



2024:DHC:4723



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

+ O.M.P. (COMM) 217/2022, I.A. 6885/2022, I.A. 6886/2022, I.A. 6887/2022, I.A. 6943/2022

INDIAN STRATEGIC PETROLEUM RESERVES LIMITED ISPRL
..... Petitioner

Through: Mr. Sanjay Jain, Sr. Adv. with Mr. Lalit Chauhan, Ms. Laxmi Chauhan, Mr. Manish Yadav, Mr. Yuvraj Sharma, Ms. Shambhvi Mansingh, Ms. Nikita Chauhan, Advs. Mr.Somesh Dubey, LR of ISPRL.

versus

SK ENGINEERING COMPANY KARAM CHAND THAPAR
JOINT VENTURE SKEC-KCT JV Respondent

Through: Mr. R. Viraraghavan, Sr. Adv. with Mr. Ravi Verma, Mr. Abhinav Sharma, Ms. Jayshree Dugai, Mr. K. Krishna Kumar, Advs.

+ O.M.P. (COMM) 238/2022, I.A. 8468/2022

INDIAN STRATEGIC PETROLEUM RESERVES LIMITED ISPRL
..... Petitioner

Through: Mr. Sanjay Jain, Sr. Adv. with Mr. Lalit Chauhan, Ms. Laxmi Chauhan, Mr. Manish Yadav, Mr. Yuvraj Sharma, Ms. Shambhvi Mansingh, Ms. Nikita Chauhan, Advs. Mr.Somesh Dubey, LR of ISPRL.

versus

O.M.P. (COMM) 217/2022 and O.M.P. (COMM) 238/2022

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2024:DHC:4723



SK ENGINEERING COMPANY KARAM CHAND THAPAR
JOINT VENTURE SKEC-KCT JV Respondent

Through: Mr. R. Viraraghavan, Sr. Adv. with
Mr. Ravi Verma, Mr. Abhinav
Sharma, Ms. Jayshree Dugai, Mr. K.
Krishna Kumar, Advs.

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Date of Decision: 22nd May, 2024

CORAM:

HON'BLE MR. JUSTICE DINESH KUMAR SHARMA

J U D G M E N T

DINESH KUMAR SHARMA, J. (Oral)

1. The present petitions filed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter referred as, the Act), against the arbitral award dated 30.10.2021 arising out of the agreements dated 06.09.2009 for the Mangalore project and dated 30.07.2010 for the Padur project, seeking to set aside part of the award passed by the arbitral tribunal, is proposed to be disposed of by the common order.

2. The Engineers India Limited as the Engineer-in-Charge (EIC) invited bids on 19.11.2008 for constructing underground rock caverns for crude oil storage in Mangalore, Karnataka, with a completion time of 36 months. The Respondent submitted its bid on 20.01.2009 and was awarded the contract on 16.04.2009, with a contract value of INR 403.50 Cr. The project faced multiple extensions of time due to various reasons, with the final completion achieved on 12.10.2015. Similarly, another tender for similar works in Padur



resulted in a contract awarded on 30.07.2010, with a completion time extension granted until 31.12.2013. However, due to delays, further extensions were requested and granted until the project's final completion on 31.10.2014. Arbitration proceedings resulted in Arbitration Awards for both projects, with the Respondent being awarded INR 39,58,80,000/- for the Mangalore project and INR 21,98,81,621 for the Padur project.

3. Sh. Sanjay Jain, learned senior counsel for the Petitioner has submitted that the award at hand should be set aside on the ground that it is in clear violation of the fundamental policy of Indian law. Sh. Sanjay Jain, learned senior counsel has further submitted that he would not press the ground as stipulated in Section 34(2)(A) as the present award is an International Commercial Arbitration Award. Learned senior counsel therefore submits that the challenge to the award is confined to the grounds mentioned in Section 34(2) of the Act.

4. Sh. Sanjay Jain, learned senior counsel has crystallized his arguments to the effect that as per the Clause 4.3.9.0 of the GCC it was agreed upon between the parties that in case of delay, if an extension has been granted by the petitioner then in that case the extension will be the sole remedy of the Contractor for and / or arising out of the such case and the contractor hereby waives any and all contrary rights. Learned senior counsel submits that thus in view of the provisions of this Clause the Contractor has waived his rights for any compensation on account of price escalation or any of the factor. Learned senior counsel has further submitted that the learned Tribunal in the award has fallen into grave error by not giving effect to Section 63 of the Indian Contract Act.



5. Sh. Sanjay Jain, Learned senior counsel submits that though in the award, the learned Arbitrator has referred the Judgment of ***All India Power Engineer Federation v. Sasan Power Ltd.***¹, but did not follow the law laid down by the Hon'ble Supreme Court in ***Sasan Power Ltd*** (Supra). Learned senior counsel has further submitted that the learned tribunal has also wrongly premised its findings on Section 55 Part 2 of the Indian Contract Act. Learned senior counsel submits that in view of Section 63 of the Indian Contractor Act and Clause 4.3.9.0 the claimant shall not be entitled for the claim as awarded by learned tribunal.

