
(2016) 11 CAL CK 0048

In the Calcutta High Court

Case No : G.A. No. 3904 of 2015 and A.P. No. 1734 of 2015

Tata Steel Limited

APPELLANT

Vs

Lindsay International (P) Ltd

RESPONDENT

Date of Decision : 28-11-2016

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 34
Sales of Goods Act, 1930 — Section 43

Citation : (2017) 1 ICC 798

Hon'ble Judges : Soumen Sen, J.

Bench : Single Bench

Advocate : Mr. Ratnanko Banerjee, Sr. Advocate, Mr. Lokenath Chatterjee, Mr. Joydeb Ghorai and Mr. Saugata Banerjee, Advocates, for the Petitioner; Mr. Surajit Nath Mitra, Sr. Advocate, Mr. Arindam Mukherjee and Mr. Deepak Kumar Jain, Advocates, for the Respondents

Final Decision : Disposed Off

Judgement

Soumen Sen, J.—The respondent is the award holder.

2. The petitioner has filed an application being G.A. No.3904 of 2015 for stay of operation of an award passed on 25th August, 2015. The petitioner has also filed an application being A.P. No.1734 of 2015 for setting aside of the said award.

3. The dispute between the parties arose out of an agreement dated 8th January, 2003, under which the petitioner was to manufacture and supply goods as stated in the agreement for a total consideration of Rs.1,22,00,000/-. The goods to be supplied under the agreement, inter alia, included one Pipe End Facing and Chamfering Machine Model No. EFM-4(L)-Single Tube along with maintenance, insurance, spares and consumables for the said machine; Single Pipe Hydro Tester Model No. HP-4(L) and maintenance, insurance and spares for the single pipe hydro tester model. The agreement also included charges for supervision of erection, adjustment and commissioning by the petitioner.

4. This agreement was made to satisfy the respondent's obligation for export of Kazakhstan for utilization at Ispat Karmet, Kazakhstan in their pipe plant.

5. The petitioner alleged to have supplied the goods and performed the work in terms of the contract. However, a part consideration out of the said Rs.1,22,00,000/- was paid to the petitioner by the respondent and thereafter on the allegation, the petitioner had committed a breach of the agreement in supplying the goods agreed to be supplied under the agreement, the respondent made a demand on the petitioner for refund of the entire consideration. The respondent claimed that there was a total failure of consideration and prayed for refund of the consideration money.

6. In terms of the arbitration clause contained in the agreement dated January 8, 2003, the Hon'ble Justice Ronojit Kumar Mitra (Retd.) was appointed as the Sole Arbitrator to adjudicate upon the disputes and difference between the parties.

7. The respondent as claimant in the arbitration proceeding has made the following contention:-

A) The respondent-claimant under a contract dated December 26, 2000 agreed to sell to Ispat Karmet Kazakhstan, one Pipe End Facing & Chemfering Machine, Model No.EFM. 4(L) Single tube and one Single Pipe Hydro-tester, Model No.HT-4(L) (hereinafter referred to as "the said two machines"). Thereafter the name of Ispat Karmet Kazakhstan was changed and is presently known as Mittal Steel Termirtua.

B) The Claimant on January 8, 2003 entered into an Agreement with Tata Steel Limited. In the Agreement the Claimant is mentioned as the "Buyer", the petitioner as the "Seller" and Ispat Karmet Kazakhstan as "End User" (hereinafter referred to as "the Agreement"). Under the Agreement the petitioner agreed, inter alia, to manufacture and commission the said two machines, inclusive of maintenance, insurance, spares and consumables of the machines for 20 days. The respondent in terms of the Agreement further undertook supervision of erection, adjustment and commissioning of the machines at its own cost. The contract price was agreed at Rs.1,22,00,000.

C) The petitioner entrusted M/s. ITL Industries Ltd. (hereinafter referred to as "ITL") to manufacture the two machines, in accordance with the specifications supplied by the claimant. During the course of manufacture of the two machines, the claimant in terms of the Agreement was entitled to inspection.

D) Upon completion of manufacture of the two machines, the petitioner issued "inspection release note" and the claimant "the dispatch clearance". The two machines in terms of the Agreement were then shipped and transported by the petitioner to the End User's designated plant in Kazakhstan. In the presence of technical experts including one Mr. Arun Khanwalker on behalf of ITL, on March 9, 2004 erection and commissioning process of the two machines commenced.

