

(2006) 12 CAL CK 0044

In the Calcutta High Court

Case No : APO No. 434 of 2003 with APOT No. 393 of 2003 and AP No. 26 of 2001

Damodar Valley Corporation

APPELLANT

Vs

Central Concrete and Allied Products Ltd.

RESPONDENT

Date of Decision : 11-12-2006

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 13(5), 16(6), 34, 34(2), 36
Civil Procedure Code, 1908 (CPC) — Section 47
Contract Act, 1872 — Section 7, 73, 74
Registration Act, 1908 — Section 17

Citation : (2007) 3 ARBLR 531

Hon'ble Judges : Tapan Mukherjee, J; Girish Chandra Gupta, J

Bench : Division Bench

Advocate : Jayanta Mitra, Ambar Mujumdar and Tapan Roy Chowdhury, for the Appellant; P.C. Sen, Hiral Mitra, Raj Ratan Sen and C.K. Saha, for the Respondent

Final Decision : Allowed

Judgement

1. This appeal is directed against an order passed by our brother Ashim Kumar Banerjee, J. refusing to set aside an award u/s 34 of the Arbitration and Conciliation Act, 1996. The undisputed facts of the case briefly stated are as follows:

The parties entered into a contract for construction of an Intake Pump House for Mejia Thermal Power Station. The stipulated period for completion of the work was two years which expired on 22nd February, 1991. The work was actually completed on 31st May, 1995. On account of delay in completion of the work Central Concrete & Allied Products Limited (hereinafter referred to as "the contractor") claimed revision of rates besides escalation provided in the contract. The contractor also claimed payment on account of some extra works. The correspondence in this regard commenced with the letter dated 2nd February, 1994. By its letter dated 2nd February, 1994 the contractor raised 22 claims which included a claim on account of general revision of rates. It would appear

from the letter dated 2nd February, 1994 that 19 out of 22 claims preferred therein related to extra items of work. On 9th April, 1994 a meeting took place between the parties wherein the letter of the contractor dated 2nd February, 1994 was thoroughly discussed. It appears from the minutes of the meeting dated 9th April, 1994 that D.V.C. (hereinafter referred to as "the employer") agreed in principle its liability to pay for 11 out of 19 items of extra work. The claim on account of revision of rates was also principally agreed to by the employer in the meeting dated 9th April, 1994. The contractor by its letter dated 3rd November, 1994 claimed revision of rates by 60%. The contractor also disclosed particulars of claims which were 35 in number which included the claim on account of revision of rates. By a letter dated 25th November, 1994 the contractor invoked the arbitration clause and requested the authority to refer the claims to an arbitrator. However, the contractor by his further letter dated 7th December, 1994 pointed out that he was not insisting upon reference in view of the fact that D.V.C. had condescended to consider the claims sympathetically. On 3rd May, 1995 a further meeting was held between the parties, the outcome whereof has been recorded by the contractor in its letter dated 18th May, 1995. From the letter dated 18th May, 1995 it appears that in the meeting dated 3rd May, 1995 in consideration of the employer agreeing to grant revision of rates by 39.28% with effect from 1st March, 1992, the contractor had agreed to give up its claims, on account of overrun period of the contract, which have been tabulated in the letter dated 18th May, 1995. The abandoned claims include overhead charges for the extended period, additional hire charges for plant and equipment, loss of profit, various types of reimbursements and interest. However, the claim for extra items of work remained as would appear from the letter dated 18th May, 1995 and it would only be proper to notice the relevant portion of the letter which reads as follows:

Simultaneously, it was offered to us that all our other claims for extra works would now be settled by D.V.C. expeditiously, in terms of Clause 1.07 of the Additional General Conditions of the Contract.

We were further advised that the total offer should be taken as a package deal and we should give our positive written confirmation on the same, for D.V.C. to issue necessary orders on the above lines.

Although the offer of D.V.C, for rate revision is very much less than our expectation, yet we had given our acceptance to the same during the meeting, in view of our excellent relationship with D.V.C. as a client and also to avoid further financial hardship on account of still further delays in settlement otherwise. We now give our written confirmation on the above lines, as instructed.

