grounds on which an award would be branded as against the public policy of India were added as explanations : those in conflict with the basic notions of morality or justice and fundamental policy of Indian law. The ground of patent illegality was included as a separate Section 2A with a clarification that a mere error of law would not render an award to be patently illegal.

In the Ssangyong case the Supreme Court felt that an award could be tested on the grounds mentioned in Associate Builders to ascertain whether it was patently illegal or not. However, in one part of its judgment it added that only if the error in the appreciation of the law rendered the award liable to be set aside on the ground of being against the fundamental policy of Indian law i.e. against law of public importance or concerning public interest could the award be assailed as patently illegal. This is different from the view taken in Associate Builders where any infraction of substantive law would render the award partly illegal.

Section 34(2)(b) after the 2015 amendment is set out below:-

> *"34.* Application for setting aside arbitral award.—
>
> *(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).*
>
> *(2) An arbitral award may be set aside by the Court only if— ………………………………………*
>
> *(b) the Court finds that—*
>
> *(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or*
>
> *(ii) the arbitral award is in conflict with the public policy of India.*
>
> *1 [Explanation 1.—For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,—*
>
> *the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or*
>
> *(ii) it is in contravention with the fundamental policy of Indian law; or*
>
> *(iii) it is in conflict with the most basic notions of morality or justice.*
>
> *Explanation 2.—For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.]*
>
> *2 [(2A) An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the Court, if the Court finds that the award is vitiated by patent illegality appearing on the face of the award:*
>
> *Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by reappreciation of evidence.]"*

The explanation before the amendment was as follows:-

> *"Explanation.- Without prejudice to the generality of sub-clause (ii) it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81."*

The Ssangyong has substantially adopted the ratio in Associate Builders. The principle on which an award could be declared as being against the fundamental policy of Indian law or against the basic notions of morality or justice have been laid down by the Supreme Court in paragraphs 34, 35, 36, 37, 38, 39, 40, 41 of **Ssangyong Engineering & Construction Co. Ltd. vs. National Highways Authority of India** reported in **(2019) 15 SCC 131**. These paragraphs are set out below:-

> *"**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 reappreciation 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."*

An arbitral award may not be vitiated on the grounds of infraction of the fundamental policy of Indian law as laid down in the Associate Builders case. There may be very substantive and serious errors of law committed by the arbitral tribunal which are not against the fundamental policy of Indian law, but which goes to the root of the matter. Say for example an arbitral award is highly excessive in terms of damages. That should constitute a serious error of substantive law. But that would not vitiate the award on the ground that it is patently illegal.

A mere mistake in the appreciation of law not being part of the fundamental policy of Indian law is not a patent error. An error in the evaluation of evidence is also not one of those mistakes. Say for example, on an appraisal of the entire evidence the arbitrator comes to the finding that no fraud was involved and hence the contract was not avoidable. There may have been a mistake in law and in the appreciation of facts but it could not be called a patent error of law.

As opposed to this a perverse award being most unreasonable and irrational as described in the Associate Builders case would constitute patent illegality. In paragraph 14 of **PSA SICAL Terminals (P) Ltd. vs. Board of Trustees of V.O Chidambranar Port Trust Tuticorin & Ors.** reported in **2021 SCC OnLine SC 508**, the views of the Supreme Court in **Ssangyong Engineering & Construction Co. Ltd.** were reaffirmed by it.

If an award shocks the conscience of the court it is against basic notions of morality or justice and is liable to be set aside.

The subject award is challenged on mainly two grounds – it is against the fundamental policy of Indian law and it is perverse and hence, patently illegal.

