

(2024) 09 SHI CK 0020
In the High Court Of Himachal Pradesh
Case No : Arb. C. No. 78 Of 2015

State of Himachal Pradesh and Anr	Vs	APPELLANT
Sh. Gian Chand		RESPONDENT

Date of Decision : 20-09-2024

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11, 28(1)(a), 34

Citation : (2024) 09 SHI CK 0020

Hon'ble Judges : Satyen Vaidya, J

Bench : Single Bench

Advocate : Gobind Korla, Sumeet Raj Sharma,

Final Decision : Dismissed

Judgement

Sr.,Description of claim,Amount demanded

1.,Anticipated profits,"Rs. 13,58,219/-

2,"Earnest money and security deposit and
bank guarantee in shapes of FDR.",Not specified

3,"Compensation for idling of labour and
machinery.", "Rs. 5,00,000/-

4,"Amount payable on account of final bill
and 10cc.",Not specified

5.,Interest,Not specified

6.,Cost of arbitration,"Rs. 1,00,000/-

Learned Additional Advocate General has not been able to take this Court through any piece of documentary evidence, which had been wrongly",,
rejected by the Arbitrator.,,

13. Even otherwise also I have found that the findings recorded and conclusions drawn by the Arbitrator are duly supported by material on record.,,

14. Noticeably, the employer did not produce before the Arbitrator any authentic site plan showing extent of forest land. The revenue record was also",,,

not produced. Though, the employer had propagated that it had applied for clearance under FCA, but no document evidencing such fact was",,,

produced, which otherwise could have been the best evidence to prove the extent of forest land involved in the work.",,,

15. In above circumstances, though, the requirement of clearance under FCA was proved, but the extent of forest land involved was not proved",,,

therefore, the Arbitrator was not wrong in upholding the contention of the contractor attributing reasons for non-completion of work to the employer.",,,

16. The contention of employer that the contractor had not completed the work to the extent of hinderance free site available to him has also been,,,

rightly rejected.,,

17. Once, the employer was held to be responsible for not providing hinderance free site to the contractor, the award of loss or profit @ 13% of the",,,

amount of balance work cannot be said to be unreasonable. The Arbitrator has provided detailed reasons for arriving at said conclusion. Similarly, no",,,

fault can be found with the award, whereby a meager sum of Rs. 50,000/- has been awarded to the contractor on account of compensation for idle",,,

labour and machinery. Rest of the award is a necessary consequence and within the discretion of the Arbitrator.,,

18. The scope of interference with arbitral award in proceedings under Section 34 of the Act is limited. The contravention with fundamental policy of,,,

Indian law as also patent illegality should emerge on the face of the award itself. It is impermissible for the court to sit in appeal or review over the,,,

findings recorded by the arbitral tribunal.,,

19. In Associate Builders Vs. Delhi Development Authority, 2015 (3) SCC 49, it was held as under:-",,,

42. In the 1996 Act, this principle is substituted by the 'patent illegality' principle which, in turn, contains three sub heads-",,,

42.1 (a) A contravention of the substantive law of India would result in the death knell of an arbitral award.,,

This must be understood in the sense that such illegality must go to the root of

the matter and cannot be of a trivial nature. This again is a really a contravention,,

of Section 28(1)(a) of the Act, which reads as under:",,

28. Rules applicable to substance of dispute.-(1) Where the place of arbitration is situated in India:-",,

(a) inÂ anÂ arbitrationÂ other than an international commercial arbitration, the arbitral tribunal shall decide the dispute submitted to arbitration in",,,

accordance with the substantive law for the time being in force in India;"",,,

42.2 (b) A contravention of the Arbitration Act itself would be regarded as a patent illegality- for example if an arbitrator gives no reasons for an award in,,

contravention of section 31(3) of the Act, such award will be liable to be set aside.",,

42.3 (c) Equally, the third sub-head of patent illegality is really a contravention of Section 28 (3) of the Arbitration Act, which reads as under:-",,

28. Rules applicable to substance of dispute.-",,

(3) In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to",,,

the transaction.,,,

This last contravention must be understood with a caveat. An arbitral tribunal must decide in accordance with theÂ termsÂ ofÂ theÂ contract,Â butÂ ifÂ an",,,

arbitrator construes a term of the contract in a reasonable manner, it will not mean that the award can be set aside on this ground. Construction of the terms of a",,,

contract is primarily for an arbitrator to decide unless the arbitrator construes the contract in such a way that it could be said to be something that no fair,,

minded or reasonable person could do.â??,,

20. In SsangyongÂ EngineeringÂ andÂ Construction Company Limited Vs. National Highways Authority of India (NHAI) reported in 2019,,