6. Sh. Sanjay Jain, learned senior counsel has relied upon ***All India Power Engineer Federation (supra)*** and has invited the attention of this Court to paras 17 to 21 the Apex Court wherein inter alia held as under,

*“17. The relevant section therefore that would apply on the facts of the present case is Section 63. At this stage, it is important to advert to an argument made by counsel for the appellants that Article 18.3 only refers to waivers that can expressly be made under various provisions of the agreement and not to Article 6 which, according to learned counsel, cannot be waived under the PPA. Assuming that such argument is correct, and that Article 18.3 refers only to the mode of carrying out a waiver under the PPA, yet it is clear that Section 63 would operate on the facts of this case. This is for the reason that, when read with Section 1 of the Contract Act, it becomes clear that the PPA is subject to Section 63 of the Contract Act, which would allow a promisee to dispense with or remit, wholly or in part, the performance of the promise made to him, and accept instead of it any satisfaction which he thinks fit. This is made clear in an interesting judgment by Stone, C.J. in *Official Assignee of Bombay v. Madholal Sindhu* [Official Assignee of*

¹ (2017) 1 SCC 487



Bombay v. Madholal Sindhu, ILR 1948 Bom 1 : 1946 SCC OnLine Bom 47] . The learned Chief Justice after setting out the facts had this to say on the effect of Section 1 of the Contract Act: (SCC OnLine Bom)

“The Indian Contract Act of 1872 applies to all contracts in India and with regard to a pawn is a codification of the English common law. Speaking of the common law right to sell Mr Justice Story in his Commentaries on the Law of Bailments, Eighth Edn., says at p. 262:

‘Another right resulting, by the common law, from the contract of pledge is the right to sell the pledge, where there has been a default in the pledge in complying with his engagement, but a sale before default would be a conversion. Such a right does not divest the general property of the pawner but still leave in him (as we shall presently see) a right of redemption.’

‘The common law of England, existing in the time of Glanville, seems to have required a judicial process to justify the sale, or at least to destroy the right of redemption. But the law as at present established leaves an election to the pawnee. He may file a bill in equity against the pawner for a foreclosure and sale; or, he may proceed to sell ex mero motu, upon giving notice of his intention to the pledger.’

The terms of an instrument of pledge, such as there is in this case, giving an unqualified power of sale, are inconsistent with the provisions of Section 176 of the Contract Act, and, therefore, by virtue of Section 1 of that Act must give place to the express provisions of the Act (see K.R. Chitguppi & Co. v. Vinayak Kashinath Khadilkar [K.R. Chitguppi & Co. v. Vinayak Kashinath Khadilkar, ILR (1921) 45 Bom 157 : (1920) 22 Bom LR 659 : 1920 SCC OnLine Bom 78]).

The group of sections in the Indian Contract Act dealing with bailment commence with Section 148, and it is to be observed that in Sections 152, 163, 171 and 174 the power is given to contract out of



the Act. In the former section the words are “in the absence of any special contract” and in the three latter sections the expression used is “in the absence of any contract to contrary”. In my opinion, therefore, except in these four sections, the provisions of the Act with regard to bailment are mandatory (see Coop. Hindusthan Bank Ltd. v. Surendranath De [Coop. Hindusthan Bank Ltd. v. Surendranath De, ILR (1932) 59 Cal 667 : 1931 SCC OnLine Cal 224]).”

18. It is thus clear that if on facts there is a waiver of a provision of the PPA by one of the parties to the PPA, then Section 63 of the Contract Act will operate in order to give effect to such waiver.

19. At this juncture, it is important to understand what exactly is meant by waiver. In Jagad Bandhu Chatterjee v. Nilima Rani [Jagad Bandhu Chatterjee v. Nilima Rani, (1969) 3 SCC 445] this Court held: (SCC pp. 446-47, para 5)

“5. In India the general principle with regard to waiver of contractual obligation is to be found in Section 63 of the Contract Act. Under that section it is open to a promisee to dispense with or remit, wholly or in part, the performance of the promise made to him or he can accept instead of it any satisfaction which he thinks fit. Under the Indian law neither consideration nor an agreement would be necessary to constitute waiver. This Court has already laid down in Waman Shrinivas Kini v. Ratilal Bhagwandas & Co. [Waman Shrinivas Kini v. Ratilal Bhagwandas & Co., 1959 Supp (2) SCR 217 : AIR 1959 SC 689] , SCR p. 226 that: (AIR p. 694, para 13)

‘13. ... waiver is the abandonment of a right which normally everybody is at liberty to waive. A waiver is nothing unless it amounts to a release. It signifies nothing more than an intention not to insist upon the right.’

