

(2019) 10 DEL CK 0171

In the Delhi High Court

Case No : Original Miscellaneous Petition (COMM) No. 298 Of 2017

Ubv Infrastructures Limited

APPELLANT

Vs

National Highways Authority Of India

RESPONDENT

Date of Decision : 11-10-2019

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 9, 18, 28(3), 34

Citation : (2019) 10 AD(Delhi) 250

Hon'ble Judges : Jyoti Singh, J

Bench : Single Bench

Advocate : Abhijeet Sinha, Siddharth Naidu, Vipin Prabhat, Aditya Shukla, Narender Hooda, Abhishek Kumar, Arvshi Gupta

Final Decision : Dismissed

Judgement

Jyoti Singh, J

I.A. No.12005/2019

This is an application seeking condonation of delay of 82 days in filing the written submissions on behalf of the petitioner.

For the reasons stated in the application, the same is allowed. The delay in filing the written submissions is condoned. Written Submissions are taken on record.

The application stands disposed of.

O.M.P. (COMM) 298/2017

1. This is a petition under Section 34 of the Arbitration and Conciliation Act, 1996 ("Act") seeking to set aside the Arbitral Award passed by the Arbitral Tribunal on 15.12.2016.

2. The brief facts which need to be captured for adjudication are that Tenders were invited by the respondent (NHA) from pre-qualified contractors for the work of four laning of Km 59,500 to Km 75,500 of Lucknow - Kanpur Section of

NH-25 in the State of U.P. The petitioner herein, who was formerly named as Rana Projects International Ltd., at the relevant time, submitted its bid on 21.06.1999 and finally the work was awarded to the petitioner. A formal Agreement was entered into between the parties on 12.08.1999.

3. The contract price was Rs. 39,82,01,266/-. The contract stipulated the time period for execution, completion and maintenance of the work being 24 months. M/s. International Consultants and Technocrat Pvt. Ltd. were engaged by the respondent as the Engineer of the work.

4. Respondent issued notice to the petitioner to proceed with the work as per clause 5 of the Contract Data, requiring it to complete the work by 28.12.2001 and first milestone to be achieved by 28.10.2000 as per Clause 6. Time for completion was extended upto 27.12.2001, for the first milestone and for the whole work upto June 2002.

5. On 11.10.2002, the respondent terminated the contract and took over the Plant and Machinery lying at the site. In a petition filed under Section 9 of the Act, this Court had appointed a receiver on 06.12.2004, who took symbolic possession of the Plant and other Stores.

6. On termination of the contract, disputes and differences arose between the parties and the respondent in accordance with clause 3 of the Special Conditions of Contract (SCC) invoked the Arbitration Clause and the matter was referred to Arbitration. The Arbitral Tribunal was constituted and the hearing started from 30.07.2003.

7. Respondent was the claimant and on 13.09.2003, it submitted its statement of claim. Petitioner submitted the Statement of Defense and Counter Claims. Pleadings were completed by 05.11.2004.

8. Subsequently, the Arbitral Tribunal was reconstituted.

9. After the evidence was led, and the arguments were completed, the Arbitral Tribunal rendered the impugned award.

10. The claims of the claimant/respondent were as under:

(a) Claim No.1 - Repayment of balance mobilization advance of INR 1,98,37,753;

(b) Claim No.2 - Repayment of balance secured advance of INR 7,06,422;

(c) Claim No.3 - Deduction on account of sales tax on column 6 of INR 1,08,967;

(d) Claim No.4 - Deduction of payments made to Dispute Re view Expert of INR 13,314;

(e) Claim No.5 - Deduction on account of rain cuts and poor quality of INR 2,00,000;

(f) Claim No.6 - Liquidated damages of INR 2,65,56,000 levied;

- (g) Claim No.7- Other recoveries of INR 39,05,148.00;
- (h) Claim No.8 - Recoveries on balance 20 % work of INR 6,06,10,606.43;
- (i) Claim No.9 - Interest;
- (j) Claim No. 10 - Costs of arbitration and other legal expenses of INR 1,00,000.

