
(2016) 12 CAL CK 0048
In the Calcutta High Court
Case No : A.P. 923 of 2015

MBL Infrastructures Ltd.

APPELLANT

Vs

Ircon International Ltd.

RESPONDENT

Date of Decision : 19-12-2016

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 34(2)(a), Section 34(2)(b)(ii)
Contract Act, 1872 — Section 73, Section 74

Citation : (2017) 2 BC 376 : (2017) 2 ICC 305

Hon'ble Judges : Soumen Sen, J.

Bench : Single Bench

Advocate : Mr. Abhrajit Mitra, Senior Advocate Ms. R. Kajaria, Mr. S. Bhattacharya, Advocates, for the Petitioner; Mr. Sabyasachi Chowdhury, Senior Advocate Mr. Biman Kumar Saha and Mr. Jayanta Dutta, Advocates, for the Respondent

Final Decision : Disposed Off

Judgement

Soumen Sen, J.—This is an application for setting aside of an award under Section 34 of the Arbitration and Conciliation Act, 1996.

2. The respondent (IRCON International Ltd.) was awarded the contract by National Highway Authority of India (NHAI) for four laning and strengthening of the existing two lanes highway section from 115 KM. to 158 K.M. on the National Highway-2 in Uttar Pradesh.

3. The respondent entered into a contract with the petitioner for earth work, GSB, WMM and other civil works between 129 KM. to 145 KM. The original contract price was Rs.14,69,53,061/- and the same was subsequently reduced to Rs.10,76,96,821/-.

4. The petitioner as required under the contract had furnished three Bank Guarantees to the respondent as follows:-

i. Bank Guarantee dated 7th February, 2002 towards mobilization advance for

Rs.73,47,654/-;

ii. Bank Guarantee dated 8th February, 2002 for Rs.4,77,598/- on account of interest towards the aforesaid mobilization advance;

iii. Bank Guarantee dated 28th December, 2001 for Rs.73,47,654/- towards performance guarantee;

5. The first two Bank Guarantees lapsed and so far as the third bank guarantee is concerned, by order of Court dated 17th November, 2003, an amount of Rs.73,47,654/- was deposited with the Registrar, Original Side, High Court, Calcutta.

6. The dispute arose with regard to the performance of the contract.

7. IRCON contended that the petitioner did not perform the contract. The petitioner had abandoned a part of the contract in the month of May, 2002 followed by abandonment in the rest of contract in the month of October, 2002. In view of failure to complete the work, IRCON issued risk and cost notice under Clause 63(1) of the contract on 20th January, 2003.

8. In the arbitration proceeding IRCON has claimed refund of mobilization advance towards unexecuted work quantified at Rs.71,33,261/- together with interest, damages for breaches of contract, risk and cost expenses under Clause 63(1) of the contract amounting to Rs.6.5 crores approximately and further risk and cost amounting to Rs.6.8 crores approximately.

9. The petitioner in the arbitration proceeding has principally raised three issues.

Firstly, there has been a foreclosure of contract whereby the parties have agreed to absolve themselves of all liabilities.

Secondly, the claim towards mobilization advance is not realizable in view of the agreement reached by and between the parties in a tripartite meeting held on 29th April, 2002.

Thirdly, since the principal employer of the respondent did not impose any liquidated damage for the execution of the work in the extended period and allowed escalation charges to the respondent, the respondent, in fact, had not suffered any loss and damage and, accordingly, no claim on account of damages could be awarded in favour of the claimant/respondent.

10. The arbitrator considered each of the issues in his own inimitable style. The arbitrator has come to a finding that there has been no amicable foreclosure of the contract and, accordingly, the contention of the petitioner that by reason of amicable foreclosure, no amount is due and payable either on account of mobilization advance or otherwise is not sustainable.

11. The arbitrator has relied upon the measurement book duly signed by the parties from which it would appear that only 2.65% of the work executed by the petitioner and after adjustment has awarded the refund of mobilization advance

for a sum of Rs.71,33,261/- together with interest.

12. The claimant on account of damages suffered due to the abandonment by the petitioner was allowed on the ground that the petitioner has committed breach of contract and it is irrelevant whether the principal employer has allowed the claim towards escalation charges or did not levy liquidated damage.

13. Mr. Abhrajit Mitra, the learned Senior Counsel appearing on behalf of the petitioner submits that with the introduction of a third party, namely, M/s. Millith Karvee, the petitioner was absolved from all liability and the finding of the arbitrator that the parties did not agree to an amicable foreclosure is perverse and contrary to record. Moreover, it is submitted that the arbitrator could not have awarded a sum of Rs.71,33,261/- towards refund of mobilization advance having regard to the communication made by the respondent on 25th November, 2005 quantifying the claim towards balance mobilization advance as Rs.61,01,904/-.