It is well known that in the law of pre-emption the general principle which can be said to have been uniformly adopted by the Indian courts is that acquiescence in the sale by any positive act amounting to relinquishment of a pre-emptive right has the effect of



the forfeiture of such a right. So far as the law of pre-emption is concerned the principle of waiver is based mainly on Mohammedan Jurisprudence. The contention that the waiver of the appellant's right under Section 26-F of the Bengal Tenancy Act must be founded on contract or agreement cannot be acceded to and must be rejected."

20. *In P. Dasa Muni Reddy v. P. Appa Rao [P. Dasa Muni Reddy v. P. Appa Rao, (1974) 2 SCC 725] , this Court held: (SCC p. 729, para 13)*

"13. ... Waiver is an intentional relinquishment of a known right or advantage, benefit, claim or privilege which except for such waiver the party would have enjoyed. Waiver can also be a voluntary surrender of a right. The doctrine of waiver has been applied in cases where landlords claimed forfeiture of lease or tenancy because of breach of some condition in the contract of tenancy. The doctrine which the courts of law will recognise is a rule of judicial policy that a person will not be allowed to take inconsistent position to gain advantage through the aid of courts. Waiver sometimes partakes of the nature of an election. Waiver is consensual in nature. It implies a meeting of the minds. It is a matter of mutual intention. The doctrine does not depend on misrepresentation. Waiver actually requires two parties, one party waiving and another receiving the benefit of waiver. There can be waiver so intended by one party and so understood by the other. The essential element of waiver is that there must be a voluntary and intentional relinquishment of a right. The voluntary choice is the essence of waiver. There should exist an opportunity for choice between the relinquishment and an enforcement of the right in question. It cannot be held that there has been a waiver of valuable rights where the circumstances show that what was done was involuntary. There can be no waiver of a non-existent right. Similarly, one cannot waive that which is not one's as a right at the time of waiver. Some mistake or misapprehension as to some facts which constitute the underlying assumption without which parties would not have made the contract may be sufficient to justify the court in saying that there was no consent."



21. Regard being had to the aforesaid decisions, it is clear that when waiver is spoken of in the realm of contract, Section 63 of the Contract Act, 1872 governs. But it is important to note that waiver is an intentional relinquishment of a known right, and that, therefore, unless there is a clear intention to relinquish a right that is fully known to a party, a party cannot be said to waive it. But the matter does not end here. It is also clear that if any element of public interest is involved and a waiver takes place by one of the parties to an agreement, such waiver will not be given effect to if it is contrary to such public interest. This is clear from a reading of the following authorities.”

7. Sh. Sanjay Jain, Learned senior counsel for the petitioner, submitted that the bare perusal of this makes it clear that if there is a waiver clause in the contract entered into between the parties, Section 63 of the Indian Contract Act would come into play. Learned senior counsel emphasized that the waiver clause was signed by the respondent / claimant with their complete knowledge.

8. Sh. Sanjay Jain, Learned senior counsel for the petitioner has also referred to judgment of *Associate Builders v. DDA*² and has referred to paragraphs 18 and 27, wherein it was inter alia held as under,

“18. In Renusagar Power Co. Ltd. v. General Electric Co. [Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCC 644] , the Supreme Court construed Section 7(1)(b)(ii) of the Foreign Awards (Recognition and Enforcement) Act, 1961:

“7. Conditions for enforcement of foreign awards.—(1) A foreign award may not be enforced under this Act—

² (2015) 3 SCC 49



(b) if the Court dealing with the case is satisfied that—

(ii) the enforcement of the award will be contrary to the public policy.”

In construing the expression “public policy” in the context of a foreign award, the Court held that an award contrary to

(i) The fundamental policy of Indian law,

(ii) The interest of India,

(iii) Justice or morality,

would be set aside on the ground that it would be contrary to the public policy of India. It went on further to hold that a contravention of the provisions of the Foreign Exchange Regulation Act would be contrary to the public policy of India in that the statute is enacted for the national economic interest to ensure that the nation does not lose foreign exchange which is essential for the economic survival of the nation (see SCC p. 685, para 75). Equally, disregarding orders passed by the superior courts in India could also be a contravention of the fundamental policy of Indian law, but the recovery of compound interest on interest, being contrary to statute only, would not contravene any fundamental policy of Indian law (see SCC pp. 689 & 693, paras 85 & 95).

Fundamental Policy of Indian Law

27. Coming to each of the heads contained in Saw Pipes [(2003) 5 SCC 705 : AIR 2003 SC 2629] judgment, we will first deal with the head “fundamental policy of Indian law”. It has already been seen from Renusagar [Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCC 644] judgment that violation of the Foreign



Exchange Act and disregarding orders of superior courts in India would be regarded as being contrary to the fundamental policy of Indian law. To this it could be added that the binding effect of the judgment of a superior court being disregarded would be equally violative of the fundamental policy of Indian law.”