2. The letter dated 18th May, 1995 ended with a request to the employer to issue a formal order which was subsequently issued by the employer on 6th July, 1995. The said formal order goes to show that the employer had agreed to upward revision of rates by 39.28% with effect from 1st March, 1992 and had also agreed to pay for the extra items of work which had already been admitted.

We already have noticed that in the meeting dated 9th April, 1994 D.V.C. had agreed to pay 11 out of 19 claims on account of extra work. On 31st August, 1995 the contractor submitted a supplementary bill claiming revision of rates as per the order dated 6th July, 1995. On 19th September, 1995 the contractor wrote a letter to the Chief Engineer of the employer stating that it had on 31st August, 1995 submitted Supplementary Bill No. 1 for a sum of Rs. 28.61 lakhs in terms of the D.V.C.'s order dated 6th July, 1995, which was yet to be paid. The contractor in the circumstances requested the employer to release the bank guarantee for a sum of Rs. 20 lakhs furnished by the former to secure an advance payment made by the latter. On 26th September, 1995 the contractor submitted its final bill for a sum of Rs. 82,51,110 which included 29 items of extra work for a sum of Rs. 77,84,282.98p. The final bill taking into consideration the total work done from the date of commencement was for a sum of Rs. 3,94,36,930.01p., out of which a sum of Rs. 3,11,55,355 had already been paid during payment from 1st to 66th running account bill, therefore, the balance payable according to the contractor was a sum of Rs. 82,81,675 which included a sum of Rs. 77,84,282.98p. on account of extra works. Towards the final bill the employer paid a sum of Rs. 15,88,288. Therefore, even according to the final bill submitted by the contractor a sum of Rs. 67 lakhs approximately remained outstanding. The contractor accepted payment of the final bill with the following endorsement:

Final bill as above accepted, subject only to the claims submitted to DVD/HQ.

3. The matter was referred to arbitration. The arbitrator has passed an award for a sum of Rs. 2,06,79,116 inclusive of interest and costs with further interest at the rate of 18% per annum. It is this award which was the subject matter of challenge before Banerjee, J. The learned trial court refused to interfere with the award on the following grounds:

In my view, those claims were withdrawn by the respondent in the said letter dated 18th May, 1995 conditional upon revision of rate as well as settlement of remaining extra work dispute. The petitioner revised the rate, however, did not settle the extra work dispute. Hence, the confirmation given by the respondent by the said letter dated 18th May, 1995 with regard to the withdrawal of certain claims was not taken into account in view of the non-performance of the condition manipulated (stipulated) therein on behalf of the petitioner.

In the event on this score the arbitrator considered all aspects (illegible) and gave his decision on merits. I am not competent to decide the veracity of such decision in terms of Section 34 of the Arbitration and Conciliation Act, 1996.

In the result the petition fails and is hereby dismissed. There would, however, be no order as to costs.

4. Mr. Mitra, learned senior advocate appearing for the employer/ appellant has contended:

(a) That in consideration of the employer agreeing to pay revision of rates at the rate of 39.28% and in further consideration of the employer agreeing to pay for the admitted items of extra work, the contractor had consciously given up its claims tabulated in the letter dated 18th May, 1995. Based on the letter dated 18th May, 1995 written by the contractor, the employer issued the order dated 6th July, 1995 which was accepted by the contractor by acting upon the same inter alia by raising and realising claims in accordance therewith. It was no longer open for the contractor to go back on its solemn promise and to put forward the claims already abandoned. Based on the offer and acceptance and the resulting promise of the contractor the employer acted to its detriment and altered its position by issuing the order dated 6th July, 1995 and making payment in accordance therewith.

(b) He submitted that the learned judge failed to apply his mind to the facts and circumstances of the case and was clearly wrong in holding that the abandonment of the claims contained in the letter dated 18th May, 1995 would not bind the contractor because the claim on account of extra works had not been settled.