14. Moreover, it has been strenuously argued on behalf of the petitioner that the award suffers from serious misconception of law as the learned Arbitrator has quantified damages by taking into consideration the amount mentioned in the performance guarantee. It is submitted that the amount mentioned in the performance guarantee cannot be considered as a pre-estimate of damage alleged to have been suffered by the petitioner. The Arbitrator proceeded on the basis that the performance guarantee is in the nature of the indemnity bond and having regard to the fact that the contract was breached by the petitioner, the respondent is required to be indemnified for the loss suffered. The learned senior Counsel has referred to the decision of the Hon''ble Supreme Court in *State Bank of Saurashtra v. M/S Ashit Shipping Services (P) Ltd. & Anr.* reported at (2002) 4 SCC 736 and submits that in the said decision, the Hon''ble Supreme Court has considered the difference between performance guarantee and indemnity and held that in order to sustain a claim on the basis of indemnity it has to be established that the loss has been sustained. A mere breach may not automatically result in a loss. The arbitrator would be required independently to assess the loss and the amount mentioned in the performance guarantee cannot be treated as a pre-estimation of loss which the respondent has failed to establish in the proceeding.

15. It is submitted that the arbitrator has completely overlooked and has committed a serious error of law in not recognizing that bank guarantee is an independent contract between the bank and the beneficiary and the obligation to pay under the guarantee is on the bank depending upon the terms of the bank guarantee.

16. Mr. Mitra refers to the observation made in *Daewood Motors India Ltd. v. Union of India & Ors.* reported at (2003) 4 SCC 690 in an attempt to show that the agreement between the petitioner and the respondent is of no avail although it may be true that the bank guarantee has to be read in full conjunction with the

terms of the contract. Mr. Mitra submits that the arbitrator in treating the bank guarantee as an indemnity bond has committed serious error of law and the same has ultimately affected the decision of the arbitrator as the amount covered under the performance guarantee could not be treated to be a pre-estimate of damage and in this regard he has relied upon the following decisions:-

(i) Vinitec Electronics Pvt. Ltd. v. HCL Infosystems Ltd. reported at (2008) 1 SCC 544;

(ii) State Bank of India & Anr. v. Mula Sahakari Sakhar Karkhana Ltd. reported at (2006) 6 SCC 293;

(iii) Reliance Salt Ltd. v. Cosmos Enterprises & Anr. reported at (2006) 13 SCC 599.

17. Mr. Mitra has referred to Sections 73 and 74 of the Contract Act and submits that the performance guarantee cannot be treated to be liquidated damage as the purpose of giving the said guarantee is that in view of failure to perform the contract, the petitioner would be obliged to release the payment in favour of the respondent. The breach of performance may not automatically result in a loss of Rs.73,47,654/-. It may be more or even less. It does not reflect a pre-estimation of damage. The performance guarantee represents in this case, approximately 6.8% of the total contract value, which the respondent would be entitled to receive for failure of the petitioner to perform the contract and it is not a matter of consideration at the time of deciding the quantum of guarantee, what the possible damage may be.

18. Mr. Mitra, in this regard, has relied upon the decision of the Hon''ble Supreme Court in M/S. Kailash Nath Associates v. Delhi Development Authority & Anr. reported at 2015 (4) SCC 136 and submits that damage or loss is sine qua non for payment of damages for breach of contract even under Section 74 and even where liquidated damages are provided for in the contract, the claimant would be required to establish that he has suffered loss or damage. It is submitted on behalf of the petitioner that the award to the extent it is contrary to Clause 63.1 of the General Terms and Conditions is hit by Section 28(3) of the Arbitration and Conciliation Act, 1996. After having held that compensation cannot be claimed under Clause 63.1 which is the provision for payment of compensation money, the arbitrator has proceeded to determine the compensation in a manner not contemplated by the contract and in this regard the learned Senior Counsel has relied upon the following decisions:-

(i) J.G. Engineers Pvt. Ltd. v. Union of India & Anr. reported at (2011) 5 SCC 758;

(ii) Oil & Natural Gas Corporation Ltd. v. Saw Pipes Ltd. reported at (2003) 5 SCC 705;

(iii) New India Civil Erectors (P) Ltd. v. Oil & Natural Gas Corporation reported at (1997) 11 SCC 75.

Per contra, Mr. Sabyasachi Chowdhury, the learned Senior Counsel appearing on behalf of the respondent placed reliance on various parts of the award which highlighted that the petitioner is only executed 2.65% of the work and asserted that there is a clear finding that the petitioner has committed breach of contract. It is submitted that although the learned Arbitrator in estimating the damage has referred to the amount covered by performance guarantee, the arbitrator has awarded such sum after arriving at a clear finding that the petitioner has committed a breach of contract.

19. Mr. Chowdhury has relied upon Paragraph 67 of Oil & Natural Gas Corporations Ltd. v. Saw Pipes Ltd. (supra) and submits that there cannot be any doubt that after the petitioner had left the site, the entire work was executed and for which there has been considerable delay. The damage suffered by the petitioner cannot be accurately assessed or assessed with mathematical precision and some guesswork may be applied to quantify the damage. It is submitted that the petitioner cannot dispute that the amount covered under the bank guarantee was payable to the petitioner on a demand being raised by the respondent upon the bank as the terms of the bank guarantee are unconditional. This amount by the order of the Court the petitioner had deposited with the Registrar, Original Side, High Court, Calcutta. Once a breach is established, it is submitted that the entitlement to the said amount whether on the ground of damages or otherwise cannot be denied. The reference in the award to such an amount is to be understood on this reasoning.

20. The challenge to the award under the 1996 Act is very limited.

21. The width and ambit of power under Section 34 of the Arbitration and Conciliation Act, 1996 has been recently considered by the Hon"ble Supreme Court in "Associate Builders v. Delhi Development Authority" reported at 2015 (3) SCC 49.