E) The End User alleged that due to diverse defects and deficiencies in the basic

design, the two machines failed to attain the production level stipulated in the Agreement. One Jayanta Chakraborty, the local representative of the End User, by an e-mail dated April 29, 2004 wrote to ITL with copies endorsed to the claimant and the respondent. In the letter, the End User complained that even after one and a half month's efforts by ITL's supervising engineers, the machines could not be made fully operational, as the machines had basic design problems and the components used were of inferior quality and unreliable. It was further alleged that the welded joints had started leaking and the paint on the machines was peeling off.

F) In the above e-mail the End User Offered ITL two options. It could bring its team of experts at its cost, and without any further assistance from the End User make "the machines fully functional and capable of meeting the contract specifications by 15th may, 2004". In the alternative, "After 15th May, 2004, Ispat Karmet will reject the machines and you will be required to.. ..take the machines back and return entire payment".

G) ITL by an e-mail dated April 30, 2004, to the End User with copies to the claimant and the petitioner, repeated its several earlier assurances to the End User that it would send one of its Technical Directors along with a team of experts to overcome all the problems and that their object "must be to run the two machines without any interruption for 4 continuous days".

H) The claimant wrote to the Executive-in-charge of Tata Growth Shop (TGS), on May 11, 2004 and stated that delivery of the equipments due in June 2003 was made by TGS in September, 2003 in a "knocked down" condition, at Calcutta Port for F.O.B. shipment, and that upon arrival at Ispat Karmet Warehouse, many boxes and crates were found broken. It was further alleged that at the time of checking the packing list, in the presence of engineers representing ITL, 18 items as enlisted in the letter, were "identified as short supplied". In spite of such short supply the petitioner had billed for the full amount. It was also stated in the letter that the two machines did not meet with the safety norms and violated labour safety conditions. The allegations made in the petitioner's earlier letter were reiterated to the effect that the machines had not been put into operation nor were capable of achieving regular production conforming with the contractual specifications.

I) Thereafter, the petitioner in an e-mail dated June 18, 2004 to the End User, with copies to both the claimant as also ITL, tendered apology "for the inconvenience caused to Ispat Karmet (IK) on account of non-function of the above two machines ordered on TGS". It was also stated in the e-mail, that ITL had realized "the serious difficulties being faced by the End User with its customers on account of this problematic situation." According to the petitioner the matter had been "strongly taken up" with ITL to rectify the machines "designed and supplied by them" and assured the claimant of "successful establishment of performance guaranteed parameters in both the machines". The e-mail ended with a further request for an opportunity to "set right the issues to

the full satisfaction of the End User".

J) The petitioner on the same dated on June 18, 2004 sent an e-mail to ITL with a copy endorsed to the claimant in which the grievances of the End User were reiterated and certain suggestions were forwarded in order to ensure successful commission of the machines and trouble free commercial production. The petitioner suggested that ITL's team of designers and production people be deputed to TGS Jamshedpur immediately "for discussion with the designers and operating persons of TGS for pooling in combined efforts" for best technical solution of the problems. Further, it was suggested that "trouble free commission and commercial production" ought to be ensured before July 10, 2004 including "the performance guarantee parameters successfully commissioning these machines and finally training the personnel."

K) The End User by an e-mail dated June 25, 2004 informed ITL as also the petitioner with a copy endorsed to the claimant that the machines were not "fully functional satisfying the technical specifications of machines will have to be taken back - entire price refunded including cost of rectification work". It has been mentioned in the e-mail that a copy of a letter in Russian language written by one Mr. Serdukov, Chief of Pipe Plant, was enclosed along with this e-mail. The points highlighted therein, however, it was added, were the same as the points which were informed earlier in the End User's e-mail dated 21st June, 2004.

L) In a letter dated November 21, 2005, the claimant informed the petitioner that in spite of three visits by the engineers the machines could not be commissioned and that therefore the End User rejected the machines and demanded from the claimant the loss it had suffered which was to the tune of US\$ 648072 being equivalent to Rs.3,33,75,708/-. The claimant called upon the petitioner to remit the said sum to the claimant. By another letter dated March 2, 2006, the claimant repeated its demand to the petitioner and enclosed a "technical rejection note", issued by the Chamber of Commerce and Industries in the Karaganda region together with its translated version in English. The petitioner did not reply to either of the letters.

