

(2019) 09 UK CK 0148

In the Uttarakhand High Court

Case No : Appeal From Order No. 306 Of 2011

M/s O.N.G.C. Ltd. Dehradun

APPELLANT

Vs

M/s SIV Magcobar Lignins Ltd

RESPONDENT

Date of Decision : 21-09-2019

Acts Referred:

Arbitration And Conciliation Act, 1996 — Section 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 14, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 31(4), 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43
Representation Of The People Act, 1951 — Section 90, 90(2), 92
Indian Contract Act, 1872 — Section 70, 73, 74

Citation : (2019) 09 UK CK 0148

Hon'ble Judges : Lok Pal Singh, J

Bench : Single Bench

Advocate : Rakesh Thapliyal, Dinesh Gehtori, Siddhartha Sah

Final Decision : Allowed

Judgement

Lok Pal Singh, J

1. This appeal, under Section 37 of the Arbitration and Conciliation Act, 1996, has been preferred against the majority Award dated 18.10.2007 passed by Sri S.K. Goyal and Sri G. Saran, Arbitrators in Arbitration Case No.04 of 2008 Oil & Natural Gas Corporation vs. M/s SIV Magcobar Lignins Ltd.

2. Facts leading to the present case are that the appellant invited tenders to supply of 551 MTs of chrome lingo Sulphonate. Respondent participated in the tender process and was declared successful. As per the agreement, the appellant placed a purchased order dated 3.4.2001 on the respondent for sale and supply of 551 MTs of chrome lingo Sulphonate. Supply was to be completed in 32 weeks by 14.11.2001. Respondent was asked to submit a bank guarantee of Rs.16,33,885/- in case of failure of contract. Out of 551 MTs, 276 MTs offered and supplied by the respondent was failed in the first test report dated 12.7.2001 as the same was not with the conformity with specifications

mentioned in the purchase order. Appellant sent a letter dated 30.10.2001 to the respondent conveying that the supplier has option to get it tested on payment basis in line with clause 9, but the respondent refused for the same and replied that they have already started reprocessing of 276 MTs. Respondent offered and supplied the material second time but the same again could not pass the laboratory test. The test report was communicated to the respondent. As the respondent failed to comply with the conditions of Supply Order, the appellant invoked Performance Bank Guarantee of Rs. 16,33,885/-, vide letter dated 17.7.2002, and subsequently cancelled the supply order. Being dissatisfied, the respondent invoked the arbitration clause to adjudicate the dispute between the parties. Mr. S.K. Goyal, Mr. A.K. Garde and Mr. G. Saran were appointed as Arbitrators. It was contended that respondent was precluded from making a request for an independent evaluation of the material due to the onerous and one sided clauses of the Order; respondent was also not enable to offer the balance quantity of 276 MTs of CLS for the third test; the appellant unilaterally invoked the performance bank guarantee for its full sum of Rs.16,33,885/-.

3. Appellant filed the written statement and also raised a counter claim for an amount of Rs. 83,022/- alongwith interest @ 18 % per annum. Appellant contended that neither the respondent challenged the first and second test report conducted by the appellant nor it prayed for re-examination of the material through an independent agency. In support of its counter claim, the appellant contended that due to non-performance of the contract, the appellant suffered huge loss and thus constrained to invoke the performance bank guarantee. It was claimed that the appellant incurred additional losses in procuring the material from in house sources in the absence of supplies expected from the respondent and that this loss was over and above the amount of performance bank guarantee.

4. On the basis of pleadings of parties, the Arbitral Tribunal framed the following preliminary issue in the matter:-

"Whether the claim of the petitioner is barred by the principles of estoppel and acquiescence?"

5. Preliminary issue was decided against the appellant vide order dated 25.11.2004. Thereafter, the claim and counter claim were decided by the majority of Arbitral Tribunal by its award dated 18.10.2007. Another Arbitrator Mr. A.K. Garde passed separate Award thereby dismissing the claim petition of the respondent vide Award dated 21.9.2007. Mr. A.K. Garde learned Arbitrator while dismissing the claim petition by the respondent has categorically recorded its findings that the bank guarantee was given for careful performance of the contract and the bank guarantee is irrevocable. With regard to the submission that the bank guarantee should not have encashed to the full extent as loss was only to the tune of Rs.83,022/- as per the respondent version, it was held that the bank guarantee was placed at the disposal of respondent as a security of satisfactory performance of supply in accordance with conditions of contract and

since there was breach in contract, the appellant was justified in invoking the bank guarantee.