(c) He submitted that by the order dated 6th July, 1995, the employer agreed to pay for "extra items for which claims have already been admitted". According to him, parties obviously proceeded on the basis of admission of the employer in the meeting dated 3rd April, 1994, wherein out of 19 claims on account of extra work 11 claims had been admitted by the employer. These are the claims which the employer had agreed to pay in addition to the revision of rates in the meeting dated 3rd May, 1995 and in consideration thereof the contractor had given up its claims tabulated in the letter dated 18th May, 1995. Therefore, it is not correct to say that there has been any laches or omission on the part of the employer in settling the claims for extra work or that the alleged failure to pay for the extra work did or could have furnished a basis for reopening the whole issue or to rake up the claim which had already been abandoned by the letter dated 18th May, 1995.

(d) He drew our attention to Issue Nos. 1 and 2 formulated by the learned arbitrator which read as follows:

(1) Issue No. 1--Is the claimant entitled to raise or claim the amounts on any of them, as alleged in their statement of claim in the present case, in view of settlement and payment made as alleged by the respondents in their counter statement of facts ?

(2) Issue No. 2--If so, can the claimant, resile from such settlement and make claim before the learned arbitrator ?

The learned arbitrator has answered both the issues in affirmative. He submitted that the reasons assigned by the learned arbitrator are clearly bad, illegal and in any event immoral.

(e) His next submission was that the learned arbitrator has awarded a sum of Rs. 44,56,584 on account of "additional site overheads" which was specifically given up by the letter dated 18th May, 1995 which is Claim No. 2 appearing in the letter dated 3rd November, 1994. He further drew our attention to the fact that the learned arbitrator has awarded a sum of Rs. 32,82,246 on account of hire charges of plant and equipment which was also given up by the letter dated 18th May, 1995 which was Claim No. 3 in the letter dated 3rd November, 1994. He also drew our attention to the award for a sum of Rs. 4,08,517.63 paise on account of reimbursement of higher rate of payment made to the labourers which was also given up by the letter dated 18th May, 1995 which was Item No. 31 of the letter dated 3rd November, 1994. He also drew our attention to the grant of interest amounting to a sum of Rs. 1,00,31,399 which was also given up by the letter dated 18th May, 1995. He, therefore, submitted that out of the award for a sum of Rs. 206 lakhs (approx.) a sum of Rs. 182 lakhs (approx.) is on account of claims which had been given up in toto and the balance sum of Rs. 24 lakhs includes Rs. 4 lakhs on account of costs. The remaining sum of Rs. 20 lakhs can at the highest be regarded as an award on account of extra works. Even assuring that the employer was liable to pay Rs. 20 lakhs for the alleged extra works, the award for more than Rs. 2 crores is without any legs to stand upon and is patently bad, illegal and is clearly contrary to public policy.

(f) He drew our attention to the judgment of the Apex Court in the case of Oil and Natural Gas Corporation Ltd. Vs. SAW Pipes Ltd., . He relied upon paragraphs 15 and 74 of the aforesaid judgment which read as follows:

15. The result is--If the award is contrary to the substantive provisions of law or the provisions of the Act or against the terms of the contract, it would be patently illegal, which could be interfered u/s 34. However, such failure of procedure should be patent affecting the rights of the parties.

74. In the result, it is held that:

(A)(1) The court can set aside the arbitral award u/s 34(2) of the Act if 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.

(2) The court may set aside the award:

(i)(a) if the composition of that arbitral tribunal was not in accordance with the agreement of the parties;

(b) failing such agreement, the composition of the arbitral tribunal was not in accordance with Part I of the Act.

(ii) if the arbitral procedure was not in accordance with;

(a) the agreement of the parties, or

(b) failing such agreement, the arbitral procedure was not in accordance with Part I of the Act

However, exception for setting aside the award on the ground of composition of arbitral tribunal or illegality of arbitral procedure is that the agreement should not be in conflict with the provisions of Part I of the Act from which parties cannot derogate.

(c) If the award passed by the arbitral tribunal is in contravention of the provisions of the Act or any other substantive law governing the parties or is against the terms of the contract.

(3) The award could be set aside if it is against the Public Policy of India, that is to say, if it is contrary to:

(a) fundamental policy of Indian Law; or

(b) the interest of India; or

(c) justice or morality; or

(d) if it is patently illegal.

