

(2017) 04 AHC CK 0165
In the Allahabad High Court
Case No : 16242 of 2017

Balveer Singh Bansal

APPELLANT

Vs

Union of India & Ors

RESPONDENT

Date of Decision : 18-04-2017

Acts Referred:

[Arbitration Act, 1940](#), [Section 68](#) -
[National Highways Act, 1956](#), [Section 34](#),
[Section 34\(2\)](#), [Section 3G](#), [Section 3G\(5\)](#), [Section 3G\(6\)](#), [Section 3G\(7\)](#) - Determination of amount payable as compensation - Determination of amount payable as compensation - Determination of amount payable as compensation - Determination of amount payable as compensation

Citation : (2017) 04 AHC CK 0165

Hon'ble Judges : Krishna Murari, Ravindra Nath Kakkar

Bench : Division Bench

Judgement

1. Heard learned counsel for the petitioner, Shri Rajesh Tripathi for Union of India and Shri Neeraj Dube appearing for respondent no. 3. 2. By means of this petition filed under Article 226 of the Constitution of India, the petitioner has challenged the judgment and award dated 16.02.2013 passed by Competent Authority/Special Land Acquisition Officer, Joint Organisation, Mathura as well as order dated 22.11.2016 passed by the Arbitrator/Additional Commissioner (Administration), Agra Division, Agra. 3. Undisputed facts, giving rise to the dispute, are as under. 4. Petitioner claims to be recorded bhoomidhar of khasra plot nos. 41, 42 and 43 situate in village Narhauili, Pargana and Tehsil Mathura, District Mathura. The said plots were subject matter of acquisition under the National Highways Act, 1956 (for short "Act, 1956") for construction and widening of NH-2. After publication of notification under Section 3A and 3D and taking over possession under Section 3E, an award under Section 3G was declared on 16.02.2013. Dissatisfied with the award, petitioner made an application under Section 3G (5) of the Act, which was registered as Arbitration Case No. 881 of 2014 before the Commissioner, Agra Division, Agra, who was

appointed as Arbitrator by the Central Government. Arbitrator vide judgment and order dated 22.11.2016 rejected the claim of the petitioner. 5. Grievance of the petitioner is that both the Competent Authority as well as Arbitrator have failed to take into account the norms prescribed under sub-Section (7) of Section 3G of the Act for determining the compensation. The petitioner is, thus, basically aggrieved against the quantum of compensation determined by the Competent Authority and affirmed by the Arbitrator. 6. However, a preliminary objection with respect to maintainability of this writ petition has been raised by learned counsel for the respondent on the ground that in view of Section 3G (6) of the Act, 1956, since the provisions of Arbitration and Conciliation Act, 1996 (for short "Act, 1996") have been made applicable to every arbitration under this Act, the petitioner has a remedy of making application under Section 34 of the Act, 1996 for setting aside the arbitral award and this writ petition directly challenging the award, is not liable to be entertained. 7. Replying to the preliminary objection, learned counsel for the petitioner contends that the scope of interference under Section 34 of the Act, 1996 is very limited and in exercise of the said powers, award can only be set aside on certain limited grounds specified in the said Section and, thus, the remedy provided under Section 34, as a matter of fact, is no remedy much less an efficacious one. 8. In order to appreciate the rival contention, it may be relevant to quote Section 34 of the Act, 1996, which reads as under : "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 subsection (3). 2. An arbitral award may be set aside by the Court only if. A. the party making the application furnishes proof that - (i) a party was under some incapacity, or (ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or (iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or (iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration : Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or (v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or 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. 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." 9. A perusal of the provisions of Section 34 of the Act, 1996 goes to show that one of the grounds prescribed on which an arbitral award may be set aside by the court is if the same is in conflict with the public policy of India. 10. The phrase "public policy of India" used in Section 34(2)(b)(ii) has been subject matter of interpretation in various judicial pronouncements and the definition of the said term has been expanded to a very great extent by various pronouncements of the Hon'ble Apex Court. Reference may be made to the judgment of the Hon'ble Apex Court in the case of Central Inland Water Transport Corporation Limited & ANR. v. Brojo Nath Ganguly & Anr., [(1986) 3 SCC 156] wherein it has been held in paragraph 92 & 93 of the reports as under : "92. The Indian Contract Act does not define the expression "public policy" or "opposed to public policy". From the very nature of things, the expressions "public policy", "opposed to public policy", or "contrary to public policy" are incapable of precise definition. Public policy, however, is not the policy of a particular government. It connotes some matter which concerns the public good and the public interest. The concept of what is for the public good or in the public interest or what would be injurious or harmful to the public good or the public interest has varied from time to time. As new concepts take the place of old, transactions which were once considered against public policy are now being upheld by the courts and similarly where there has been a well recognised head of public policy, the courts have not shirked from extending it to the new transactions and changed circumstances and have at times not even flinched from inventing a new head of public policy. There are two schools of thought- "the narrow view" school and "the broad view" school. According to the former, courts cannot create new heads of public policy whereas the latter countenances judicial law-making in this area. The adherents of "the narrow view" school would not invalidate a contract on the ground of public policy unless that particular ground had been well- established by authorities. Hardly ever has the voice of the timorous spoken more clearly and loudly than in these words of Lord Davey in Janson v. Driefontein Consolidated Gold Mines Ltd. [(1902) AC 484, 500] : "Public Policy is always an unsafe and treacherous ground for legal decision". That was in the year 1902. Seventy-eight years earlier, Burrough, J., in Richardson v. Mellish [(1824) 2 Bing 229, 252] described public policy as "a very unruly horse, and when once you get astride it you never know where it will carry you." The Master of the Rolls, Lord Denning, however, was not a man to shy away from unmanageable horses and in words which conjure up before our eyes the picture of the young Alexander the Great taming Bucephalus, he said in Enderby Town Football Club Ltd. v. Football Assn. Ltd. [(1971) Ch. 591, 606]; "With a good man in the saddle, the unruly horse can be kept in control. It can jump over obstacles". Had the timorous always held the field, not only the doctrine of public policy but even the Common Law or the principles of Equity would never have evolved. Sir William Holdsworth in his "History of English Law", In fact, a body of law like the common law, which has grown up gradually with the growth of the nation, necessarily acquires some fixed principles, and if it is to maintain these principles it must be able, on the ground of public policy or some