22. Section 5 of the 1996 Act provides that notwithstanding anything contained in any other law for the time being enforce, in matters governed by Part 1, no judicial authority is to intervene, except where so provided in the said part.

23. Section 34, read in conjunction with Section 5 makes it clear that an arbitral award that is governed by Part 1 of the 1996 Act, can only be set aside on grounds mentioned in Section 34(2) and (3) and not otherwise.

24. None of the grounds contained in Sub-section 2(a) of Section 34 permit the Court to adjudicate the merits of the decision rendered by an arbitral award.

25. The grounds given under Section 34(2)(a) are crisp and precise and lay the law as it is without the inclusion of any open-ended expression which otherwise would have given the courts an opportunity to widen their scope of interference with the arbitral awards. The only open-ended expression which can be and has been of concern is the ground of public policy of India. It has been under many cases defined as an unruly horse thus 3 giving the interpretation that it can

never be defined or be a certain thing. However, for the purpose of achieving the aim of the new Act, the Act of 1996 ? the legislature while drafting the Act limited the scope of public policy in its explanation restricted it to:-

(a) Fraud

(b) Corruption

(c) Section 75 or Section 81 (confidentiality breach or admissibility of evidence)

26. The scope of public policy was, however, widened after Supreme Court in its decision of Oil & Natural Gas Corporation Ltd. v. Saw Pipes Ltd. (2003 (5) SCC 705) (also referred to as : "Saw Pipes Case") interpreted it to include "patent illegality" in its definition. The case mentioned that the term public policy can be construed and understood in a narrow or with a wider meaning and then went ahead to say that it should not have a limited meaning ? thus, included the term "patent illegality" within the scope of public policy. "Patent Illegality" as explained by the Saw Pipes Case meant any error of law on the face of award, however, it did mention that the error which would be taken into consideration should not be trivial in nature. Lord Mansfield in *Holman v. Johnson* stated that the principle of public policy is *ex dolo malo non oritur actio*. No Court of law will lend its aid to a man who founds his cause of action upon an immoral or illegal act. The rule has been further illustrated by Russel by stating that grounds of public policy on which an award may be set aside include: (1) that its effect is to enforce an illegal contract; (2) that the arbitrator, for instance manifested obvious bias too late for an application for his removal to be effective before he made his award.

27. In its decision in *Oil and Natural Gas Corpn. Ltd. (supra)*, the Supreme Court has elaborated the concept of public policy at great length. The concept was extended to permit challenge to an arbitral award which is based on an irregularity of a kind which has caused substantial injustice. It is stated:-

"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, 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.

The expression "public policy" or "opposed to public policy" is not defined either in the Arbitration and Conciliation Act, 1996 or in the Contract Act, 1872. The reason is that these expressions are incapable of precise definition. The concept has to be taken to connote larger public interest on public good. Broadly speaking it would mean policy of law and, therefore, whatever tends to obstruct justice or violate a statute, whatever is against good morals is against public policy.

Public policy means the principles and standards regarded by the legislature or by the Court as being of fundamental concern to the state and the whole of the society. The notion of public policy is not static. Ideas on what is good for the public or what is in public interest, keeps changing with time. The enforcement of an award is to be refused as being contrary to public policy if it is contrary to the fundamental policy of Indian law, country's interests, and its sense of justice and morality. The case in which this point was raised did not involve any such violation, nor any other ground for setting aside could be proved.

The word "public policy" is not to be confined to the Explanation appended to the provision. That would be a very narrow construction of the provision."

28. In *Centrotrade Minerals & Metals Inc. v. Hindustan Copper Ltd.* reported at 2006 (11) SCC 245 the Supreme Court has interpreted public policy to include patent illegality and such patent illegality must go to the root of the matter. It should be unfair and unreasonable so as to shock the conscience of the Court. The pleadings of the parties and the materials on record are required to be considered to lay the Court if the award is against public good on public interest.

29. The law laid down by the Supreme Court in *Saw Pipes (supra)* has led many other courts to interpret the law to include any error of law to be hit by Section 34 including the subsequent decisions of the Hon"ble Supreme Court, for instance, in the case of *Delhi Development Authority v. R.S. Sharma* (2008(13) SCC 80) the Hon"ble Supreme Court summarized the law thus:-

"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:
- (i) Fundamental policy of Indian Law; or
 - (ii) The interest of India; or
 - (iii) Justice or morality;
 - (iv) The Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the Court;
 - (v) 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."

30. In *ONGC Ltd. v. Garware Shipping Corporation Ltd.* reported at 2007(13) SCC 434, it was held that under Section 34 of the Act, an award can be set aside on the ground that it is erroneous in law.

31. The Supreme Court in *McDermott International v. Burn Standards Co. Ltd.* reported at (2006) 11 SCC 181 has commented on the scope of the powers of the arbitrator to interpret terms of the contract, and the permissible interference by the courts on the assessment of the arbitrator. It was held:-

"It is trite that the terms of the contract can be express or implied. The conduct of the parties would also be a relevant factor in the matter of construction of a contract. The construction of the contract agreement, is within the jurisdiction of the arbitrators having regard to the wide nature, scope and ambit of the arbitration agreement and they cannot, be said to have misdirected themselves in passing the award by taking into consideration the conduct of the parties. It is also trite that correspondences exchanged by the parties are required to be taken into consideration for the purpose of construction of a contract. Interpretation of a contract is a matter for the arbitrator to determine, even if it gives rise to determination of a question of law.