M) The petitioner wrote to the claimant on March 21, 2005 inter alia that it had a series of telephonic discussions with ITL to settle the matter and that it would organize a joint meeting in the end of April, 2006 to sort out the issue.

N) The claimant on March 27, 2006 wrote to the petitioner that the End User had lost its confidence on the capability of the petitioner and ITL and any attempt at a salvage programme was not acceptable. The Claimant further repeated its demand. There was no reply from the petitioner.

8. The respondent in its counter-statement along with counter-claim denied its liability and claimed successful execution of the contract.

9. The contention of the petitioner before the arbitrator was that the order placed by the respondent upon the petitioner was for manufacture and supply of items/

components of the said two machines. There was no question of total failure of consideration as it was provided in the contract that payment would be made in a phased manner. The claimant had failed to prove that the two machines did not perform in conformity with the specifications and stipulations envisaged in the contract and the claimant had failed and neglected to prove the alleged damages.

10. The witnesses of the claimant as well as the petitioner was examined and cross-examined extensively. The parties filed their respective pleadings along with documents. The arbitrator on consideration of the pleadings and the evidence both oral and documentary has arrived at a finding that there is a failure on consideration and, accordingly, the petitioner was directed to refund a sum of Rs.1,08,07,398/- and a further sum of Rs.50,96,533/- towards the loss of profit. The claimant was further awarded a sum of Rs.8,99,915/- towards the expenditure incurred by the claimant on account of shipment expenses and a sum of Rs.1,00,00,000/- towards loss of goodwill and loss of business. The petitioner was further directed to pay interest at the rate of 10% per annum.

11. Mr. Ratnanko Banerjee, the learned Senior Counsel appearing on behalf of the petitioner submits that the arbitrator has not assigned any reason for allowing the claim on account of goodwill and loss of profit and on that ground alone the award is liable to be set aside. It is further submitted that the arbitrator has also completely misdirected its mind in allowing the claim on account of failure of consideration by overlooking the fact that the foreign buyer has asked for refund over Rs.3 Crores from the petitioner which presupposes that the petitioner has received a sum over Rs.3 Crores and unless the petitioner could prove in the proceeding that they had paid the aforesaid sum, the petitioner cannot claim any amount in this regard as it would be an unjust enrichment. It is submitted that the award lacks judicial approach and the decision of the arbitrator is perverse as it ignored two very vital documents, namely, the letters dated 10th November, 2005 and 21st November, 2005.

12. The learned Senior Counsel has referred to the following decisions :- i) K.P. Poulose v. State of Kerala & Anr. reported at (1975) 2 SCC 236; ii) Oil & Natural Gas Corporation Ltd. v. Saw Pipes Ltd. reported at (2003) 5 SCC 705; iii) Oil and Natural Gas Corporation Ltd. v. Western Geco International Ltd. reported at (2014) 9 SCC 263 in support of setting aside of the award on account of perversity and non-application of mind.

13. Mr. Surajit Nath Mitra, the learned Senior Counsel appearing on behalf of the respondent submits that there has been no effective cross-examination on the said two letters by the respondent in the arbitral proceeding. It is submitted that the value of the contract was Rs.1.73 Crores approximately out of which an order was placed upon the claimant for a sum of Rs.1.22 Crores approximately out of which Rs.1.80 Crores approximately was paid to the petitioner. On account of shipment, a sum of Rs.9 lakhs was paid. Since the petitioner had failed to perform the contract and there has been a clear finding of failure of consideration, the petitioner was obliged to return the entire consideration

amount along with the loss suffered by the petitioner.

14. It appears from the award that an issue was raised with regard to the meaning ascribed to "items and goods" mentioned in the agreement in order to establish that it was an item-wise contract and it does not include machines. Mr. Banerjee, the learned Senior Counsel realizing the difficulties that the petitioner would face in arguing those points and more so having regard to the interpretation given by the arbitrator on examination of the documents did not argue those points and did not challenge the award on that score. The argument of Mr. Banerjee was confined to perversity and non-application of mind.

15. The letters referred to by Mr. Banerjee in order to justify as the said award suffers from non-application of mind or disregarding any vital evidence is clearly unacceptable. There is a clear finding on breach of contract. The claimant has clearly stated in its communication dated 21st November, 2005 that the foreign buyer claimed to have suffered losses did not tune of US\$648072 (equivalent in Indian Rs. 2,98,11,312/) because of defective equipment supplied by the petitioner and has forwarded the said intimation levying the damages to the respondent.