(15) SCC 131, it was held as under:-",,

â??37. Insofar as domestic awards made in India are concerned, an additionalÂ groundÂ isÂ nowÂ available under sub-section (2A), added by the Amendment",,,

Act, 2015, to Section 34.",,

Here, there must be patent illegality appearing on the face of the award, which refers to such illegality as goes to the root of the matter but which does not amount",,,

to mere erroneous application of the law. In short, what is not subsumed within the fundamental policy of Indian law, namely, the contravention of a statute not linked to public policy or public interest, cannot be brought in by the backdoor when it comes to setting aside an award on the ground of patent illegality.,,

38. Secondly, it is also made clear that reappreciation of evidence, which is what an appellate court is permitted to do, cannot be permitted under the ground of patent illegality appearing on the face of the award.,,

39. To elucidate, paragraph 42.1 of Associate Builders (supra), namely, a mere contravention of the substantive law of India, by itself, is no longer a ground available to set aside an arbitral award. Paragraph 42.2 of Associate Builders (supra), however, would remain, for if an arbitrator gives no reasons for an award,,

and contravenes Section 31(3) of the 1996 Act, that would certainly amount to a patent illegality on the face of the award.",,

40. The change made in Section 28(3) by the Amendment Act really follows what is stated in paragraphs 42.3 to 45 in Associate Builders (supra), namely, that the",,

construction of the terms of a contract is primarily for an arbitrator to decide, unless the arbitrator construes the contract in a manner that no fair-minded or",,

reasonable person would; in short, that the arbitrator's view is not even a possible view to take. Also, if the arbitrator wanders outside the contract and deals",,

with matters not allotted to him, he commits an error of jurisdiction. This ground of challenge will now fall within the new ground added under Section",,

34(2A).,,

41. What is important to note is that a decision which is perverse, as understood in paragraphs 31 and 32 of Associate Builders (supra), while no longer being a ground for challenge under the public policy of India, would certainly amount to a patent illegality appearing on the face of the award. Thus, a finding based",,

on no evidence at all or an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside on the ground of patent,,

illegality. Additionally, a finding based on documents taken behind the back of the parties by the arbitrator would also qualify as a decision based on no",,

evidence inasmuch as such decision is not based on evidence led by the parties, and therefore, would also have to be characterised as perverse.",,

21. In Delhi Airport Metro Express Private Limited Vs. Delhi Metro Rail Corporation Limited reported in 2022 (1) SCC 13,1 it has been held",,,

as under:-",,,

â??26. A cumulative reading of the UNCITRAL Model Law and Rules, the legislative intent with which the 1996 Act is made, Section 5 and Section 34 of the",,,

1996 Act would make it clear that judicial interference with the arbitral awards is limited to the grounds in Section 34. While deciding applicationsÂ filedÂ",,,

underÂ Section 34 of the Act, Courts are mandated to strictly act in accordance with and within the confines of Section 34, refraining from appreciation or re-",,,

appreciation of matters of fact as wellÂ asÂ law.Â (SeeÂ Uttarakhand Purv SainikKalyan Nigam Ltd. v.Northern Coal Field Ltd. [Uttarakhand Purv Sainik",,,

Kalyan Nigam Ltd. v. Northern Coal Field Ltd., (2020) 2 SCC 455 : (2020) 1 SCC (Civ) 570] , Bhaven Construction v. Sardar Sarovar Narmada Nigam Ltd.",,,

[Bhaven Construction v. Sardar Sarovar NarmadaÂ NigamÂ Ltd.,Â (2022)Â 1 SCC 75] and Rashtriya Ispat Nigam Ltd. v. Dewan Chand Ram Saran [Rashtriya",,,

Ispat Nigam Ltd. v. Dewan Chand Ram Saran, (2012) 5 SCC 306] .)â??",,,

22. In UHL Power Company Ltd. Vs. State of Himachal Pradesh, 2022 (4) SCC 11,6 a Three-Judge Bench of Honâ??ble Supreme Court",,,

expounded the scope of interference under Section 34 of Arbitration and Conciliation Act, 1996, and has held as under:-",,,