6. A perusal of the majority award dated 18.10.2007 would reveal that preliminary issue was framed by the Arbitrator but thereafter any other issues was not framed to decide the lis between the parties.

7. Being aggrieved with the majority Award dated 18.10.2007 passed by Sri S.K. Goyal and Sri G. Saran, appellant filed Arbitration Case No.4 of 2008, under Section 34 of the Arbitration and Conciliation Act, 1996 (for short, the Act) in the court of District Judge, Dehradun, on the ground that the appellant with its right invoked the bank guarantee; finding of the majority award is wrong and illegal and has been passed on basis of surmises and conjectures; Arbitrators had no authority to go beyond the terms of the contract. The majority Award is in conflict with the public policy in India. It was also contended that in view of clause 9.4 of the agreement in the event of non-performance of the contract, if the losses suffered by ONGC are more than the value of the Performance Security/Performance bond, ONGC in addition to forfeiting the performance security/performance bond, reserves the right to claim the balance amount of damages/losses suffered by ONGC. In support of its case, reliance was placed on the judgment of Hon'ble Apex Court in the case Oil and Natural Gas Corporation Ltd. v. SAW Pipes Ltd., (2003) 5 SCC 705: AIR 2003 SC 2629.

8. On behalf of the respondent, as none appeared despite service, hearing of the application was made ex-parte against the respondent.

9. After hearing the counsel for the appellant and on perusal of record, learned District Judge, Dehradun, vide its judgment and order dated 25.04.2011, dismissed the application filed u/s 34 of the Act.

10. Heard learned counsel for the parties and perused the material available on record.

11. Learned Senior Counsel appearing for the appellant would submit that Clause 9.4 of the Contract specifically gives a right to the appellant to invoke the bank guarantee on non-performance of the contract. Clause 9.4 is unambiguous and specific and nothing can be added in the contract to invoke the bank guarantee on pro-rata basis in respect of material not supplied. He would submit that in the general terms and conditions of the Contract, there is no provision of pro-rata principle. He would also submit that not only the appellant suffered loss due to non-performance of the contract but the appellant incurred expenses in transporting the material twice from another place. Besides this, appellant had spent a lot of time and money in inviting tender and thereafter in execution of the same with the respondent. On non-performance of the contract by the respondent, the appellant invited another tender to fulfill its requirement, which stalled the work of the appellant.

12. Learned Senior Counsel would further submit that the moment the

respondent signed the Contract and accepted the terms and conditions of the Contract and started supplying the material and also submitted the bank guarantee in pursuance thereof, at subsequent stage, unless there is a challenge to the terms and conditions of the arbitration agreement for declaring them as arbitrary and void, the terms and conditions could not be moulded or changed by the majority Arbitrators, inasmuch as, the majority Arbitrators cannot act to correct any of the condition of the agreement already agreed between the parties. He would further submit that it is settled position in law that the parties entered into the agreement are bound by the terms and conditions unless the terms and conditions of an agreement are found to be illegal.

13. In support of his case, learned Senior Counsel would place reliance on the judgment of Hon'ble Apex Court in the case of SAW Pipes Ltd. SAW Pipes Ltd., (2003) 5 SCC 705,. He would then submit that Majority of Arbitral Tribunal have not considered this judgment relied upon by the appellant. Judgment of Hon'ble Apex Court in the case of Maula Bux v. Union of India, AIR 1970 SC 1955, Union of India v. Rampur Distillery & Chemical Co. Ltd. AIR 1973 SC 1098 and P.K. Abdulla v. State of Kerala, AIR 2002 Kerala 108 was considered by the Majority of Arbitral Tribunal whereas the case of SAW Pipes Ltd, (2003) 5 SCC 705 which was on the same analogy and facts, was to be considered. Some relevant paras of the judgment are extracted hereunder:-