16. The arbitrator has referred to Clauses 7.1 and 7.2 of the Agreement which refers to erection and commissioning of the machines, the Clauses are:-

"7.1. SELLER shall arrange to depute their competent Engineers to the End User's site at Ispat Karmet/Kazakhstan within 15 working days for supervision of erection and commission of Goods on receipt of BUYER's written notification about readiness of undertaking such work; 7.2 The SELLER shall depute their Engineers for a period of 20 (Twenty) days for supervision of erection and commissioning and training of operating and maintenance personnel of the End User."

17. The said clauses clearly stipulate that the petitioner would be obliged to depute its "competent engineers" to supervise erection and commission of the machines. The learned Arbitrator has referred to the 10th Edition of Concise Oxford Dictionary where the word "Supervise" has been explained to mean, "observe and direct the execution of a work". In addition to the above provisions in the contract included that the:

"SELLER has confirmed that they would be able to complete supervision and erection within 20 working days time. If additional time is required to complete the work for reasons attributed to the SELLER, the SELLER shall do the work and complete the work at no additional cost to the BUYER or End User."

18. The main purpose of the contract between the parties was undisputedly for the claimant to procure the machines capable of performing in accordance with the stipulated specifications in the Agreement and obtain optimum production. The property would only pass upon completion of the contractual terms and not otherwise which, in the instant case, was successful erection and commission

and running of the machines for a period of 12 months and give the optimum production. The period of 12 months after successful commission may be considered to be a warranty. The arbitrator arrived at a finding that there has been no satisfaction of erection and commission and no such satisfaction was expressed or recorded at any material time. Short of such certificate, it cannot be construed and held that there has been a satisfactory erection and commission of the machines. The contention of the petitioner that the commission was completed on the second attempt appears to have been belied by the e-mail dated 18th June, 2004 addressed to the ITL with a copy to the claimant, directing the ITL to ensure "successful commissioning of the machines and trouble free commercial production". It is not in dispute that the petitioner was unable to produce any evidence that neither the claimant nor the End User or even the petitioner for that matter, had ever at any material time admitted satisfactory commission or erection of the machines. "Working order" as observed by the arbitrator must surely convey the meaning that the machines functioned and achieved trouble free optimum commercial production. The petitioner has failed to substantiate that the problems faced during erection "was minor teething problems".

19. The objection to the claimant for loss or damage was also rejected by the arbitrator relying upon the letters dated 10th November, 2005 and 20th March, 2009 disclosed by the claimant which reveal that on account of the non-reimbursement of the entire purchase price received by the petitioner, the End User was withholding large sums of money which was otherwise lawfully payable to the claimant. The End User's demand was in addition to the entire price of the two machines for damages and for the loss of goodwill. In a letter dated 10th September, 2008, the End User made it clear to the claimant that in future it would not be considered the claimant for any of its future tenders. The evidence to that effect has been taken note of and, in fact, the claimant had claimed the money which as on date remained due and payable by the End User to the claimant by reason of the failure on the part of the petitioner to reimburse the entire purchase price to the End User.

20. The arbitrator has also found that the boxes in which the machines were exported in unassembled state, were in a damaged condition and to the knowledge petitioner diverse parts were missing. The missing parts were never replaced. The claimant undeniably did not receive the machines it had ordered to be manufactured and had paid for. There was no denial nor any evidence which would show that by reason of short supply of the eighteen items of components the machines were incomplete in their manufacture which was probably an additional reason why the machines could not be erected by commissioned nor could it achieve the stipulated production level. The arbitrator has refused to accept the argument on behalf of the petitioner that the defects were minor in nature and at the worst which could be termed as a breach of warranty. The arbitrator has rightly observed that the allegation of "defects" was a red-herring used by the petitioner knowing all the time that the machines were not

manufactured in accordance with the stipulated design and specifications.