9. Learned senior counsel has submitted that in the present case learned Arbitrator has disregarded order of the Apex Court of this land as laid down in ***All India Power Engineer Federation (supra)*** and the award on the face of it is contrary to the fundamental policies of Indian Law.

10. Sh. Sanjay Jain, Learned senior counsel for the petitioner has also referred to ***Ssangyong Engg. And Construction co. Ltd (supra)*** and has brought the attention of the court to para36, wherein it was inter alia held as under,

“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.”



11. Sh. R. Viraraghavan, learned senior counsel for the respondents has refuted the averments made by the learned senior counsel for the petitioner. Learned senior counsel submits that there cannot be any doubt to the proposition that by virtue of Section 63 of the Indian Contract Act right to compensation can be waived. However, learned senior counsel submits that in view of the categorical law laid down by the various judgments of Hon'ble Supreme Court, the waiver is a matter of fact and has to be proved in accordance with law.

12. Sh. R. Viraraghavan, Learned senior counsel submits that the challenge of the petitioner to the present award merits rejection primarily on the ground that the plea regarding Section 63 of the Indian Contract Act was never raised before the learned Arbitral Tribunal. Secondly, the petitioner/non-claimant has not proved the waiver as a matter of fact before the learned tribunal. Learned senior counsel has submitted that at the worst, the award by the learned arbitrator can be termed as an error in law. However, the award being International Commercial Arbitration, the error in law cannot be a ground to set aside as has been held in *Ssangyong Engg. And Construction co. Ltd. V. NHAI*³

13. Sh. R. Viraraghavan, Learned senior counsel for the respondent has invited the Court's attention to the *All India Power Engineer Federation* (supra) and has submitted that in this case, the Apex Court after referring to *P. Dasa Muni Reddy v. P. Appa Rao*⁴ has inter alia held that waiver is an intentional relinquishment of known right. Learned senior counsel has

³ (2019)B 15 SCC 131

⁴ (1974) 2 SCC 725



submitted that in order to invoke the waiver there has to be a clear intention to relinquish a right which is fully known to the party. Learned senior counsel has submitted that in the present case at the time of signing of the contract, the contractor/claimant was not fully aware of the damages/compensation to be claimed on account of delay in the completion of project. Learned senior counsel has fairly submitted that he is not pressing the issue of public interest in the present case.

14. Sh. R. Viraraghavan, Learned senior counsel has also submitted that in the case of waiver, the parties have to be *ad idem*, and in the case of waiver, it has to be intended by one party and understood by the other party.

15. Sh. R. Viraraghavan, Learned senior counsel has also relied upon ***Simplex Concrete Piles (Indian Ltd.) v. Union of India***⁵ wherein inter alia held as under;

“15. The issue therefore boils down to whether rights which are created by Section 73 and 55 of the Contract Act can or cannot be contractually waived. If there is a public policy or public interest element in these Sections, then the rights under these sections cannot be waived. Let us examine the matter. If we look at that portion of the Contract Act, 1872 till Section 73 it broadly comprises of three parts. The first part is the formation and the requirements for the formation of a legal agreement/contract. The second part deals with the performance thereof. The third part deals with the effect of breach of the contract.

Provisions pertaining to the effect of breach of contract, two of which provisions are Sections 73 and 55, in my opinion, are the very heart, foundation and the basis for existence of the Contract Act. This is because a contract which can be broken at will, will destroy

⁵ (2010) 115 DRJ 616



the very edifice of the Contract Act. After all, why enter into a contract in the first place when such contracts can be broken by breaches of the other party without any consequential effect upon the guilty party? It therefore is a matter of public policy that the sanctity of the contracts and the bindingness thereof should be given precedence over the entitlement to breach the same by virtue of contractual clauses with no remedy to the aggrieved party. Contracts are entered into because they are sacrosanct. If Sections 73 and 55 are not allowed to prevail, then, in my opinion, parties would in fact not even enter into contracts because commercial contracts are entered into for the purpose of profits and benefits and which elements will be non-existent if deliberate breaches without any consequences on the guilty party are permitted. If there has to be no benefit and commercial gain out of a contract, because, the same can be broken at will without any consequences on the guilty party, the entire sub-stratum of contractual relations will stand imploded and exploded. It is inconceivable that in contracts performance is at the will of a person without any threat or fear of any consequences of a breach of contract. Putting it differently, the entire commercial world will be in complete turmoil if the effect of Sections 55 and 73 of the Contract Act are taken away.”