"8. In the aforesaid sub-clause (v), the emphasis is on the agreement and the provisions of Part-I of the Act from which parties cannot derogate. It means that the composition of arbitral tribunal should be in accordance with the agreement. Similarly, the procedure which is required to be followed by the arbitrators should also be in accordance with the agreement of the parties. If there is no such agreement then it should be in accordance with the procedure prescribed in the Part-I of the Act i.e. Sections 2 to 43. At the same time, agreement for composition of arbitral tribunal or arbitral procedure should not be in conflict with the provisions of the Act from which parties cannot derogate. Chapter V of Part-I of the Act provides for conduct of arbitral proceedings. Section 18 mandates that parties to the arbitral proceedings shall be treated with equality and each party shall be given full opportunity to present his case. Section 19 specifically provides that arbitral tribunal is not bound by the Code of Civil Procedure, 1908 or the Indian Evidence Act, 1872 and parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting its proceedings. Failing any agreement between the parties subject to other provisions of Part-I, the arbitral tribunal is to conduct the proceedings in the manner it considers appropriate. This power includes the power to determine the admissibility, relevance, the materiality and weight of any evidence. Sections 20, 21 and 22 deal with place of arbitration, commencement of arbitral proceedings and language respectively. Thereafter, Sections 23, 24 and 25 deal with statements of claim and defence, hearings and written proceedings and procedure to be followed in case of default of a party.

11. The aforesaid provisions prescribe the procedure to be followed by the arbitral tribunal coupled with its powers. Power and procedure are synonymous in the present case. By prescribing the procedure, the arbitral tribunal is empowered and is required to decide the dispute in accordance with the provisions of the Act, that is to say, the jurisdiction of the tribunal to decide the dispute is prescribed. In these sections there is no distinction between the jurisdiction/power and the procedure. In *Harish Chandra Bajpai v. Triloki Singh* [1957 SCR 370], while dealing with Sections 90 and 92 of the Representation of the People Act, 1951 (as it stood), this Court observed thus (AIR p. 454, para 18):-

"It is then argued that S. 92 confers powers on the Tribunal in respect of certain matters, while S. 90(2) applies the CPC in respect of matters relating to procedure that there is a distinction between power and procedure, and that the granting of amendment being a power and not a matter of procedure, it can be claimed only under section 92 and not under S. 90(2). We do not see any antithesis between 'procedure' in S. 90(2) and 'powers' under S. 92. When the respondent applied to the Tribunal for amendment, he took a procedural step, and that he was clearly entitled to do under S. 90(2). The question of power arises only with reference to the order to be passed on the petition by the Tribunal. Is it to be held that the presentation of a petition is competent, but the passing of any order thereon is not? We are of opinion that there is no substance in the contention either."

12. Hence, the jurisdiction or the power of the arbitral tribunal is prescribed under the Act and if the award is de hors the said provisions, it would be, on the face of it, illegal. The decision of the Tribunal must be within the bounds of its jurisdiction conferred under the Act or the contract. In exercising jurisdiction, the arbitral tribunal can not act in breach of some provision of substantive law or the provisions of the Act.

46. From the aforesaid Sections, it can be held that when a contract has been broken, the party who suffers by such breach is entitled to receive compensation for any loss which naturally arise in the usual course of things from such breach. These sections further contemplate that if parties knew when they made the contract that a particular loss is likely to result from such breach, they can agree for payment of such compensation. In such a case, there may not be any necessity of leading evidence for proving damages, unless the Court arrives at the conclusion that no loss is likely to occur because of such breach. Further, in case where Court arrives at the conclusion that the term contemplating damages is by way of penalty, the Court may grant reasonable compensation not exceeding the amount so named in the contract on proof of damages. However, when the terms of the contract are clear and unambiguous then its meaning is to be gathered only from the words used therein. In a case where agreement is executed by experts in the field, it would be difficult to hold that the intention of the parties was different from the language used therein. In such a case, it is for

the party who contends that stipulated amount is not reasonable compensation, to prove the same.

46. From the aforesaid Sections, it can be held that when a contract has been broken, the party who suffers by such breach is entitled to receive compensation for any loss which naturally arise in the usual course of things from such breach. These sections further contemplate that if parties knew when they made the contract that a particular loss is likely to result from such breach, they can agree for payment of such compensation. In such a case, there may not be any necessity of leading evidence for proving damages, unless the Court arrives at the conclusion that no loss is likely to occur because of such breach. Further, in case where Court arrives at the conclusion that the term contemplating damages is by way of penalty, the Court may grant reasonable compensation not exceeding the amount so named in the contract on proof of damages. However, when the terms of the contract are clear and unambiguous then its meaning is to be gathered only from the words used therein. In a case where agreement is executed by experts in the field, it would be difficult to hold that the intention of the parties was different from the language used therein. In such a case, it is for the party who contends that stipulated amount is not reasonable compensation, to prove the same.

48. From the aforesaid decision, it is clear that the Court was not dealing with a case where contract named a sum to be paid in case of breach but with a case where the contract contained stipulation by way of penalty.