21. In allowing the claim on account of loss suffered by the claimant, the arbitrator has relied upon the communication dated 29th April, 2004 to ITL in which it was, inter alia, alleged that "After one and half months of efforts by your Supervising Engineers" the machines were not fully operational. Both the machines have basic design problem, components used are unreliable, welded joints are leaking, even the painting is peeling off at various places". In the letter it is significant that ITL was cautioned that it was for the manufacturers to bring its experts and "make the machines fully functional and capable of meeting the contract specifications by 15th May, 2004", or "take the machines back and return the entire payment". On the same date Mr. Naik on behalf of the ITL the manufacturer of the machines replied. In the letter Mr. Naik assured the claimant once again that ITL would send its "Technical Director ... to overcome all the problems...and the coming "Technical Director . . . to overcome all the problems . . and the coming team comes well equipped to overcome all the defects". There was not a word of denial on behalf of ITL in respect to the above mentioned serious allegations made in the claimant's letter that there was a defect in the basic design. It would, therefore, appear that ITL, the actual manufacturer, was fully aware and had clearly admitted that the machines were not functioning due to basic design defects. In other words, the machines could not have been manufactured in conformity with the specifications stipulated in the Agreement as sought to be claimed new. Whatever the petitioner had manufactured admittedly it would appear was not what the subject matter of the contract was or what was intended by the parties at the time of entering into the contract is the finding of the arbitrator which does not call for any interference.

22. The oral evidence of Mr. Naik that the machines have been commissioned on June 18, 2004 was rejected as an unreliable piece of evidence. It would appear that immediately after receiving the copy of the claimant's letter dated May 11, 2004 the petitioner had written to ITL on June 18, 2004. The letter reiterated the claimant's allegations that "the system is not at all functioning due to serious design limitations with respect to the basic requirement/order specification, and that the commissioning is getting further delayed". In the letter the petitioner directed ITL to "ensure trouble free commissioning and commercial productionset right these machines and successful commissioning and handing over all these machines to I.K. . . . establishing the performance guarantee parameters successfully commissioning these machines". A voluntary admission by the petitioner of the case made out by the claimant.

23. By a letter dated May 11, 2004 the Claimant had brought it to the notice of the petitioner that delivery of the machines was stipulated in the Agreement to be made in June, 2003 but in fact short-delivery was made in September, 2003, and that too in a knocked down condition with process of checking the items with the Packing List was done in the presence of the representatives of ITL. There was no denial on behalf of the petitioner.

24. In the course of his oral evidence Mr. Naik stated that the machines were unable to achieve the required level of production by reason of bent and inferior quality pipes used by the End User at the time of test runs and that the End User was verbally cautioned against such misuse of the machines. It appears that there was no pleading to that effect and no objection appears to have been recorded in that respect in any of the contemporaneous disclosures on behalf of the petitioner in the arbitral proceedings. Mr. Naik's evidence was rejected as wholly untenable and unreliable. The allegation was held to be without any basis and considered to be a mere afterthought. The observation of the arbitrator in this regard is very pertinent:-

" It would therefore appear undeniably that a Senior Engineer of the very manufacturer of the machines, admittedly present throughout the several attempts to commission the machines, had deliberately failed to give an honest answer and reiterate what had been already admitted by him in his earlier letter dated April 29, 2004, where Mr. Naik has categorically admitted that the machines were not manufactured in conformity with the agreed specifications and that they did not perform as was contemplated by the contracting party."

25. The arbitrator on assessment of the evidence arrived at a finding that the claimant has adduced uncontroverted evidence which confirm that in spite of every effort by the petitioner and ITL, the manufacturers of the two machines, the machines were simply not capable of being commissioned or erected. It was held by the arbitrator that the two machines were incapable of achieving optimum output of the contract and even after one and half month's supervision and direction by the competent engineers duly authorised by ITL, the manufacturers, the petitioner failed to substantiate with any evidence that the machines were not defectively designed or that they did conform to the requirements of the End User, as stipulated in the agreement. The arbitrator has relied upon correspondence of the documents disclosed in the proceeding which would show that the petitioner had admittedly assured the claimant in writing that its engineers would travel to Kazakhstan and "overcome all the problems". The arbitrator has referred to the letter dated June 18, 2004 in which the petitioner had even apologized to both the End User and also the claimant and prayed for time to bring about "successful performance of the two machines". It was mentioned in the said letter that the petitioner had sent "a still letter to ITL" concerning the "serious difficulties being faced by the End User.....on account of this problematic situation". This conduct of the petitioner was held to be a clear admission of the allegations of the claimant. The arbitrator found, rightly so, that neither the petitioner nor ITL in any of their correspondence between themselves or with the claimant, at any material time, denied the claimant's contention that the machines were not eventually fully commissioned or erected due to basic defects in design and there was no denial at any material time that the machines were not manufactured in conformity with the specifications stipulated in the agreement. In fact, the petitioner in writing proposed to "settle the matter". In other words, as rightly observed by the arbitrator, it must be

understood that the petitioner having admitted that what had been manufactured by ITL was anything but the subject matter of the contract was in favour of the settlement.