16. Sh. R. Viraraghavan, Learned senior counsel for the respondent has submitted that Clause 4.3.9.0 being in violation of section 55(2) of the Indian Contract Act, is liable to be held non-operative by virtue of section 1 of the Indian Contract Act. Learned senior counsel for the respondent has also submitted that in order to invoke waiver as set up in Section 63 of the Indian Contract Act that can only be held to be valid, if it is being done with the full and complete knowledge of the rights.

17. Sh. Sanjay Jain, Learned senior counsel for the **petitioner** in his rejoinder has submitted that the waiver was specifically pleaded and has



invited the attention of this Court to para 2.2.5 of the award which records the same. Learned senior counsel has also invited the attention of this Court to the various communications between the project management consultant of the petitioner and the respondent wherein the extension was granted referring to *Clause 4.3.9.0*. learned senior counsel for the petitioner has further submitted that the *Simplex* (supra) may not be applicable in the present cases as it does not deal with Section 63 of the Indian Contract Act as *Simplex* (Supra) is governed by section 55 and 73 of the Indian Contract Act and *Simplex* (Supra) is impliedly overruled by *Sasan Power Ltd.* (Supra). Learned senior counsel for the petitioner has further submitted that in any case after the *Simplex* the Supreme Court has categorically propounded the concept and scope of the Section 63 of the Indian Contract Act. Learned senior counsel for the petitioner has also submitted that arguments of the complete knowledge is also not to be accepted as the contracts are signed for all the future transactions within the preview of the execution, of the Contract.

18. If we see the complete scheme of the Arbitration and Conciliation Act and the law as settled is that the Arbitral Award calls for the minimum judicial intervention. In this regard, reference can be made to Section 5 of the Arbitration and Conciliation Act, 1996 which reads as under;

“5. Extent of judicial intervention.—Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part.”



19. The Courts have repeatedly held that while exercising the jurisdiction under the Section 34 of the Arbitration and Conciliation Act, 1996, the Court cannot sit in an appeal over the Arbitral Award. The award can be set aside only on the limited grounds as mentioned under Section 34(2) of the Arbitration and Conciliation Act, 1996. It is not longer *res integra* that Court cannot meticulously examine the award of the Arbitral Tribunal. While exercising its jurisdiction, the Court cannot wear a lens to find out that what are the errors and shortcomings in the award. Even at the cost of brevity, it may be said that if two views are possible which could have been taken by the learned Arbitrator, and one view which may be a possible view is taken, the Court cannot substitute its own view with the view of the learned Arbitrator. Of course, if the view taken by the learned arbitrator is an impossible view then in that case, the Court can interfere.

20. In the present case, the learned Arbitrator *inter alia* made the following observations;

“4.2.3 The Contract between the Claimant and the Respondent is a construction contract and admittedly provides for extension of time by the Respondent. The Hon'ble Supreme Court has held in M/s Hind Construction Contractors v. State of Maharashtra (1979) 2 SCC that even where the parties are provided that time is of essence to the contract, such a stipulation will have to be dealt along with other provisions of the Contract to come to the conclusion that completion of work by a particular date was intended to be fundamental and therefore time was of essence to the Contract. In the present case, as the Contract itself provides for extension of time, time is not of essence and therefore the first part and the third part of Section 55 of the Indian Contract Act, 1872, which are applicable to cases where time is of the essence



of the contract, do not apply and the second part of Indian Contract Act, 1872, applies.

4.2.4. The second part of Section 55 of the Indian Contract Act, 1872 is extracted hereunder:

"Effect of such failure when time is not essential.-If it was not the intention of the parties that time should be of the essence of the contract, the contract does not become voidable by the failure to do such thing at or before the specified time; but the promisee is entitled to compensation from the promisor for any loss occasioned to him by such failure."

4.2.5. A reading of the second part of Section 55 of the Indian Contract Act, 1872 extracted above would show that it is not subject to any agreement between the parties. Section 1 of the Indian Contract Act, 1872 is as follows:

"1. Short title.-This Act may be called the Indian Contract Act, 1872. —This Act may be called the Indian Contract Act, 1872." Extent, Commencement.—It extends to the whole of India 1 [except the State of Jammu and Kashmir]; and it shall come into force on the first day of September, 1872.

*(Saving) - 2 [***] Nothing herein contained shall affect the provisions of any Statute, Act or Regulation not hereby expressly repealed, nor any usage or custom of trade, nor any incident of any contract, not inconsistent with the provisions of this Act."*

The effect of the words "any incident of any contract, not inconsistent with the provisions of this Act" is that a contract cannot have a stipulation with the provision of the Indian Contract Act, 1872. This has been held by stone CJ in Official Assignee of Bombay V. Madholal Sindhu (1946) SCC OnLine BOM 47 in the following words:



“ the terms of an instrument of pledge, such as there is in this case, giving an unqualified power of sale or inconsistent with the provisions of section 176 of the contract act, and, therefore, by virtue of section 1 of that act must give place to the express provisions of the act.