(emphasis added)

The 1996 Act makes the provision for the supervisory role of courts, for the review of the arbitral award only to ensure fairness. Intervention of the Court is envisaged in few circumstances only, like, in case of fraud or bias by the arbitrator, violation of natural justice, etc. The court cannot correct the errors of the arbitrators. It can only quash the award leaving the parties free to begin the arbitration again if it is desired. So, the scheme 7 of the provision aims at keeping the supervisory role of the court at minimum level and this can be

justified as parties to the agreement make a conscious decision to exclude the court's jurisdiction by opting for arbitration as they prefer the expediency and finality offered by it."

32. The Court will not judge the reasonableness of a particular interpretation accorded by the arbitrator to the terms of the contract. Even an error in interpretation, unless patently illegal, will only amount to an error within the jurisdiction of the arbitrator.

33. In *Bharat Coking Coal Ltd. (supra)* the Hon"ble Supreme Court observed as follows:-

"11. There are limitations upon the scope of interference in awards passed by an arbitrator. When the arbitrator has applied his mind to the pleadings, the evidence adduced before him and the terms of the contract, there is no scope for the court to reappraise the matter as if this were an appeal and even if two views are possible, the view taken by the arbitrator would prevail. So long as an award made by an arbitrator can be said to be one by a reasonable person no interference is called for. However, in cases where an arbitrator exceeds the terms of agreement or passes an award in the absence of any evidence, which is apparent on the face of the award, the same could be set aside."

(emphasis added)

34. In *KV Mohd. Zakir v. Regional Sports Centre* reported at AIR 2009 SC (Supp) 2517 it held that the courts should not interfere unless reasons given are outrageous in their defiance of logic or if the arbitrator has acted beyond his/her jurisdiction.

35. In *P.R. Shah Shares & Stock Brothers v. M/s. B.H.H. Securities (P) Ltd.* reported at 2012 (1) SCC 594 it states that a court does not sit in appeal over the award of an arbitral tribunal by re-assessing or re-approaching the evidence. An award can be challenged only on the grounds mentioned in Section 34(2) of the Act.

36. In *Steel Authority of India Ltd. v. Salzgitter Mannesmann*; OMP No.736 of 2009, decided on 18th April, 2012 (Delhi HC) it refused to set aside the award in view of court's limited and restricted powers for judicial intervention as under Section 34 of the Act. The court relied upon the judgment in *P.R. Shah Shares (supra)* and held that the court cannot sit in appeal over the award of the tribunal by re-assessing and reevaluating the evidence.

37. In a fairly recent decision of *Associate Builders v. Delhi Development Authority* reported at (2015) 3 SCC 49 the Hon"ble Supreme Court had the occasion to re-consider the grounds on which an award can be challenged under Section 34 of the Arbitration and Conciliation Act, 1996. In dealing with the grounds on which an award can be challenged, the Hon"ble Supreme Court has noticed the distinction between Section 34(2)(a) and Section 34(2)(b)(ii) and held that it is only when arbitral award is in conflict with Public Policy of India as

per Section 34 (2)(b)(ii) that merits of an arbitral award are to be looked into under certain specified circumstances it includes if it is in conflict with Public Policy of India. The Hon''ble Supreme Court has subdivided Public Policy of India in four separate and distinct sub-heads, namely:-

(i) Fundamental Policy of Indian Law;

(ii) Interest of India;

(iii) Justice or Morality; and

(iv) Patent Illegality.

38. Fundamental Policy of Indian Law was again subdivided in four heads, namely, i) Compliance with statutes and judicial precedents; ii) Need of judicial approach; iii) Natural justice compliance; iv) Wednesbury reasonableness.

39. Patent Illegality principle was subdivided in three heads, namely, i) Contravention of substantive law of India; ii) Contravention of Arbitration and Conciliation Act, 1996; iii) Contravention of the terms of the contract.

40. The Hon''ble Supreme Court in Associate Builders (supra) had taken into consideration the object and reason for introduction of the 1996 Act and observed that the said Act was enacted to replace the 1940 Arbitration Act in order to provide for an arbitral procedure which is fair, efficient and capable of meeting the needs of arbitration and also to provide that the Tribunal gives reasons for an arbitral award; to ensure that the Tribunal remains within the limits of its jurisdiction; and to minimize the supervisory roles of courts in the arbitral process. The Fundamental Policy of Indian Law requires compliance with statutes meaning thereby that an award which is patently in violation of statutory provisions is in conflict with Public interest and would be regarded as being contrary to the Fundamental Policy of Indian Law. Furthermore, the binding effect of the judgment of a superior Court if disregarded would be equally violative of the Fundamental Policy of Indian Law. The arbitral tribunal being vested with the power to determine the rights and obligations of the parties is required to show fidelity to judicial approach meaning thereby that they cannot act in an arbitrary, capricious or whimsical manner. Judicial approach demands that a decision should be fair, reasonable and objective and not actuated by any extraneous considerations. Equal important and indeed fundamental was that the arbitral tribunal is required to follow the principles of natural justice. Audi alteram partem principle is Fundamental to the Policy of Indian Law and is also contained in Sections 18 and 34(2)(ii) of the Arbitration and Conciliation Act. The juristic principle of wednesbury reasonableness also forms part of the Fundamental Policy of Indian Law and a decision which is perverse or so irrational that a reasonable person conversant with the facts would not have arrived at the same conclusion is part of the Fundamental Policy of Indian Law and on the ground of which an award can be challenged. In New Brunswick (Board of Management) v. Dunsmuir ("Dunsmuir") reported at (2008) 1 SCR 190, the Supreme Court of