â??15. This Court also accepts as correct, the view expressed by the appellate court that the learned Single Judge committed a gross error in re-appreciating the",,,

findings returned by the Arbitral Tribunal and taking an entirely different view in respect of the interpretation of the relevant clauses of the implementation",,,

agreement governing the parties inasmuch as it was not open to the said court to do so in proceedings under Section 34 of the Arbitration Act, by virtually acting",,,

as a court of appeal",,,

16. As it is, the jurisdiction conferred on courts under Section 34 of the Arbitration Act is fairly narrow, when it comes to the scope of an appeal under Section 37",,,

of the Arbitration Act, the jurisdiction of an appellate court is examining an order, setting aside or refusing to set aside an award, is all the more circumscribed. In",,,

MMTC Ltd. V. Vedanta Ltd., the reasons for vesting such a limited jurisdiction on

the High Court in exercise of powers under Section 34 of the Arbitration Act",,,
have been explained in the following words: (SCC pp.166-67, para 11).",,,

11. As far as Section 34 is concerned, the position is well-settled by now that the Court does not sit in appeal over the arbitral award and may interfere on merits",,,
on the limited ground provided under Section 34(2) (b)(ii) i.e. if the award is against the public policy of India. As per the legal position clarified through,,
decisions of this Court prior to the amendments to the 1996 Act in 2015, a violation of Indian public policy, in turn, includes a violation of fundamental policy of",,,

Indian Law, a violation of the interest of India, conflict with justice or morality, and the existence of patent illegality in the arbitral award. Additionally, the",,,
concept of the "fundamental policy of Indian law" would cover compliance with statutes and judicial precedents, adopting a judicial approach, compliance",,,
with the principles of natural justice, and Wednesbury reasonableness. Furthermore, "patent illegality" itself has been held to mean contravention of the",,,

substantive law of India, contravention of the 1996 Act, and contravention of the terms of the contract.",,,

23. Recently in Delhi Metro Rail Corporation Limited Vs. Delhi Airport Metro Express Private Limited, (2024) 6 SCC 35, the scope of",,,

interference with arbitral award has been discussed as under:-,,

35. In Associate Builders v. DDA , a two-Judge Bench of this Court held that although the interpretation of a contract is exclusively within the domain of the",,,
arbitrator, construction of a contract in a manner that no fair-minded or reasonable person would take, is impermissible. A patent illegality arises where the",,,

arbitrator adopts a view which is not a possible view. A view can be regarded as not even a possible view where no reasonable body of persons could possibly,,

have taken it. This Court held with reference to Sections 28(1)(a) and 28(3), that the arbitrator must take into account the terms of the contract and the usages of",,,

trade applicable to the transaction. The decision or award should not be perverse or irrational. An award is rendered perverse or irrational where the findings,,

are:,,

(i) based on no evidence;,,

(ii) based on irrelevant material; or,,

(iii) ignores vital evidence,,

39. In essence, the ground of patent illegality is available for setting aside a domestic award, if the decision of the arbitrator is found to be perverse, or so",,,

irrational that no reasonable person would have arrived at it; or the construction of the contract is such that no fair or reasonable person would take; or, that",,,

the view of the arbitrator is not even a possible view. 12 A ""finding"" based on no evidence at all or an award which ignores vital evidence in arriving at its",,,

decision would be perverse and liable to be set aside under the head of ""patent illegality"". An award without reasons would suffer from patent illegality. The",,,

arbitrator commits a patent illegality by deciding a matter not within his jurisdiction or violating a fundamental principle of natural justice.â??.",,,

24. Learned Additional Advocate General has not been able to point out any material on the basis of which the findings recorded by learned Arbitrator,,

can be termed to be either patently illegal or perverse. The view taken by the Arbitrator is a possible view. The employer has also not been able to,,

establish its allegations with respect to slow pace of work; misconduct, if any, of the contractor and breach of terms of contract etc.",,,

25. Hence, keeping in view the facts of the case and above noted exposition of law, I find no reasons to interfere with the impugned award.",,,

26. The petition is, accordingly, dismissed with no order as to costs.",,,

27. Pending miscellaneous application(s), if any, shall also stand disposed of.",,,