The group of sections in the Indian Contract Act dealing with bailment commence with section 148, and it is to be observed that in section 152,163,171 and 174 the power is given to contract out of the act. In the former section the words are “in the absence of any special contract.” And in the three latter sections the expression used is “in the absence of any contract to contrary”. In my opinion, therefore, except in these 4 sections, the provision of the act with regard to bailment are mandatory”.

The aforesaid judgement by Stone CJ in official assignee of Bombay v. Madholal Sindhu has been relied on by the honorable Supreme Court in para 17 of the judgement in All India Power Engineer Federation v. Sasan Power ltd. (2017) 1 SCC 487 to hold that “when waiver is spoken of in the realm of contract, section 63 of the Contract Act, 1872, governs.”

4.2.6 The arbitral tribunal therefore holds that the provisions of the second part of section 55 of the Indian contract act, 1872 are mandatory and when time is not of the essence of the contract, the promisee is entitled to compensation for loss for failure on the part of the promiser to perform its promise within the time stipulated in the contract and that provision and stipulation of the contract between the parties which are inconsistent with the second part of section 55 of the Indian contract act, 1872, Have to be ignored by the arbitral tribunal. The various clauses and stipulations to the effect that the claimant is not entitled to compensation for prolongation cause but is only entitled to extension of time are therefore of no aid to the respondent if the arbitral tribunal comes to a finding that any delay beyond the period of 36 months was because of a default on the part of the



respondent to do a particular thing on account of which the claimant has suffered a loss. Hence, the first question to be decided is whether the delay beyond the period of 36 months was because of default on the part of the respondent to do a particular thing on account of which claimant has suffered a loss.”

21. The scope of the jurisdiction under Section 34 of the Arbitration and Conciliation Act has repeatedly come up for discussion before the Courts. The Division Bench of this Court in **Delhi Development Authority v. M/s Erore Resorts and Hotels Ltd.** in FAO (OS)(COMM)75/2022 2022/DHC/001247, it was inter alia held as under;

“20. The endeavor of the legislation is to make arbitration more responsive to the contemporary requirement as an alternative dispute redressal mechanism. One of the objectives is to minimize the supervisory role of the Courts. It has repeatedly been held by the Constitutional Courts that a court while dealing with objections under Section 34 of the Arbitration and Conciliation Act (hereinafter referred to as „the Act) does not sit in appeal over the arbitral award. The courts can exercise their jurisdiction to interfere and can travel on the well-settled limited grounds. An award can be set aside only if it is contrary to substantive provisions of the law or the provisions of the Act or against the terms of the contract. Interference can be made only if the award suffers from patent illegality. (M.V.Elisabeth vs. Harwan Investment and Trading Private Limited (1993) Suppl (2) SCC 433.

21. In Oil and Natural Gas Corporation Ltd. vs. Saw Pipes Limited 2003 SCC online SC 545, it was inter alia held that the award would be set aside if it is contrary to (a) fundamental policy of Indian law, or (b) the interest of India: or (c) justice or morality; or (d) in addition, if it is



*patently illegal. It was further inter alia held that illegality must go to the root of the matter. If the illegality is of trivial nature it cannot be held that award is against the public policy. The Apex Court said that Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the Court and the award is opposed to public policy and is required to be adjudged void. It is also a settled proposition that interference under Section 37 of the Act by the appellate court also cannot travel beyond the restrictions laid down under Section 34 of the Act. [MMTC Limited vs. Vedanta Limited (2019) 4 SCC 163] The scope of jurisdiction under Section 37 of the Act also came up for consideration before the Supreme Court in **UHL Power Company Ltd. vs. State of Himachal Pradesh** 2022 SCC OnLine SC 19 wherein it was inter alia held as under: —*

“16. As it is, the jurisdiction conferred on Courts under Section 34 of the Arbitration Act is fairly narrow, when it comes to the scope of an appeal under Section 37 of the Arbitration Act, the jurisdiction of an Appellate Court in examining an order, setting aside or refusing to set aside an award, is all the more circumscribed. In MMTC Limited v. Vedanta Limited, the reasons for vesting such a limited jurisdiction on the High Court in the exercise of powers under Section 34 of the Arbitration Act has been explained in the following words: —

“11. As far as Section 34 is concerned, the position is well-settled by now that the Court does not sit in appeal over the arbitral award and may interfere on merits on the limited ground provided under Section 34(2)(b)(ii) i.e. if the award is against the public policy of India. As per the legal position clarified through



decisions of this Court prior to the amendments to the 1996 Act in 2015, a violation of Indian public policy, in turn, includes a violation of the fundamental policy of Indian law, a violation of the interest of India, conflict with justice or morality, and the existence of patent illegality in the arbitral award. Additionally, the concept of the —fundamental policy of Indian law would cover compliance with statutes and judicial precedents, adopting a judicial approach, compliance with the principles of natural justice, and Wednesbury [Associated Provincial Picture Houses v. Wednesbury Corpn., [1948] 1 K.B. 223 (CA)] reasonableness. Furthermore, —patent illegality itself has been held to mean contravention of the substantive law of India, contravention of the 1996 Act, and contravention of the terms of the contract.”