Canada revisited the analysis to be used on judicial review of the decision of an administrative body. The Supreme Court collapsed, from three to two, the potential standards of review, holding that review of the decision of an administrative body is to be performed on a standard of either correctness or reasonableness. The Court also redefined what is meant by reasonableness, stating as follows:-

"Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation with the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law."

41. Even in a civil trial, a finding of fact is not to be reversed unless it can be established that the trial Judge made a palpable and overriding error which means an error that gives rise to the reasonable belief that the trial judge must have forgotten, ignored or misconceived the evidence in a way that it affected his conclusion or an obvious deficiency in the trial Judge's finding of fact that affects the outcome of the trial. The Court in this jurisdiction, however, is not exercising such sweeping power. It is settled law that where a finding is based on no evidence or an arbitral tribunal takes into account something irrelevant to the decision which it arrives at or includes vital evidence in arriving at its decision. Such decision would necessarily be perverse and on those grounds, an award can be set aside. This later decision of the Hon^{ble} Supreme Court has reaffirmed its faith in *Saw Pipes Ltd.* (supra) with a word of caution 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. 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. Once it is found that the arbitrators approach is not arbitrary or capricious, and then he is the last word on facts.

42. An award can be said to be against justice or morality only when it shocks the conscience of the Court. The instance of it can be whether the Tribunal awards a sum without any acceptable reason or justification. The concept of Patent Illegality was considered by reference to the explanation under Section

34(2)(b)(ii) of the 1996 Act which states that an award is said to be in conflict with Public Policy of Indian Law if the making of the award is induced or affected by fraud or corruption. Patent Illegality would include a contravention of the substantive law of India or if an award is based in contravention of Arbitration and Conciliation Act, 1996 ? for example, if an arbitrator failed to give any reason for an award in contravention of Section 31(3) of the 1996 Act and in all cases whether the Tribunal failed to decide in accordance with the terms of the contract which in effect would be really a contravention of Section 28(3) of the 11 Arbitration and Conciliation Act. The Hon''ble Supreme Court, however, entered a caveat by stating that an arbitral tribunal must decide in accordance with the terms of the contract but if an arbitrator construes a term of the contract in a reasonable manner, it would not mean that the award can be set aside on this ground. Construction of the terms of the 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 would do, of course, the arbitrator cannot wander outside the contract and deals with the matters not forming the subject matter or allotted to him as in that case he would commit jurisdictional error. The said judgment also recognised and reaffirmed the settled law that where a cause or matters in differences are referred to an arbitrator, whether lawyer or layman, he is constituted the sole and final judge of all questions of law and of fact obviously with the limited grounds of interference as alluded to above.

43. As observed by the Supreme Court in Associate Builders (supra), the 1996 Act was enacted to provide for an arbitral procedure, which is fair, efficient and capable of meeting the needs of arbitration, to provide that the Arbitral Tribunal gives reasons for an arbitral award, to ensure that the Arbitral Tribunal remains within the limits of its jurisdiction and to minimize the supervisory role of Courts. The merits of an award might only be looked into under certain specified circumstances, when an award is found to be in conflict with the public policy of India, as held by the Supreme Court in Associate Builders (supra). An award might be set aside as patently illegal, provided the illegality goes to the root of the award. If the illegality is of a trivial nature it cannot be said that the award is against public policy. This proposition was reaffirmed by the Supreme Court in Hindustan Zinc Ltd. v. Friends Coal Carbonization reported at (2006) 4 SCC 445.

44. In ONGC v. Saw Pipes Ltd. (supra) the Supreme Court held that an award could also be set aside, if it was so unfair and unreasonable, that it shocked the conscience of the Court.

45. In Associate Builders (supra) the Supreme Court held that it must be clearly understood that when a Court is applying "public policy" test to an arbitral award, it does not act as a Court of appeal and consequently the errors of fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to be accepted as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon, when he delivers his arbitral award. Thus, an award

based on little evidence or no evidence, which does not measure up in quality to a trained legal mind would not be held to be invalid on this score. Once it is found that the arbitrators' approach is not arbitrary or capricious then he is the last word on facts.

(emphasis added)

46. Patent illegality may render an award to be in conflict with the public policy of India. Under the explanation to Section 34(2)(b) an award may be said to be in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption.

47. In *Indu Engineering & Textiles Ltd. v. Delhi Development Authority* reported at (2001) 5 SCC 691, the Supreme Court held that the Arbitrator being a Judge appointed by the parties, the award passed by him is not to be interfered with lightly. When the view taken by the arbitrator was a possible or a plausible one, on his analysis of evidence and interpretation of contractual and/or statutory provisions and did not suffer from any manifest error, it was not open to the Court to interfere with the award.