49. The aforesaid case and other cases were referred to by three Judge Bench in Maulla Bux's case (supra) wherein the Court held thus: -

"... 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 case of breach even if no actual damage is proved to have been suffered in consequence of the breach of contract. But the expression "whether or not actual damage or loss is proved to have been caused thereby" is intended to cover different classes of contracts which come before the Courts. In case of breach of some contracts it may be impossible for the Court to assess compensation arising from breach, while in other cases compensation can be calculated in accordance with established rules. Where the Court is unable to assess the compensation, the sum named by the parties if it be regarded as a genuine pre- estimate may be taken into consideration as the measure of reasonable compensation, but not if the sum named is in the nature of a penalty. Where loss in terms of money can be determined, the party claiming compensation must prove the loss suffered by him."

50. In Rampur Distillery and Chemical Co. Ltd.'s (supra) also, two Judge Bench of this Court referred to Maulla Bux's case and observed thus: -

" It was held by this Court that forfeiture of earnest money under a contract for

sale of property does not fall within Section 70 of the Contract Act, if the amount is reasonable, because the forfeiture of a reasonable sum paid as earnest money does not amount to the imposition of a penalty. But, "where under the terms of the contract the party in breach has undertaken to pay a sum of money or to forfeit a sum of money which he has already paid to the party complaining of a breach of contract, the undertaking is of the nature of a penalty."

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.

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 consequences 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, Court can award the same if it is genuine pre-estimate by the parties as the measure of reasonable compensation.

14. Learned Senior Counsel appearing for the appellant would also invite attention of this Court to Section 31 of the Act and would submit that the impugned majority Award is hit by Section 31 of the Act. He would submit that as per Section 31, the Arbitral Award shall state the reasons upon which it is based; shall state its date and the place of arbitration, but in the present case, neither any reason has been stated nor place of arbitration is mentioned.

15. He would submit that the learned District Judge also did not peruse the evidence in correct perspective and in a very cursory manner, has rejected the

application of the appellant. With regard to the judgment rendered in Saw Pipes, learned District Judge, has simply recorded that the judgment of Saw Pipes is distinguishable. However, nothing has been said as to in what manner the ratio of the said judgment is not applicable and by giving a go-bye to the ratio of the judgment, District Judge has upheld the majority award.

16. Per contra, learned counsel for the respondent would support the impugned majority Award and would submit that the invocation of bank guarantee and realization of Rs.16,33,885/- was unjustified and illegal. He would submit that the contract was awarded to supply 551 MTs of CLS to the respondent; out of which 275 MTs of CLS was supplied whereas remaining 276 MTs of CLS could not be supplied as the same got failed in the laboratory test. In such contingency, the appellant could have invoked bank guarantee on pro-rata basis. It is submitted that unless the appellant could not have proved the actual loss occurred to it, entire bank guarantee could not have invoked. He would submit that in view of provisions contained in Section 73 and 74 of the Contract Act, on failure on part performance of the contract, the appellant can recover the bank guarantee to the non-performance of the contract and it was incumbent upon the appellant to prove the loss so occurred to it. He would place reliance on the judgment of *Maula Bux v. Union of India*, AIR 1970 SC 1955, *Union of India v. Rampur Distillery & Chemical Co. Ltd.* AIR 1973 SC 1098 and *P.K. Abdulla v. State of Kerala*, AIR 2002 Kerala 108.

17. Before parting with the merit of the case, few clauses of General Terms and Conditions of the Contract would be relevant, which are as under:-

"9.4 In the event of non-performance of the contract, if the losses suffered by the ONGC are more than the value of the Performance Security/Performance bond, ONGC in addition to forfeiting the performance security/performance bond, reserves the right to claim the balance amount of damages/losses suffered by ONGC.

9.6 The performance security/performance bond shall remain at the entire disposal of ONGC as a security of the satisfactory completion of the supply in accordance with the conditions of the contract.

Performance Guarantee

11.1 Supplier shall guarantee that the performance of the equipment/material supplied under the order shall be strictly in conformity with the specification and shall perform the duties specified under the Order.

11.2 Materials/equipment that shall be purchased from the subcontractor(s) shall have to fulfill the requirement as laid down vide paras 10.1 to 10.7 above.