26. The argument of Mr. Banerjee that the buyer would be required to return of the equipments in case of defective supply of equipments cannot be accepted in view of Section 43 of the Sale of Goods Act which reads:-

"43. Buyer not bound to return rejected goods. - Unless otherwise agreed, where goods are delivered to the buyer and he refuses to accept them, having the right so to do, he is not bound to return them to the seller, but it is sufficient if he intimates to the seller that he refuses to accept them."

27. It is well-settled that when a buyer properly rejects the goods, it is not his duty to send them back to the seller, it is enough for him to give clear notice that they are not accepted, and then they are at the seller's risk.

28. Apart from the aforesaid it is not in dispute that an opportunity was given to the petitioner to take back the equipments which they have resisted and declined. The buyer has not done anything inconsistent with the ownership of the seller.

29. It is well-settled that under the 1996 Act, the interference of the Court is very limited. 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.

30. 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.

31. 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.

32. 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.

33. 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)

34. 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 Russell 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.

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 or 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."

35. 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 or public interest.

36. 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."

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.

37. The Supreme Court in *McDermott International* (supra) 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."

38. 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 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.

39. 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.

40. 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."

41. 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.

42. 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.

43. 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.

44. 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 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.

45. 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.

46. 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.

47. 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. 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.

48. 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 o an arbitrator, whether layer 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.

49. 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).

50. 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.

51. 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.

52. 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) 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.

53. 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.

54. 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.

55. 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.

56. It cannot be said that the award allowing a sum of Rs. 1,08,07,398/ for failure on consideration is without any evidence or basis. However, the claimant on account of loss of profit should be Rs. 42,00,000/- instead of Rs. 50,96,533/- in view of evidence of the claimant before the arbitrator. In answer to Question No.143 put by the arbitrator, the witness on behalf of the claimant had given the following answer:-

"143. To Arbitrator:- Are you personally aware of the expenses that the claimant had incurred on account of shipment?/ Yes. WE had spent about Rs.9 lacs on account of shipment. We made payment to the shipping company. But in this some modification should be made by us. Loss of profit should be a little less. Our order value was to the tune of Rs. 1,73,00,000/- (approx). We placed the order on Tata Steel for Rs. 1,22,00,000/- (approx). On account of shipment we

had spent about Rs.9 lacs. Our total expenditure was Rs. 1,31,00,000/-. So, instead of Rs.50 lacs our claims should be Rs. 42 lacs in this respect. Another expenditure was made by us on account of Visa and Air fare for sending the representatives of Tata Steel which was about Rs. 3 lacs."

57. This evidence has remained uncontroverted.

58. Under such circumstances, the claimant on account of loss of profit should be for Rs. 42,00,000/- and to that effect the said award is modified.

59. The award for a sum of Rs. 8,99,915/- being an expenditure incurred by the claimant on account of shipment expenses is also based on evidence and, accordingly, is upheld.

60. However, having regard to the fact that no evidence was led for loss of goodwill and loss of business which would be evident from the evidence adduced on behalf of the claimant, in my view, awarding a sum of Rs.1 Crore for loss of goodwill and/or loss of business is without any evidence and suffers from non-application of mind.

61. The importance of goodwill was recognised by the Supreme Court in R.C. Cooper v. Union of India reported at AIR 1970 SC 564 in the following words:-

"Goodwill of a business is an intangible asset. It is the whole advantage of the reputation and connection formed with the customers together with the making the connection durable. It is that component of the total value of the undertaking which is attributable to the ability of the concern to earn profits over a course of years or in excess of normal amounts because of its reputation, location and other features. Goodwill of the business is, therefore, the value of the attraction to customers arising from the name, and the reputation for skill, integrity, efficient business management, efficient service."

62. The only evidence before the arbitrator was that the loss of goodwill for a sum of Rs.2 Crores was valued on a perceived intellectual property right and on the basis of one line evidence. There was no evidence to support the claim inasmuch as the award allowing goodwill partly is unreasoned. The claim on account of interest is, however, upheld.

63. The application being A.P. No.1734 of 2015 is allowed in part. The award stands modified to the aforesaid extent. G.A. No.3904 of 2015 is also disposed of in terms of this order.

64. However, there shall be no order as to costs.

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