48-49. Even though the judgment in *Indu Engineering & Textiles Ltd.* (supra) was rendered in the context of an application under Section 30 of the Arbitration Act 1940, 13 for setting aside of an award, the same principle would apply to an application for setting aside an award, under Section 34 of the 1996 Act.

50. The judgment in *Associate Builders* (supra) clearly enunciates unless there is a patent illegality or perversity or violation of the principle of natural justice, the award cannot be interfered with. On the basis of law laid down by various decisions, the argument of Mr. Mitra is now to be considered.

51. The petitioner cannot possibly argue that the finding of the arbitrator with regard to refund of mobilization advance is perverse or based on no evidence. The arbitrator has disbelieved that Mr. Birkha Agarwal who has signed the Measurement Book was not authorised to represent the Company since the early correspondence, namely, the letter dated 11th March, 2002 shows that Mr. Birkha Agarwal was the person named in the communication and was authorised to represent the company during the discussions preceding the joint inspection. The Measurement Book is the best evidence of the work executed under the Contract.

52. The Measurement Book was signed by Mr. Birkha Agarwal on the measurement as a representative of the respondent. The progress of the work by the respondent from 129 KM. to 138 KM. remained extremely slow and on 11th June, 2002, the claimant by a letter to the respondent objected to the slow rate of progress of work and asked the petitioner to mobilize and expedite the works. The arbitrator thereafter considered the issue as to whether the petitioner had abandoned the contract on 30th September, 2002 and there was an amicably foreclosure without any liability of either party with effect from the said date. The

petitioner contended that because of alleged rise in the prices of materials in July/ August, 2002 the petitioner was no longer in a position to continue doing any work at the existing rates except the earth work and embankment. It was alleged that the claimant had recently amicably foreclosed its two other contracts and that on or about 4th August, 2002 an agreement for foreclosure was reached by and between the parties.

53. The contract between the claimant and the respondent stipulated that the petitioner would complete the entire stretch of KM. 129 to KM.138 by 14th December, 2002, that is within the period of one year. The claimant had made available to the respondent the entire stretch of the road between 129 KM. to 138 KM. The petitioner had started work between 129 KM. to 138 KM. but did not at all commence the work in the other stretch from 138 Km. to 145 Km. The claimant/respondent in the proceeding had produced letters to show that in spite of giving reminder to the petitioner and even threatening them with termination, the petitioner did not progress with the work diligently. The claimant was anxious to have the work completed within the stipulated time. There is categorical finding that the petitioner had abandoned the contract on 30th September/5th October, 2002, and the claimant itself began to construct the road.

54. In the arbitration proceeding, the petitioner alleged that in order to expedite the progress of the work, the petitioner introduced M/s. Millith Karve and in a tripartite meeting held on 29th April, 2002, it was recorded in the minutes of the meeting that while the petitioner would complete the work between 129 KM. to 138 KM., M/s. Millith Karve would do the work between 138 KM and 145 KM. and the volume of work under the original contract would, accordingly, be split into two parts, namely, Section A and Section B. The contract value of the work to be performed by MBL was fixed at Rs.6,82,58,977.13 and the contract value of the work to be performed by M/s. Millith Karve was fixed at Rs.9,17,95,597.97. The petitioner further contended that this tripartite agreement was valid and acted upon by the claimant/respondent and M/s. Millith Karve and that there was partial foreclosure of its contract to the claimant and, accordingly, MBL was liable to execute the contracted works only between 129 KM. to 138 KM. and M/s. Millith Karve was to execute the remaining stretch between 129 KM. to 138 KM.

55. The petitioner alleged that it faced various difficulties in executing the contract and desired to amicably foreclose its contract with the claimant/respondent. On 4th August, 2002 there were talks between the representative of the petitioner and the representative of IRCON in which both of them allegedly agreed that the contract would be amicably foreclosed without any financial liability on either side. On 27th August, 2002 the petitioner sent a letter to the claimant/respondent requesting for foreclosure of their contract without any liability of the either party. The petitioner informed the claimant that they would carry on earth and embankment work not later than 30th September, 2002. On 4th October, 2002, the Additional General Manager of the claimant informed that on 5th October, 2002, joint measurement of the works done by the petitioner will

be taken. The 10th running and the final bill were prepared.

56. The petitioner alleged that on the basis of the joint measurement its dues for the total volume of the work executed by the petitioner were in excess of the mobilization advance made by the claimant. The petitioner alleged that they have no liability to discharge and, accordingly, the invocation of bank guarantees by the respondent was illegal and fraudulent. In the said proceeding, the petitioner made a counter-claim for a sum of Rs.1,14,42,835/-.