12.0. Rejection

If ONGC finds that the goods supplied are not in accordance with the specification and other conditions stated in the order or its sample(s) are

received in damaged condition (of which matters ONGC will be the sole judge) ONGC shall be entitled to reject the whole of the goods or the part, as the case may be, and intimate to the supplier the rejection without prejudice to ONGC other rights and remedies to recover from the supplier any loss which the ONGC may be put to, also reserving the right to forfeit the performance security/ performance Bond if any, made for the due fulfillment of the contract. The goods shall be removed by the supplier and if not removed within 14 days of the date of communication of the rejection ONGC will be entitled to dispose of the same on account and at the risk of the supplier and after recovering the storage charge at the rate of 5% of the value of goods for each month or part of a month and the loss and expenses if any caused to ONGC, pay balance to the supplier.

13. Failure and Termination Clause/Liquidated Damages Clause Time and date of delivery shall be the essence of the contract. If contractor/supplier fails to deliver the stores, or any installment thereof within the period fixed for such delivery in the schedule or any time repudiates the contract before the expiry of such period, the purchaser may, without prejudice to any other right or remedy, available to him to recover damages for, breach of the contract:

(a) Recover from the Contractor/Supplier as agreed liquidated damages and not by way of penalty, a sum equivalent to ½% (half percent) of the contract/supply order price of the whole unit per week for such delay or part thereof (this is an agreed, genuine pre-estimate of damages duly agreed by the parties) which the contractor has failed to deliver within the period fixed for delivery in the schedule, where delivery thereof is accepted after expiry of the aforesaid period, it may be noted that such recovery of liquidated damages may be upto a ceiling of 5% of the contract/supply order price of the whole unit of stores which the contractor/supplier has failed to deliver within the period fixed delivery; or

16. Inspection/Testing of Material

16.1 The inspection of material will be carried out by the authority specified in the purchase order. The material will be accepted only after the same has been found satisfactory after inspection and duly marked and sealed by the inspecting authority.

16.2 The contractor shall ensure that the material to be supplied against this order shall be individually inspected, tested and analysed in terms of the specifications attached to the order and the relevant codes and practices specified therein by expression or implication.

16.10 In addition to the general conditions of the inspection stated above, the contractor shall also satisfy all the specific conditions of inspection as enumerated in the specification attached.

17. Sub-standard Material/Replacement of Rejected Goods

17.1 If ONGC finds that material supplied are not of the correct quality or not according to specifications required or otherwise not satisfactory owing to any

reason of which ONGC will be the sole judge. ONGC will be entitled to reject materials, cancel the contract and buy its requirement in the open market at the risk and cost of supplier reserving always to itself the right to forfeit the performance security/Performance Bond placed by the Supplier for the due fulfillment of the contract.

Clause 9 of Special Instructions would also be relevant for the purpose, which reads as under:-

9. Rejection of Bulk Samples

In the event of bulk samples getting rejected, the supplier will be asked to offer again. However, if the products fail even second time, the supplier will have the option to get it tested on payment basis on his presence from the same Laboratory where it was tested earlier on following conditions:

- (a) ONGC will refund the testing fee if the earlier result found faulty.
- (b) The supplier on his part will be debarred from participating in ONGC's future tender for a period of one year if earlier result are confirmed.
- (c) ONGC has right to decide on merit of the case as to whether the supplier should be debarred for a period of one year for participating in ONGC tenders for that particular item where such supplier does not challenge the Laboratory test result wherein mud chemical offered second time after re-processing has not again been found as per specification or re-testing of such product is not asked on payment basis by the party".

18. Indisputably, parties have entered into a contract for supply of 571 MTs of Chrome Ligno Sulphonate. Respondent supplied 275 MTs of CLS and the remaining 276 MTs CLS, though supplied, but got failed in lab test twice. As the respondent did not supply the material as per the terms and conditions, settled between the parties, by means of contract, the appellant invoked the performance bank guarantee. As per Clause 9 (C) of "Special Instructions", the respondent had the option to get the material tested on payment basis in his presence before the same Laboratory where it was tested earlier but neither the respondent choose to do so nor he challenged the test result of second time. The respondent requested for re-processing of material for the 3rd time. Under the Contract, there was no provision to supply the material third time. The respondents failed to supply the balance quantity of 276 MTs of CLS by the date fixed as per the specification. Thus, there is breach of contract meaning thereby failure on the part of the respondent in the performance of contract. Further, by not challenging the test result as per Clause 9(c), the respondent waived its rights to invoke the arbitration clause by filing the claim before the Tribunal. The claim petition was, therefore, not maintainable.