17. A similar view, as stated above, has been taken by this Court in K. Sugumar v. Hindustan Petroleum Corporation Ltd. , where it has been observed as follows:

“2. The contours of the power of the Court under Section 34 of the Act are too well established to require any reiteration. Even a bare reading of Section 34 of the Act indicates the highly constricted power of the civil court to interfere with an arbitral award. The reason for this is obvious. When parties have chosen to avail an alternate mechanism for dispute resolution, they must be left to reconcile themselves to the wisdom of the decision of the arbitrator and the role of the court should be restricted to the bare minimum. Interference will be justified only in cases of commission of misconduct by the arbitrator which can



find manifestation in different forms including exercise of legal perversity by the arbitrator.”

18. It has also been held time and again by this Court that if there are two plausible interpretations of the terms and conditions of the contract, then no fault can be found, if the learned Arbitrator proceeds to accept one interpretation as against the other. In Dyna Technologies (P) Ltd. v. Crompton Greaves Ltd. , the limitations on the Court while exercising powers under Section 34 of the Arbitration Act has been highlighted thus:

“24. There is no dispute that Section 34 of the Arbitration Act limits a challenge to an award only on the grounds provided therein or as interpreted by various Courts. We need to be cognizant of the fact that arbitral awards should not be interfered with in a casual and cavalier manner, unless the Court comes to a conclusion that the perversity of the award goes to the root of the matter without there being a possibility of alternative interpretation which may sustain the arbitral award. Section 34 is different in its approach and cannot be equated with a normal appellate jurisdiction. The mandate under Section 34 is to respect the finality of the arbitral award and the party autonomy to get their dispute adjudicated by an alternative forum as provided under the law. If the Courts were to interfere with the arbitral award in the usual course on factual aspects, then the commercial wisdom behind opting for alternate dispute resolution would stand frustrated.”

19. In Parsa Kente Collieries Limited v. Rajasthan Rajya Vidyut Utpadan Nigam Limited , adverting to the



previous decisions of this Court in McDermott International Inc. v. Burn Standard Co. Ltd. and Rashtriya Ispat Nigam Ltd. v. Dewan Chand Ram Saran , wherein it has been observed that an Arbitral Tribunal must decide in accordance with the terms of the contract, but if a term of the contract has been construed in a reasonable manner, then the award ought not to be set aside on this ground, it has been held thus:

***“9.1It is further observed and held that construction of the terms of a contract is primarily for an Arbitrator to decide unless the Arbitrator construes the contract in such a way that it could be said to be something that no fair-minded or reasonable person could do. It is further observed by this Court in the aforesaid decision in paragraph 33 that when a court is applying the —public policy‖ test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the Arbitrator on facts has necessarily to pass muster as the Arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. It is further observed that thus an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score.*”**

9.2 Similar is the view taken by this Court in NHAI v. ITD Cementation (India) Ltd., (2015) 14 SCC 21, para 25 and SAIL v. Gupta Brother Steel Tubes Ltd., (2009) 10 SCC 63, para 29.”



[emphasis
supplied]

20. In *Dyna Technologies (P) Ltd. (supra)*, the view taken above has been reiterated in the following words:

“25. Moreover, umpteen number of judgments of this Court have categorically held that the courts should not interfere with an award merely because an alternative view on facts and interpretation of contract exists. The courts need to be cautious and should defer to the view taken by the Arbitral Tribunal even if the reasoning provided in the award is implied unless such award portrays perversity unpardonable under Section 34 of the Arbitration Act.”

21. An identical line of reasoning has been adopted in *South East Asia Marine Engg. & Constructions Ltd. [SEAMAC Limited] v. Oil India Ltd.* and it has been held as follows:

*“12. It is a settled position that a court can set aside the award only on the grounds as provided in the Arbitration Act as interpreted by the courts. Recently, this Court in *Dyna Technologies (P) Ltd. v. Crompton Greaves Ltd.* [*Dyna Technologies (P) Ltd. v. Crompton Greaves Ltd.*, (2019) 20 SCC 1 : 2019 SCC OnLine SC 1656] laid down the scope of such interference. This Court observed as follows : (SCC pp. 11-12, para 24)*

“24. There is no dispute that Section 34 of the Arbitration Act limits a challenge to an award only on the grounds provided therein or as interpreted by various Courts. We need to be cognizant of the fact



that arbitral awards should not be interfered with in a casual and cavalier manner, unless the Court comes to a conclusion that the perversity of the award goes to the root of the matter without there being a possibility of alternative interpretation which may sustain the arbitral award. Section 34 is different in its approach and cannot be equated with a normal appellate jurisdiction. The mandate under Section 34 is to respect the finality of the arbitral award and the party autonomy to get their dispute adjudicated by an alternative forum as provided under the law. If the Courts were to interfere with the arbitral award in the usual course on factual aspects, then the commercial wisdom behind opting for alternate dispute resolution would stand frustrated.”