other like ground, to suppress practices which, under ever new disguises, seek to weaken or negative them. It is thus clear that the principles governing public policy must be and are capable, on proper occasion, of expansion or modification. Practices which were considered perfectly normal at one time have today become obnoxious and oppressive to public conscience. If there is no head of public policy which covers a case, then the court must in consonance with public conscience and in keeping with public good and public interest declare such practise to be opposed to public policy. Above all, in deciding any case which may not be covered by authority our courts have before them the beacon light of the Preamble to the Constitution. Lacking precedent, the court can always be guided by that light and the principles underlying the Fundamental Rights and the Directive Principles enshrined in our Constitution. 93. The normal rule of Common Law has been that a party who seeks to enforce an agreement which is opposed to public policy will be non-suited. The case of *A. Schroeder Music Public Co. Ltd. v. Macaulay* [(1974) 1 WLR 1308], however, establishes that where a contract is vitiated as being contrary to public policy, the party adversely affected by it can sue to have it declared void. The case may be different where the purpose of the contract is illegal or immoral. In *Kedar Nath Motani v. Prahlad Rai* [(1960) 1 SCR 861], reversing the High Court and restoring the decree passed by the trial court declaring the appellants' title to the lands in suit and directing the respondents who were the appellants' benamidars to restore possession, this Court, after discussing the English and Indian law on the subject, said. The correct position in law, in our opinion, is that what one has to see is whether the illegality goes so much to the root of the matter that the plaintiff cannot bring his action without relying upon the illegal transaction into which he had entered. If the illegality be trivial or venial, as stated by Williston and the plaintiff is not required to rest his case upon that illegality, then public policy demands that the defendant should not be allowed to take advantage of the position. A strict view, of course, must be taken of the plaintiff's conduct, and he should not be allowed to circumvent the illegality by resorting to some subterfuge or by misstating the facts. If, however, the matter is clear and the illegality is not required to be pleaded or proved as part of the cause of action and the plaintiff recanted before the illegal purpose was achieved, then, unless it be of such a gross nature as to outrage the conscience of the court, the plea of the defendant should not prevail. The types of contracts to which the principle formulated by us above applies are not contracts which are tainted with illegality but are contracts which contain terms which are so unfair and unreasonable that they shock the conscience of the court. They are opposed to public policy and require to be adjudged void." 11. Reference may also be made to the following observations of the Hon'ble Apex Court in another celebrated case of *Oil and Natural Gas Corporation Limited v. Saw Pipes Ltd.*; (2003) 5 SCC 705. While considering the scope of the word "public policy of India" used in Section 34(2) (b)(ii), the Hon'ble Apex Court in paragraphs 26, 27, 28 & 31 of the reports has held as under : "26. It is true that Legislature has not incorporated exhaustive grounds for challenging the award passed by the arbitral tribunal or the ground