57. MBL agreed to furnish two fresh bank guarantees towards performance security and for mobilization advance based on the reduced value of work. MBL would also return by draft extra mobilization advance. Based upon the minutes of 29th April, 2002, a tripartite agreement shall be signed containing the aforesaid terms. The documents shall be forwarded to the company for their final approval and only then the minutes and the agreed terms and conditions shall be operative and come into force. The claimant contended that the parties did not fulfil the terms of the minutes of 29th April, 2002 and therefore, the said terms and conditions did not become operative. The petitioner on the other hand contended that the claimant by its conduct acted upon and implemented the terms of the contract between IRCON and MBL. The length K.M. 138 to K.M. 145 was no longer part of the contract. The arbitrator on the basis of materials and evidence on record found that the petitioner did not furnish bank guarantees for mobilization advance and for performance guarantee. It also did not refund the excess amount of mobilization advance previously received. No fresh tripartite agreement was signed by the claimant, petitioner and Millith Karve. On that basis, the objections raised by the petitioner about splitting of the original contract was rejected. The arbitrator has also arrived at a finding that there was not even any written record of formal acceptance by IRCON of the terms of the minutes of 29th April, 2002 including partial foreclosure of the contract with the respondent of Division II B-K.M. 138 to K.M. 145. It was an undisputed fact that the petitioner did not execute any work in Division IIB (K.M. 138 to K.M. 145) since the commencement of its contract or even after 29th April, 2002.

58. The arbitrator at least in three places has recorded that only 2.65% work was executed by the petitioner.

59. The arbitrator has declined to give damages on account of risk and cost until January, 2003 when the notice of 14 days required under Clause 63(1) of the Conditions of Contract was actually served upon the petitioner. In between, the respondent on their own executed some work and thereafter by engaging sub-agencies M/s. Swastik Traders & Suppliers, M/s. Rahul Construction, M/s. Sandhu Contractors Pvt. Ltd., M/s. J.G. Construction and M/s. B. Agarwal Stone Products. It is not in dispute that some works were done between May, 2002 and September, 2002, when admittedly the petitioner did not perform any work. The claim for this period was disallowed in view of failure to give notice to the petitioner inasmuch as the respondent was unable to lead any satisfactory evidence as to the proportionate work carried out by the said agencies after the

risk and cost clause was invoked. Without first serving a notice under sub-clause (c) of Clause 63 of the contract, the respondent herein was not entitled to retrospectively invoke this clause with effect from May, 2002 or even from 30th September, 2002. There was no evidence for recording a definite finding as to what portion of the road was carried out departmentally or by appointing contractors before service of notice upon the respondent on 20th January, 2003 and how much work was carried out after service of notice.

60. The respondent herein being the claimant in the arbitration proceedings "has not been able to prove the exact amount of expenses incurred" after the respondent's abandoned the work and for which it was entitled to reimbursement for the works executed by it under the Risk and Cost Clause.

61. The work has now been completed. The question arises whether in such a situation the arbitrator was justified in allowing damages for failure on the part of the petitioner to carry out the work and the basis of the quantification of such damages. The petitioner cannot resist a claim on account of damages since the breach is admitted.

62. The petitioner, in this case, has claimed that the National Highway Authority of India had waived liquidated damages imposed on the claimant/respondent. The NHAI had also paid large amounts because of escalation in cost. The Learned Arbitrator held that the petitioner had not succeeded in proving that the contract between the claimant and the respondent for KM 129 to KM 145 was back to back with the contract between the National Highway Authority and IRCON for the length KM115 to KM 158. He found that not only were the escalation payment and subsequent waiver of liquidated damages by NHAI under a different contract between the NHAI and IRCON but also the same covered a much longer length of the National Highway. The Learned Arbitrator also pointed out that payment by NHAI on account of escalation to the claimant IRCON was presumably for the increase in costs of labour and material. Therefore, the receipt of the said escalation charges was not relevant for deciding whether or not the claimant could recover damages from the respondent for breach of contract. A waiver of the liquidated damages which was previously imposed on the claimant/respondent does not disentitle him from enforcing the performance guarantee furnished by the petitioner.

63. The argument of the petitioner that the arbitrator could not have treated Rs.73,47,654/- as a genuine pre-estimate of damages is equally unsustainable. The Learned Arbitrator after examining the evidence came to the conclusion that the claimant/respondent had not been able to prove the exact amount of expenses incurred after the petitioner abandoned the contract for which it was entitled to reimbursement for the works executed by it under the risk and cost clause of the contract. However, he found that the claimant's case for recovery of the amount of performance guarantee given by the petitioner to be unassailable. This obligation of the petitioner under the contract was in respect of all losses and damages which the claimant might suffer and as specified in the

notice of demand by the claimant. The petitioner definitely committed breaches of the terms and conditions of the contract with the claimant, at least for the length of KM 129 to KM 138. The claimant, under performance guarantee was the sole Judge as to whether the petitioner had committed any breach or breaches of any of the terms or conditions of the contract, the extent of loss and damage, cost and charges and expense suffered by the claimant. The decision of the claimant as to breaches are final and binding upon the bank which has furnished the guarantee for performance by the petitioner up to maximum sum of Rs. 73,47,654/-. The Learned Arbitrator felt that this was a genuine pre-estimation of the damages or expenses which the claimant might suffer on account of any breach committed by the petitioner. In no sense such pre-estimation of damages was by way of penalty. Both the State Bank of Mysore by way of furnishing the guarantee and the petitioner on whose behalf the whole performance guarantee was furnished had unequivocally and absolutely agreed to take the maximum amount of liability undertaken by the guarantee in the event of non-performance. The petitioner committed breach of contract. Accordingly, the Learned Arbitrator held that on account of the petitioner's failure to perform the contract, the claimant is also entitled to recover Rs.73,47,654/- from the petitioner together with interest accrued thereon.