(4) It could be challenged:

(a) as provided u/s 13(5) and

(b) Section 16(6) of the Act.

(B)(1) The impugned award requires to be set aside mainly on the grounds:

(i) there is specific stipulation in the agreement that the time and date of delivery of the goods was of the essence of the contract;

(ii) in case of failure to deliver the goods within the period fixed for such delivery in the schedule, ONGC was entitled to recover from the contractor liquidated damages as agreed;

(iii) it was also explicitly understood that the agreed liquidated damages were genuine pre-estimate of damages;

(iv) on the request of the respondent to extend the time limit for supply of

goods, ONGC informed specifically that time was extended but stipulated liquidated damages as agreed would be recovered;

(v) liquidated damages for delay in supply of goods were to be recovered by paying authorities from the bills for payment of cost of material supplied by the contractor;

(vi) there is nothing on record to suggest that stipulation for recovering liquidated damages was by way of penalty or that the said sum was in anyway unreasonable;

(vii) in certain contracts, it is impossible to assess the damages or prove the same. Such situation is taken care of by Sections 73 and 74 of the Contract Act and in the present case by specific terms of the contract.

(g) Finally he submitted that the award is clearly illegal.

5. He accordingly invited us to set aside the award and to allow the appeal.

6. Mr. Sen, learned senior advocate appearing for the respondent/ contractor made the following submissions:

(a) Mr. Sen submitted that Claim No. 2 was allowed by the arbitrator on the basis of an admission. The learned arbitrator in allowing the Claim No. 2 has recorded as follows:

The respondents have accepted the claim in principle, so there is no dispute. The only dispute lies in the quantum of claim.

Similarly, Mr. Sen submitted that Claim No. 3 has also been allowed on the basis of an admission. The learned arbitrator has recorded as follows:

This claim has not been disputed by the respondents, rather it has been accepted in principle. The only dispute and difference is on the quantum of claim.

The admission according to Mr. Sen is to be found in the note prepared by the appellant itself which is intituled "brief notes on upward revision of rates by 39.28%, wherein they have taken into consideration both these elements and/or both these claims. Mr. Mitra replied that these claims had already been taken into consideration and that is why the revision of rates at 39.28% was allowed and there was or could be no occasion for the arbitrator to fish out an alleged admission on the basis of the grounds advanced by the appellant for justifying the grant of 39.28% rate revision.

(b) The second submission of Mr. Sen was that there was no concluded contract between the parties, nor according to him did the contractor give up its claims unconditionally. According to him, it was intended to be a package deal. Since, the employer did not act in accordance with the package deal, the question of the contractor being bound by the concession made by the letter dated 18th May, 1995 does not arise.

(c) His next submission was that in an application u/s 34 of the Arbitration and Conciliation Act, 1996, court cannot exercise appellate powers, nor is reappraisal of evidence permissible. In support of his submission, he relied on a judgment of the Apex Court in the case of Rajasthan State Road Transport Corpn. Vs. Indag Rubber Ltd., . He also relied on a judgment of the Apex Court for the self-same proposition in the case of M/s. Ispat Engineering and Foundry Works, B.S. City, Bokaro Vs. M/s. steel Authority of India Ltd., B.S. City, Bokaro, .

(d) Mr. Sen has taken us through the major portions of the award and submitted that the learned arbitrator has disclosed reasons in support of the claims allowed by him. Considering the state of law that it is not permissible for the court to reappraise the evidence, nor is it open to the court either to say that these reasons are wrong or to exercise appellate powers with regard to the claims allowed by the arbitrator.

(e) Mr. Sen submitted that Section 34 of the Arbitration and Conciliation Act, 1996, has to be read in conjunction with Section 5 which enjoins that interference of the judicial authority should be kept at the minimum. In support of his submission he relied on the following observations of the Apex Court in the case of Narayan Prasad Lohia Vs. Nikunj Kumar Lohia and Others, :

The said Act was enacted to consolidate and amend the law relating to domestic and international commercial arbitration and for matters connected therewith and incidental thereto. One of the objects of the said Act is to minimise the role of courts in the arbitration process. It is with this object in mind that Section 5 has been provided. Judicial authorities should not interfere except where so provided in the Act. Further, Section 34 categorically provides that the award can be set aside by the court only on the grounds mentioned therein. Therefore, one of the aspects which would have to be considered is whether the 1st and 2nd respondent's case fell within any of the categories provided u/s 34.