13. It is also settled law that where two views are possible, the Court cannot interfere in the plausible view taken by the arbitrator supported by reasoning. This Court in Dyna Technologies [Dyna Technologies (P) Ltd. v. Crompton Greaves Ltd., (2019) 20 SCC 1 : 2019 SCC OnLine SC 1656] observed as under : (SCC p.12, para 25) 25. Moreover, umpteen number of judgments of this Court have categorically held that the Court should not interfere with an award merely because an alternative view on facts and interpretation of contract exists. The Courts need to be cautious and should defer to the view taken by the Arbitral Tribunal even if the reasoning provided in the award is implied unless such award portrays perversity unpardonable under Section 34 of the Arbitration Act. [emphasis supplied]



22. *It was also inter alia held in UHL Power Company Ltd.*"s case (*supra*) that if the view taken by the arbitrator regarding the interpretation of the relevant clauses is both possible and plausible then merely because another view could have been taken, can hardly be a ground to interfere with the Arbitral award. Thus, a bare perusal of the settled legal proposition, it is crystal clear that the scope of the jurisdiction under Section 37 of the Act of this Court is very limited. Thus, we have to see whether, within this limited jurisdiction, the case of the appellant is sufficient to exercise that jurisdiction."

22. Thus, it is no longer *res integra* and position is well settled that there has to be minimal/minimum judicial intervention in this regard, the reference can also be made to Section 5 of the Arbitration and Conciliation Act, 1996 (Act). The Court can set aside the award only on the grounds which are available in Section 34(2) of the Arbitration and Conciliation Act. The Court keeping in mind, the contours of its jurisdiction has examined the award.

23. In respect to scope of judicial review, the Apex Court in ***Dyna Technologies (P) Ltd. v. Crompton Greaves Ltd.***⁶, *inter alia* held as under;

34. *The mandate under Section 31(3) of the Arbitration Act is to have reasoning which is intelligible and adequate and, which can in appropriate cases be even implied by the courts from a fair reading of the award and documents referred to thereunder, if the need be. The aforesaid provision does not require an elaborate judgment to be passed by the arbitrators having regard to the speedy resolution of dispute.*

35. *When we consider the requirement of a reasoned order, three characteristics of a reasoned order can be fathomed. They are: proper, intelligible and adequate. If the reasonings in the order are*

⁶ (2019) 20 SCC 1



improper, they reveal a flaw in the decision-making process. If the challenge to an award is based on impropriety or perversity in the reasoning, then it can be challenged strictly on the grounds provided under Section 34 of the Arbitration Act. If the challenge to an award is based on the ground that the same is unintelligible, the same would be equivalent of providing no reasons at all. Coming to the last aspect concerning the challenge on adequacy of reasons, the Court while exercising jurisdiction under Section 34 has to adjudicate the validity of such an award based on the degree of particularity of reasoning required having regard to the nature of issues falling for consideration. The degree of particularity cannot be stated in a precise manner as the same would depend on the complexity of the issue. Even if the Court comes to a conclusion that there were gaps in the reasoning for the conclusions reached by the Tribunal, the Court needs to have regard to the documents submitted by the parties and the contentions raised before the Tribunal so that awards with inadequate reasons are not set aside in casual and cavalier manner. On the other hand, ordinarily unintelligible awards are to be set aside, subject to party autonomy to do away with the reasoned award. Therefore, the courts are required to be careful while distinguishing between inadequacy of reasons in an award and unintelligible awards.”

33. It may be reiterated that the reasoning given by the learned Arbitrator may be insufficient; however, that may not be a ground to set aside the award. It is also necessary to mention that the Apex Court in ***Ssangyong Engg. and Construction Co. Ltd.*** (supra) has categorically stated that a mere contravention of the substantive law of India may no longer be a ground to set aside the Arbitral Award. It is an admitted case that the awards under challenge are of International Commercial Arbitration. Therefore, the court, while exercising its jurisdiction under Section 34 of the Arbitration and Conciliation Act, cannot look into whether the law has been applied



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correctly or not. The threshold required for setting aside an award is much higher.

34. Hence, both the petitions, along with pending applications, stand dismissed.

DINESH KUMAR SHARMA, J

MAY 22, 2024
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