64. The basis of awarding of damage is breach of contract. In *Saw Pipes* (supra) the Hon"ble Supreme Court followed *Maula Bux v. Union of India* reported at 1970 SCR (1) 928 and by way of an illustration where it may not be possible to mathematically assess the damage referred to construction of a road or a bridge. In Paragraphs 66, 67 and 68 of the report, this aspect of the matter was discussed which read:-

"66. In *Maula Bux*'s case (supra), the Court has specifically held that it is true that in every case of breach of contract the person aggrieved by the breach is not required to prove actual loss or damage suffered by him before he can claim a decree and the Court is competent to award reasonable compensation in a case of breach even if no actual damage is proved to have been suffered in consequence of the breach of contract. The Court has also specifically held that in case of breach of some contracts it may be impossible for the Court to assess compensation arising from breach.

67. Take for illustration construction of a road or a bridge. If there is delay in completing the construction of road or bridge within stipulated time, then it would be difficult to prove how much loss is suffered by the Society/State. Similarly, in the present case, delay took place in deployment of rigs and on that basis actual production of gas from platform B-121 had to be changed. It is undoubtedly true that the witness has stated that redeployment plan was made keeping in mind several constraints including shortage of casing pipes. Arbitral Tribunal, therefore, took into consideration the aforesaid statement volunteered by the witness that shortage of casing pipes was only one of the several reasons and not the only reason which led to change in deployment of plan or

redeployment of rigs Trident-II platform B-121. In our view, in such a contract, it would be difficult to prove exact loss or damage which the parties suffer because of the breach thereof. In such a situation, if the parties have pre-estimated such loss after clear understanding, it would be totally unjustified to arrive at the conclusion that party who has committed breach of the contract is not liable to pay compensation. It would be against the specific provisions of Sections 73 and 74 of the Indian Contract Act. There was nothing on record that compensation contemplated by the parties was in any way unreasonable. It has been specifically mentioned that it was an agreed genuine pre-estimate of damages duly agreed by the parties. It was also mentioned that the liquidated damages are not by way of penalty. It was also provided in the contract that such damages are to be recovered by the purchaser from the bills for payment of the cost of material submitted by the contractor. No evidence is led by the claimant to establish that stipulated condition was by way of penalty or the compensation contemplated was, in any way, unreasonable. There was no reason for the tribunal not to rely upon the clear and unambiguous terms of agreement stipulating pre-estimate damages because of delay in supply of goods. Further, while extending the time for delivery of the goods, respondent was informed that it would be required to pay stipulated damages.

68. From the aforesaid discussions, it can be held that:

(1) Terms of the contract are required to be taken into consideration before arriving at the conclusion whether the party claiming damages is entitled to the same.

(2) If the terms are clear and unambiguous stipulating the liquidated damages in case of the breach of the contract unless it is held that such estimate of damages/compensation is unreasonable or is by way of penalty, party who has committed the breach is required to pay such compensation and that is what is provided in Section 73 of the Contract Act.

(3) Section 74 is to be read along with Section 73 and, therefore, in every case of breach of contract, the person aggrieved by the breach is not required to prove actual loss or damage suffered by him before he can claim a decree. The court is competent to award reasonable compensation in case of breach even if no actual damage is proved to have been suffered in consequence of the breach of a contract.

(4) In some contracts, it would be impossible for the court to assess the compensation arising from breach and if the compensation contemplated is not by way of penalty or unreasonable, the court can award the same if it is genuine pre-estimate by the parties as the measure of reasonable compensation."

65. It is equally well-settled that the damage is a compensation for the injury sustained that the sum of money to be given for reparation of damages suffered should be, as nearly as possible be the sum which will put to injured party in the same position as he would have been if he had not sustained the wrong for which

he is getting the damages. (B.R. Herman & Mohatta v. Asiatic Steam Navigation Co. Ltd., AIR 1941 Sind 146)

66. In view of the unconditional bank guarantee now it is being established and proved beyond any doubt that the petitioner has committed a breach and, accordingly, the petitioner was entitled to invoke the bank guarantee the petitioner cannot resist realization of the said amount. The respondent, in fact, invoked the bank guarantee but by reason of the intervention of the Court, the proceed of the bank guarantee was deposited with the Registrar, Original Side of this Court. Without any adjudication as to the breach committed by the respondent and ascertainment of any amount payable consequent upon such breach, the subject-matter of the dispute was preserved by the interim order. Now as the fact reveals that there is a breach, the respondent cannot be worse off and held to be dis entitled to receive the said amount which would have been payable had there been no interim order. The realization of this amount is independent of any other claim. The bank guarantee represents only 6.8% of the contract value, which the bank at the instance of the petitioner had agreed to pay in case of a written demand by the respondent without even the requirement to state that there has been a breach of contract. It is true that the bank is not concerned with the underlying contract although, in effect, there are three parties involved in a bank guarantee, the liability to pay under the performance guarantee remains the same and more so when the breach is established.

67. Moreover, the fact that the respondent is likely to suffer by breach is foreseeable.

68. The assessment of damage cannot be said to be irrational.

69. In view of the aforesaid, the application for setting aside of the award fails. However, there shall be no order as to costs.

70. Urgent Xerox certified copy of this judgment, if applied for, be given to the parties on usual undertaking.