(f) Mr. Sen submitted that in an application for setting aside the award court has to confine itself to the grounds enumerated in Section 34. He relied on the following observations of the Apex Court in the case of M. Anasuya Devi and Another Vs. M. Manik Reddy and Others, :

4. After we heard the matter, we are of the view that in the present case this issue was not required to be gone into at the stage of the proceedings u/s 34 of the Act. In fact, this issue was premature at that stage. Section 34 of the Act provides for setting aside of the award on the grounds enumerated therein. It is not in dispute that an application for setting aside the award would not lie on any other ground, which is not enumerated in Section 34 of the Act. The question as to whether the award is required to be stamped and registered, would be relevant only when the parties would file the award for its enforcement u/s 36 of the Act. It is at this stage the parties can raise objections regarding its admissibility on account of non-registration and non-stamping u/s 17 of the Registration Act. In that view of the matter, the exercise undertaken to decide

the said issue by the civil court as also by the High Court was entirely an exercise in futility. The question whether an award require stamping and registration is within the ambit of Section 47 of the CPC and not covered by Section 34 of the Act.

(g) He submitted that the judgment in the case of ONGC has extended the scope of enquiry in an application u/s 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act"), which, according to him, was not necessary in the facts of the case. He submitted that the question for decision before the Apex Court was whether refusal on the part of the arbitrators to allow a claim on account of damages was proper, which should have been answered, but the Apex Court without restricting itself to the question in hand unduly extended the scope of enquiry and, therefore, this court should decide the present controversy in the light of the other judgments rendered by the Apex Court, wherein it has been held that an application for setting aside an award has to be tried within the four corners of Section 34 of the Act. He submitted that public policy is a concept which has been described as an unruly horse and unreliable, to say the least, and there is, therefore, no reason why the scope of enquiry in an application for setting aside the award should be extended on the ground of public policy.

(h) He submitted that even in the case of ONGC the Apex Court at page 728, has opined that an award can be set aside provided it shocks the conscience of the court. He submitted that the present award is based on evidence and is a fully reasoned award and there is no reason why this award should be branded as one shocking the conscience of the court.

(i) Finally, he submitted that the broader concept of public policy enunciated in the case of ONGC cannot be applied in the absence of any question as regards public interest or public good. In the present case, according to him, there is an award arising out of a contract between two private parties. There is no question of any public interest or public good and there is, thus, no reason why the award should be set aside on the ground of public policy either.

7. We have heard the submissions of the learned Counsel appearing for the parties. Before we take up the award for consideration let us clarify that the learned Trial Judge was clearly wrong in holding that the withdrawal of the claims contained in the letter dated 18th May, 1995 was not required to be taken into account because the appellant/petitioner did not settle the dispute as regards the extra work. This only goes to show that the facts and circumstances of the case were not clearly grasped by the learned trial court. By the order dated 6th July, 1995 the appellant had offered to pay for the extra items of work which had already been admitted. The respondent/contractor unconditionally took advantage of the order dated 6th July, 1995. Thereafter, it was not open to him to contend that the appellant had failed to settle the claim as regards extra items of work. In any event what could at the highest have been the subject matter of dispute was the legality of the rejection of the claim on account of extra works.

The abandoned claims could not have been reopened for any alleged failure to settle the claim on account of extra works.

8. Let us now examine the legality of the answer to Issue No. 1 given by the learned arbitrator. In paragraph 37.4.18 of the award the learned arbitrator has arrived at the following conclusion:

That the claimant's letter dated 18.05.1995 can be taken as an offer for Package Deal, is not disputed by either party (although the claimants argue that the same was issued under duress and not on free will. The said Package Deal contained, amongst others, provision for rate revision and simultaneous settlement of all extra works. The ultimate sanction order dated 06.07.1995 (R-9) of the respondents, however, dealt with only part of the above and not the full extent of the offer which means the acceptance of the Package Deal, had not been absolute and unqualified, as required u/s 7 of the Indian Contract Act. Therefore, under the law, there had been no absolute acceptance of the offer, leading to a settlement agreement.