11. The counter claims of the petitioner herein were as under:

- (a) Counterclaim No.1 -A sum of INR 3,55,30,000 in respect of the idling of men, staff and machinery from 1 October 1999 to 29 December 1999;
- (b) Counterclaim No.2 - A sum of INR 8,85,90,675 in respect of losses suffered on account of partial idling / under-utilization of men, staff and machinery from 29 December 1999 to 13 January 2000, 14 January 2000 to 29 June 2000 (at 50%) and 30 June 2000 to 11 October 2002 (at 25%);
- (c) Counterclaim No.3 - A sum of INR 1,96,33,020 payable to the Petitioner in respect of work done but not paid, retention money not paid, amount encashed against performance guarantee, amounts withheld in respect of interim payments, amounts illegally deducted towards liquidated damages from 19th running account bill and other amounts.
- (d) Counterclaim No.4- A sum of INR 4,92,34,115 being the loss of profit because of the wrongful termination;
- (e) Counterclaim No.5 - A sum of INR 17,15,480 being the market rate of the work executed beyond the time stipulated under the terms of the Agreement;
- (f) Counterclaim No.6 - A sum of INR 1,46,74,035 being the "forced acceptance of Bid";
- (g) Counterclaim No.7 - A sum of INR 5,00,00,000 in respect of damages to the business of the Petitioner caused by the wrongful termination and sudden invocation of the Bank Guarantee;
- (h) Counterclaim No.8 - A sum of INR 20,00,00,000 in respect of damages to the business of the Petitioner caused by blacklisting of the Petitioner;
- (i) Counterclaim No.9 - Return of plant, machinery and equipment confiscated by the Respondent alongwith compensation in respect of tentative cost for bringing the plant, machinery and equipment to the stage of operation;
- (j) Counterclaim No.10 - A sum of INR 10,02,54,000 payable as compensation in respect of the rent lost by the Petitioner because of the confiscation of the plant, machinery and equipment by the Respondent;
- (k) Counterclaim No.11 - A sum of INR 5,64,30,520 being the loss due to depreciation of the machinery for the period in which the machinery was confiscated by the Respondent;

(l) Counterclaim No.12 - A sum of INR 2,47,25,673 being the interest lost on loans obtained by the Petitioner due to the confiscation of the plant, machinery and equipment by the Respondent;

(m) Counterclaim No.13 - A sum of INR 1,71,57,829 being the loss of profits suffered from the Stop Date till the date of wrongful termination;

(n) Counterclaim No.14 - A sum of INR 5,22,880 payable towards extension of bank guarantee after the Stop Date;

(o) Counterclaim No.15 - A sum of INR 10,45,761 payable in respect of losses suffered by the Petitioner for the margin money which remained unused after the Stop Date;

(p) Counterclaim No.16 - A sum of INR 2,53,93,719 payable in respect of overheads for the prolonged / extended period of the Agreement;

(q) Counterclaim No.17 - A sum of INR 22,08,750 payable in respect of the loss suffered by the Petitioner due to underutilization of the infrastructure because of the wrongful termination of the Agreement;

(r) Counterclaim No.18 - A sum of INR 1,47,09,946 payable for the material lying at the site but illegally confiscated by the Respondent;

(s) Counterclaim No.19- Interest;

(t) Counterclaim No.20- Costs of the arbitration."

12. The Arbitral Tribunal allowed claim Nos. 1, 3, 4, 5 of the respondent and rejected claim Nos. 2, 6 and 10. Claim Nos. 7 and 8 were partly allowed. Insofar as counter claims of the petitioner are concerned, counter claim Nos. 1, 2, 3(vi) (a) to 3(vi)(g) and 4 to 20 were rejected. Counter Claim Nos. 3(i) and 3(iv) were partly allowed and Counter claim Nos. 3(ii), 3(iii) and 3(v) were allowed.

13. While the petition has been filed laying a challenge to the entire award and a number of grounds have been pleaded with respect to several claims/ counter-claims, but the arguments have been addressed by parties only with respect to Claim no.8 of the respondent and Counter-claim nos. 9 and 10 of the petitioner.

14. Learned counsel for the petitioner submits that hearing in the arbitration proceedings was concluded on 28.07.2014 which would be evident from a bare reading of para 1.22 of the Award. He submits that despite this, some additional information had been taken on record by the Arbitral Tribunal of which the petitioner had no notice and taking this material into account, the Award has been rendered. Learned counsel submits that perusal of the dissent note of Shri B.K. Biswas would show that two years after the conclusion of the hearing, the Arbitrators had an internal meeting wherein it was decided to call information regarding additional cost involved in completing the balance works from the respondent. The respondent in fact submitted some additional information vide its letter dated 25.05.2016. On the basis of this information, a finding has been

endered.