Now suppose the certificate of final completion was willfully not issued by the Calcutta Port Trust? Would the contractor be without payment of his legitimate claim? If the whole work had been completed but the engineer of the appellant for some reason was not satisfied with the work, would the claim of the contractor be defeated, applying Clause 5.12, 6.1, 6.2, 6.4, 6.5 of the General Conditions of contract? Therefore, when the above documents were not available it was always open to the learned arbitrator to rely on the documents that he did for the purpose of evaluating the claim of the respondent. This document by no stretch of imagination can be called irrelevant for the purpose of such adjudication. When the primary documents were not available, reliance on the secondary documents was permissible for the learned arbitrator to come to the conclusion whether any extra work had been done by the contractor. Hence the evidence that he had admitted and relied upon was relevant. The conclusion he had drawn are plausible, far from being perverse.

It could not be said that the learned arbitrator did not take into account the terms of the contract and was in breach of Section 28(3) of the said Act. It is not the appellant's case that in spite of availability of certificate of the final completion and measurement of actual work having been done and recorded in the formal measurement book under Clauses 5.12 to 6.5 of the General Condition of Contract, the arbitrator had ignored those provisions and proceeded in his arbitrary way and approved the respondent's bills in a random manner. As it above documents were not available, he relied on measurement for dredging work taken on 29th June, 2001. He found the measurement sheets to be jointly endorsed by KOPT and MDPL. He was also satisfied that the bills were for actual extent of dredging computed on the basis of joint recording of pre-work and post-work water levels. The amount of dredging done was according to log sheets. The learned arbitrator has also referred to Clause-2.7 of General Issues page-7 of 27 which permitted payment for additional dredging required due to inter alia lack of matching of actual soil character with data supplied by the port authority. The award recorded that it was an admitted position that soil characteristic did not match as reflected in a note sheet marked C30.

An award based on such material can never be described as one based on no evidence or insufficient evidence. The evidence relied upon by the learned arbitrator may not be the best evidence or the entire evidence but certainly is adequate. By no stretch of imagination it can be termed as perverse or patently illegal. I declare that the award is not so.

The impugned award is not patently illegal or against the fundamental policy of Indian law. Nevertheless, it is to be noted that out of the seven unpaid bills of the respondent two are for Rs.16,03,607/- and Rs.6,49,452/- dated 2nd August, 2001 and the third for Rs.1,02,28,282/- dated 24th August, 2001.

According to the appellant in the extended period the work could not be completed as a result of which the agreement had to be terminated with effect from 1st July, 2001.

The respondent says that the agreement had been carried out during the contractual period and that it was extended only for doing maintenance work.

Even if one takes the respondent's version to be true the above amounts appear to be far too excessive.

The total amount payable for the work under the contract was Rs.2,86,56,200/- out of which Rs.2,79,32,865/- has already been paid. The additional claim for alleged extra work done by the respondent has been fully allowed by the learned arbitrator for the sum of Rs.2,16,68,844/-. Out of this, bills for over Rs.1.23 crores have been raised in August, 2001. Therefore, about 70% of the total contract value is claimed as payment for extra work.

Even if an award passes the test of perversity or patent illegality, it is liable to be set aside if it is in conflict with the basic notions of morality or justice. In the above cases, the Supreme Court has categorically held that an award which shocks the conscience of the court falls in this category.

Even assuming that substantial dredging was involved and the soil was incompatible with its description in the data, it is in fact very hard to comprehend that the bills for extra work would be almost equal to the value of the original contract. This is unbelievable, against public interest and shocks the conscience of the court.

In my considered opinion, the award allowing this claim on account of extra work to the extent of 70% of the contract value seems to be shockingly high. A court of justice would not permit this award to be executed specially when public money is involved. In those circumstances, I set aside 50% of the principal award i.e. 50% of Rs.2,16,68,844/- which is Rs.1,08,34,422/-. The rest of the principal award is upheld. The rate of interest in the award is also shockingly high and set aside partially so as to reduce it to 6% on the principal sum from 8th February, 2002 as provided in the award.

The rest of the award is not interfered with.

The appeal is partially allowed to the above extent.

The impugned judgment and order is partly set aside.

I Agree

(Biswaroop Chowdhury, J.) **(I. P. MUKERJI, J.)**