9. We shall assume for the sake of argument that the letter dated 18th May, 1995 constituted an offer. We shall also assume that the order dated 6th July, 1995 did not deal with the claim on account of extra work to the fullest extent. In that event the order dated 6th July, 1995 has to be treated as a counter offer and not as an acceptance. It was thereafter for the respondent/ contractor either to accept or reject the counter offer. The respondent as we already have noticed by its letter dated 31st August, 1995 submitted a supplementary bill and by its letter dated 19 th September, 1995 prayed for release of the bank guarantee. Both these claims were made in pursuance of the order dated 6th July, 1995. The respondent is, therefore, deemed to have accepted the counter offer contained in the order dated 6th July, 1995. There is no escape from this conclusion for it is well settled that offer and acceptance need not always be in an elementary form, nor indeed does the law of contract or of sale of goods require that consent to a contract must be express. It is commonplace that offer and acceptance can be spelt out from the conduct of the parties which covers not only their acts but omissions as well. Indeed, on occasions, silence can be more eloquent than eloquence itself. Just as correspondence between the parties can constitute or disclose an offer and acceptance, so can their conduct. This is because, law does not require offer and acceptance to conform to any set pattern of formula [See Vishnu Agencies (Pvt.) Ltd. Vs. Commercial Tax Officer and Others, which was also followed in (1988) 3 SCC 263].

10. The answer to Issue No. 1 is the basis of the award. Once that answer has been found to be clearly erroneous in law the award becomes vulnerable. We are fortified in our view by the judgment of the Apex Court in the case of ONGC v. Saw Pipes (supra).

11. Mr. Sen has submitted that an award can be set aside as per the decision in Saw Pipes if the award shocks the conscience of the court. If the award in hand

is not shocking we do not know what shall be. The award for Rs. 206 lakhs includes award for Rs. 182 lakhs on account of claims which had been abandoned by the contractor.

12. We are unable to accept the submission of Mr. Sen that the contractor was not bound by the concession made by its letter dated 18th May, 1995.

13. We agree with Mr. Sen that in an application u/s 34 court shall not exercise appellate powers but that proposition cannot be extended to the extent of providing an umbrella to those awards where justice has been made a casualty.

14. Mr. Sen may be right in his contention that the learned arbitrator has given reasons for his award. We already have demonstrated the fallacy of the reasoning in the answer provided to Issue No. 1.

15. Mr. Mitra's contention, noted above, has to be accepted that the learned arbitrator in allowing the Claim Nos. 2 and 3 tried to fish out an admission which is simply not there. In allowing Claim No. 31 the learned arbitrator added a sum of Rs. 1,35,355.27p. on account of "20% as overhead and margin" for which even Mr. Sen could not demonstrate any basis.

16. Moreover, the learned arbitrator does not appear to have at all realised that it is one thing to say that a claim is payable but it is another as to what shall be the quantum thereof. The learned arbitrator, by and large, has not disclosed nor discussed any evidence on the basis whereof the claims were quantified.

17. We are unable to accept the submission of Mr. Sen that u/s 5 of the Act the interference of the judicial authority has to be kept at the minimum. We are, on the contrary, inclined to hold that Section 5 does not regulate the operation of Section 34. The decision rendered in the case of Narayan v. Nikunj (supra) cited by Mr. Sen does not militate against the view taken by us.

18. The extent of judicial powers laid down in the case of ONGC v. Saw Pipes (supra) are binding upon us and we cannot help following the law laid down by the Apex Court. The judgment in the case of Anasuya Devi cited by Mr. Sen does not really render any assistance in resolving the controversy.