on which appeal against the order of the Court would be maintainable." "27. On this aspect, eminent Jurist & Senior Advocate Late Mr. Nani Palkhivala while giving his opinion to "Law of Arbitration and Conciliation" by Justice Dr. B.P. Saraf and Justice S.M. Jhunjhunwala, noted thus:- "I am extremely impressed by your analytical approach in dealing with the complex subject of arbitration which is emerging rapidly as an alternate mechanism for resolution of commercial disputes. The new arbitration law has been brought in parity with statutes in other countries, though I wish that the Indian law had a provision similar to section 68 of the English Arbitration Act, 1996 which gives power to the Court to correct errors of law in the award. I welcome your view on the need for giving the doctrine of "public policy" its full amplitude. I particularly endorse your comment that Courts of law may intervene to permit challenge to an arbitral award which is based on an irregularity of a kind which has caused substantial injustice. If the arbitral tribunal does not dispense justice, it cannot truly be reflective of an alternate dispute resolution mechanism. Hence, if the award has resulted in an injustice, a Court would be well within its right in upholding the challenge to the award on the ground that it is in conflict with the public policy of India." 28. From this discussion it would be clear that the phrase "public policy of India" is not required to be given a narrower meaning. As stated earlier, the said term is susceptible of narrower or wider meaning depending upon the object and purpose of the legislation. Hence, the award which is passed in contravention of Sections 24, 28 or 31 could be set aside. In addition to Section 34, Section 13(5) of the Act also provides that constitution of the arbitral tribunal could also be challenged by a party. Similarly, Section 16 provides that a party aggrieved by the decision of the arbitral tribunal with regard to its jurisdiction could challenge such arbitral award under Section 34. In any case, it is for the Parliament to provide for limited or wider jurisdiction to the Court in case where award is challenged. But in such cases, there is no reason to give narrower meaning to the term "public policy of India" as contended by learned senior counsel Mr. Dave. In our view, wider meaning is required to be given so as to prevent frustration of legislation and justice. This Court in *Rattan Chand Hira Chand v. Askar Nawaz Jung (Dead) By LRs and others* [(1991) 3 SCC 67], this Court observed thus :- "17. .. It cannot be disputed that a contract which has a tendency to injure public interests or public welfare is one against public policy. What constitutes an injury to public interests or welfare would depend upon the times and climes. ... The legislature often fails to keep pace with the changing needs and values nor as it realistic to expect that it will have provided for all contingencies and eventualities. It is, therefore, not only necessary but obligatory on the courts to step in to fill the lacuna. When courts perform this function undoubtedly they legislate judicially. But that is a kind of legislation which stands implicitly delegated to them to further the object of the legislation and to promote the goals of the society. Or to put it negatively, to prevent the frustration of the legislation or perversion of the goals and values of the society." "31. Therefore, in our view, the phrase "Public Policy of India" used in Section 34 in context is required to be given a wider meaning. It can be stated that the

concept of public policy connotes some matter which concerns public good and the public interest. What is for public good or in public interest or what would be injurious or harmful to the public good or public interest has varied from time to time. However, the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice. Hence, in our view in addition to narrower meaning given to the term "public policy" in *Renusagar's* case (supra), it is required to be held that the award could be set aside if it is patently illegal. Result would be award could 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. Illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the Court. Such award is opposed to public policy and is required to be adjudged void." 12. Reference in this connection may also be made to the dictum of the Hon"ble Apex Court in the case of *Delhi Development Authority v. R.S. Sharma and Company*, New Delhi; (2008) 13 SCC 80 wherein placing reliance on the observations made in the case of *Oil & Natural Gas Corporation (Supra)*, it was held as under : "20 In *Hindustan Zinc Ltd. v. Friends Coal Carbonisation*, (2006) 4 SCC 445, the following principles laid down in paragraphs 13 and 14 are relevant for the disposal of the present case: 13. This Court in *ONGC Ltd. v. Saw Pipes Ltd.*, (2003) 5 SCC 705 held that an award contrary to substantive provisions of law or the provisions of the Arbitration and Conciliation Act, 1996 or against the terms of the contract, would be patently illegal, and if it affects the rights of the parties, open to interference by the court under Section 34(2) of the Act. This Court observed: (SCC pp. 718 & 727-28, paras 13 & 31) 14. The question, therefore, which requires consideration is whether the award could be set aside, if the Arbitral Tribunal has not followed the mandatory procedure prescribed under Sections 24, 28 or 31(3), which affects the rights of the parties. Under subsection (1)(a) of Section 28 there is a mandate to the Arbitral Tribunal to decide the dispute in accordance with the substantive law for the time being in force in India. Admittedly, substantive law would include the Indian Contract Act, the Transfer of Property Act and other such laws in force. Suppose, if the award is passed in violation of the provisions of the Transfer of Property Act or in violation of the Indian Contract Act, the question would be whether such award could be set aside. Similarly, under sub-section (3), the Arbitral Tribunal is directed to decide the dispute in accordance with the terms of the contract and also after taking into account the usage of the trade applicable to the transaction. If the Arbitral Tribunal ignores the terms of the contract or usage of the trade applicable to the transaction, whether the said award could be interfered. Similarly, if the award is a non-speaking one and is in violation of Section 31(3), can such award be set aside. In our view, reading Section 34 conjointly with other provisions of the Act, it appears that the legislative intent could not be that if the award is in contravention of the provisions of the Act, still