19. Further, a conjoint reading of Clause 9.4 and Clause 12 of the general terms and conditions of the Contract, would abundantly make it clear that the firstly the appellant was justified in invoking the performance bank guarantee since

admittedly the respondent did not supply the material in accordance with the specifications and other conditions stated in the contract, which resulted into non-performance of contract. Clause 9.4 of the general terms and conditions gives an unfettered right to the appellant to invoke the bank guarantee due to non-performance of the contract by the respondent. Unless the respondent would have challenged clause 9.4 saying that this clause is violative to other provisions of contract, by that time, the majority of Arbitral Tribunal could not have moulded the 9.4 clause, ordering for partial invocation of bank guarantee in violation of provisions of clause 9.4 and 11.1. Secondly, the contract was cancelled invoking the provisions contained in Clause 12 as the material supplied by the respondent failed twice in test. In view of Clause 9 of "Special Instructions", the respondent had the opportunity to get the material tested but he did not avail that opportunity.

20. Neither the majority of Arbitral Tribunal nor the District Judge has adhered to the provisions laid down in Saw Pipes. The Arbitral Tribunal though has mentioned the said judgment and has also stated that it is distinguishable but has not stated anything as to how said judgment is distinguishable and how they have distinguished it in their Award. There is no discussion by the Arbitral Tribunal (Majority) in their Award regarding the ratio of the Saw Pipes. It appears that the Majority Arbitral Tribunal has deliberately overlooked the ratio of judgment.

21. In Saw Pipes, the Hon'ble Apex Court has held in para-12 that the jurisdiction or the power of the Arbitral Tribunal is prescribed under the Act and if the award is dehors the said provisions, it would be, on the face of it, illegal. The decision of the Tribunal must be within the bounds of its jurisdiction conferred under the Act or the contract. In exercising jurisdiction, the Arbitral Tribunal cannot act in breach of some provision of substantive law or the provisions of the Act. A perusal of the findings recorded by the Arbitral Tribunal, in the present case, would reveal that the Arbitral Tribunal (Majority) has passed the Award in violation of the procedure prescribed under the Act and in against the specific terms and conditions of the contract. Arbitral Tribunal (Majority) has not considered the ratio of judgment in Saw Pipes, which was on the same facts and circumstances. Thus, the Award passed by Arbitral Tribunal (Majority) is patently illegal.

22. An Award of Arbitral Tribunal can be questioned if it is against the public policy of India, besides illegality. In Saw Pipes at para-16, Hon'ble Apex Court has defined the meaning of phrase "public policy of India" and has observed that the phrase "public policy of India" is not defined under the Act and thus said term is required to be given meaning in context and also considering the purpose of the section and scheme of the Act. It has been held that the concept "public policy" is considered to be vague, susceptible to narrow or wider meaning depending upon the context in which it is used. The Court, depending upon the particular facts and circumstances, has to consider that whether the Award is

against the public policy of India or not.

23. As regards the contention raised by the counsel for the respondent that the bank guarantee invoked by the appellant to the full extent is illegal, the bank guarantee was given for faithful performance of the entire contract. The respondent failed to fulfill the contract by not supplying the full quantity. Respondent has not fully complied with the requirement of the appellant. It is a case of non-performance of contract and the appellant is justified in invoking the bank guarantee to the full extent as there is no provision in the contract nor in the bank guarantee regarding invocation of partial bank guarantee. On these grounds, the impugned Majority Award is bad in the eyes of law. In the present case, the Arbitral Award (Majority) is against the public policy of India.

24. Insofar as the submission made by learned Senior Counsel that there is non-compliance of Section 31(4) of the Act, I find force in this submission. Impugned majority Award does not indicate any date nor the place of arbitration. The impugned majority Award has been passed in violation of provisions of Section 31 of the Act.

25. Having considered the submissions made by learned counsel for the respective parties and the ratio laid down by the Hon'ble Apex Court in *Saw Pipes*¹, which is applicable to the facts and circumstances of the present case, this Court is the considered opinion, that the majority of Arbitral Tribunal has erred in law in allowing the claim petition. The District Judge, Dehradun has also committed illegality in affirming the findings recorded by the majority of Arbitral Tribunal. Impugned majority Award suffers from illegality and perversity. Accordingly, impugned majority Award dated 18.10.2007 passed by Sri S.K. Goyal and Sri G. Saran, Arbitrators is hereby quashed and set-aside. Judgment and order dated 25.04.2011 passed by District Judge, Dehradun, also stands set-aside.

26. Appeal from order stands allowed, as above. No order as to costs.

27. Lower Court Record be sent back.