19. We already have recorded that as on the date of submission of the final bill the claim of the contractor was for a sum of Rs. 82.81 lakhs out of which admittedly Rs. 16 lakhs (approx.) the contractor has already got. As against the balance claim for Rs. 66 lakhs (approx.) we have before us an award for a sum of Rs. 206 lakhs, can this be treated as an instance of a fair adjudication of dispute between the parties by any standard ? Our irresistible answer is clearly "no". The learned arbitrator has awarded more than a crore of rupees on account of principal whereas the outstanding claim was for Rs. 66 lakhs according to the final bill submitted by the contractor itself. As against a claim for Rs. 66 lakhs can there be an award for Rs. 100 lakhs ? Can such an award be allowed to subsist ? Arbitration after all is an alternative method for resolving the disputes. It is also a method for doing justice between the parties. An award which has

resulted in patently unjust results, can that award be allowed to survive ?

20. In the case of ONGC v. Saw Pipes (supra) Their Lordships quoted with approval the views expressed by late Mr. Nani Palkhivala which, insofar as the same is material for our purpose, read as follows:

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.

21. Lastly public interest in the sense it is commonly understood is not what we mean when we talk about public policy. We obviously refer to public interest but public interest in the sphere has a definite meaning. There are three types of competing interests recognised by law--(a) individual interest; (b) social interest; and (c) public interest. An individual will be interested in contending that he cannot be made liable in tort unless he was at fault. The society will be interested in contending that unless the individual is made vicariously liable the victim would become a social destitute. Therefore, law has to strike a balance between an individual interest and a social interest. Public interest is the third category which contends that for a greater interest individual interest has to be sacrificed. Again a balance has to be struck between the competing interests. In our Public Welfare State the Constitution strives to dispense social, economic and political justice. If this is the goal sought to be achieved does or does not the public have a right to get a fair justice under the Constitution of India ? That is the question and if that question were to be answered in the affirmative, then it has to follow that the award which is patently unjust is also contrary to public policy and is, therefore, bad.

22. Reference in this regard can be made to the following observations made by the Apex Court in the case of Central Inland Water Transport Corporation Limited and Another Vs. Brojo Nath Ganguly and Another, :

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 practice 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.

23. Speaking jurisprudentially one of the objects of law is to provide general security to the society--how is the security provided ? The security is provided by various methods of redressal developed by law. Let us cite an example. When, a patient goes to a person professing the calling of a doctor, the patient is entitled to presume that he shall be treated with the necessary skill required of a doctor. If the doctor were to indulge in any wilful aggression in treating the patient or in case he were to treat the patient with negligence or in case the doctor were

wanting in the necessary skill, but undertook to treat the patient nonetheless, he would be held liable in law. It is here that the security lies. It is thus in public interest and, therefore, a part of public policy to promote such security if we are interested to promote a civilized society. The example of a doctor is applicable to everyone professing any calling or holding any office. The litigants are entitled to feel secured that justice shall be rendered to them by the person holding the office of a judge or an arbitrator. Whenever and wherever there has been an infraction of the duty, with or without malice, in rendering justice, law has to step in. Otherwise the general security shall cease to be there. It is unquestionably in public interest, and, therefore, a part of the public policy, to maintain this general security.

24. For the aforesaid reasons, the appeal is allowed and the award is set aside. The respondent shall pay costs assessed at Rs. 2,000. It appears that pursuant to an order dated 25th July, 2003, passed by the appellate court, at the time of admission of the appeal, the appellant was directed to furnish cash security of Rs. 1,25,00,000. Liberty was granted to the respondent/contractor to withdraw the same upon furnishing a bank guarantee. Such security was furnished in cash by the appellant and the same has been withdrawn by the respondent upon furnishing a bank guarantee. The Registrar (Original Side) is directed to invoke the bank guarantee forthwith and to refund the money to the appellant. The respondent is also directed to pay simple interest @ 6% per annum from the date when the security money was withdrawn until the date of payment so that the interest which the security would have fetched, had the same been kept in a fixed deposit, is recouped and the equities are adjusted.

25. Mr. Sen, learned senior advocate appearing for the respondent prayed for stay of operation of this order. Considering his prayer, the operation of this order is stayed till two weeks after the X-mas vacation.

26. Xerox certified copy of this order be made available to the parties on urgent basis, if applied for, upon compliance of all formalities.