however, it couldn't be set aside by the court. If it is held that such award could not be interfered, it would be contrary to the basic concept of justice. If the Arbitral Tribunal has not followed the mandatory procedure prescribed under the Act, it would mean that it has acted beyond its jurisdiction and thereby the award would be patently illegal which could be set aside under Section 34. 31. ... in our view, the phrase "public policy of India" used in Section 34 in context is required to be given a wider meaning. It can be stated that the concept of public policy connotes some matter which concerns public good and the public interest. What is for public good or in public interest or what would be injurious or harmful to the public good or public interest has varied from time to time. However, the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice. Hence, in our view in addition to narrower meaning given to the term public policy in Renuagar case, it is required to be held that the award could be set aside if it is patently illegal. The result would be award could 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. Illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court. Such award is opposed to public policy and is required to be adjudged void. 14. The High Court did not have the benefit of the principles laid down in Saw Pipes, and had proceeded on the assumption that award cannot be interfered with even if it was contrary to the terms of the contract. It went to the extent of holding that contract terms cannot even be looked into for examining the correctness of the award. This Court in Saw Pipes has made it clear that it is open to the court to consider whether the award is against the specific terms of contract and if so, interfere with it on the ground that it is patently illegal and opposed to the public policy of India. 21. From the above decisions, the following principles emerge: (a) An Award, which is (i) contrary to substantive provisions of law ; or (ii) the provisions of the Arbitration and Conciliation Act, 1996 ; or (iii) against the terms of the respective contract ; or (iv) patently illegal, or (v) prejudicial to the rights of the parties, is open to interference by the Court under Section 34(2) of the Act. (b) Award could 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; (c) The Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the Court. (d) It is open to the Court to consider whether the Award is against the specific terms of contract and if so, interfere with it on the ground that it is patently illegal and opposed to the public policy of India." 13. In recent past, the Hon'ble Apex Court in the case of J.G. Engineers Private Ltd. v. Union of India & Anr., (2011) 5 SCC 758 has again approved the definition of "public policy" as defined in the case of Oil & Natural Gas Corporation (Supra). 14. In the light of the aforesaid settled legal proposition in respect of the "public policy", another question which arises for consideration is whether an award made under Section

3G (5) of the Act, 1956, can be said to be in conflict with any "public policy of India" so as to make it amenable to proceedings under Section 34 of the Act, 1996. To arrive at an answer to the said question, it may be relevant to analyse the provisions contained in National Highways Act, 1956 laying down criteria for determination of the amount payable as compensation and criteria for determination of the market value of the land. Relevant Section 3G (7) containing the aforesaid provisions are reproduced hereunder. "3G (7). The competent authority or the arbitrator while determining the amount under subsection (1) or sub-section (5), as the case may be, shall take into consideration- (a) the market value of the land on the date of publication of the notification under section 3A; (b) the damage, if any, sustained by the person interested at the time of taking possession of the land, by reason of the severing of such land from other land; (c) the damage, if any, sustained by the person interested at the time of taking possession of the land, by reason of the acquisition injuriously affecting his other immovable property in any manner, or his earnings; (d) if, in consequences of the acquisition of the land, the person interested is compelled to change his residence or place of business, the reasonable expenses, if any, incidental to such change." 15. A perusal of the aforesaid provisions goes to show that for determination of the amount payable as compensation for acquisition of land, certain parameters have been laid down, which essentially means that fixation of quantum of compensation is not an exercise in abstract and the same is governed by the parameters contained in Section 3G (7) of Act, 1956. The Competent Authority while determining the compensation as well as Arbitrator exercising powers under Section 3G (5) has to keep in mind and adhere to the parameters so provided. Thus, the determination of proper compensation by the Arbitrator is to be based upon the parameters prescribed under Act, 1956. 16. In case, an award made by the Arbitrator is in violation or de hors the prescribed parameters, not only it would result in injustice, but would also render it patently illegal making it amenable to a challenge under Section 34 of the Act 1996 on the ground that it is in conflict with the "public policy of India". 17. In view of above facts and discussion and the settled legal proposition, the argument advanced on behalf of the petitioner that the remedy under Section 34 of the Act, 1996 is not efficacious, is fallacious and misconceived and is liable to be rejected. 18. The preliminary objection regarding the maintainability of the writ petition on the ground of existence of efficacious alternative remedy is liable to be upheld. 19. Since the statutory alternative remedy provided under Section 34 of the Act, 1996 is available to the petitioner before the appropriate forum, the present writ petition is not liable to be entertained on the ground of existence of alternative remedy and the same, accordingly, stands dismissed. In the facts and circumstances, we do not make any order as to costs.