Relevant portion of the Award containing the dissent note is extracted hereunder:

"During internal meetings of the Arbitrators, it was decided by the AT to call information from the Claimant regarding additional cost involved in completing the balance works.

The Claimant submitted the information vide its letter dated 25.06.2016. It is noticed that the Claimant had awarded the work to a 2nd Agency for executing the balance works along with additional works for construction of ROB at Km 59.50 with approaches on 22.09.2003 with date of start on 01.12.2003 and completion date as on 31.05.2005. The Claimant allowed 2nd Agency further time upto 30.04.2008 (About 3 years more) for completion of the balance works. But the 2nd Agency did not complete the work and the Claimant foreclosed the Contract of 2nd Agency after lapse of 5 years without levy of any compensation for delaying the work."

It is contended that the Award deserves to be set aside on this ground alone that the Tribunal has acted behind the back of the petitioner and even chance of rebuttal of information sought was not given. Reliance is placed on Section 18 of the Arbitration & Conciliation Act, 1996 ("Act") and judgment in ONGC Ltd. v. Saw Pipes Ltd. (2003) 5 SCC 705.

15. The next contention of the learned counsel for the petitioner is with regard to claim No. 8. Claim No. 8 was a claim made by the respondent for recovery of the balance work at the rate of 20% of the value of the work not completed, amounting to Rs. 6,06,10,60,643/-. The case of the respondent before the Arbitrator was that the petitioner had committed fundamental breaches of the contract and could not complete the entire project. The contract had to be terminated and clause 60 of the Conditions of Contract read with provisions of serial No. 40 of the Contract Data entitled the respondent to recover the said amount. The respondent had calculated the 20% on Rs. 30,30,53,032.16/- which was the value of the work not completed and this worked out to a sum of Rs. 6,06,10,60,643/-. In fact, the stand of the respondent was that the actual cost incurred was more than what was being claimed @ 20%.

16. The petitioner had contested the claim before the Arbitral Tribunal on the ground that the terms of the contract could be enforced only during the currency of the contract. Since the contract had not been extended beyond 28.6.2002, which was the date on which the extended period had ended, the termination on 11.10.2002 was illegal. The petitioner had also denied that there was any breach of contract on its part. According to the petitioner, it had continued to work beyond 28.6.2002 i.e. up to 11.10.2002. The case of the petitioner was that the delay had occurred due to the respondent having failed to hand over possession of LHS for a period of more than 18 months from the date of start. The respondent had also failed to provide the unhindered site and having failed in its obligation, it was not entitled to the amount claimed. Another ground raised by

the petitioner was that no notice was served before terminating the contract and principles of natural justice were violated. Several other issues were also raised before the Arbitral Tribunal by the petitioner, alleging failure of obligations on the part of the respondent such as failure to render timely decisions, provide drawings, lay out plans, make timely payments etc.

17. The respondent in turn in its rejoinder had justified its action of termination and had brought out that the termination was on account of fraudulent practice adopted by the petitioner, inasmuch as the Bank Guarantees provided by the petitioner were forged, the details of which had been narrated by them under claim No. 6. This according to the respondent has also caused a huge loss to the NHA. The respondent had further submitted that in commercial contracts, principles of natural justice and show cause notice, have no place.

18. Controverting this argument of the respondent, the petitioner herein had argued that the Company was not aware of the fraud committed with respect to the furnishing of the Bank Guarantees, as this was an act of the agent in collusion with one of its employees. The petitioner had also argued that in fact, they had sent a letter dated 14.09.2002 to the NHA informing them that the Company had been a victim of the fraud and the petitioner should be permitted to replace the Bank Guarantees. A stand was also taken that an FIR had been lodged by the petitioner against the said fraud.

19. Learned counsel for the petitioner before this Court contended that the petitioner was not at all responsible for delaying the work. It was the respondent who had created various hindrances on account of which the work could not be completed on time. Learned counsel further contended that once the contract had not been extended beyond 28.06.2002, any termination beyond the currency of the contract was illegal. Learned counsel further contended that a grave error has been committed by the Arbitral Tribunal in not appreciating that the Company was not responsible for furnishing the forged Bank Guarantees. In fact, the petitioner was itself a victim of the fraud committed between an agent and its employee and the NHA should have permitted the petitioner to replace the Bank Guarantees. Learned counsel also pointed out that the Tribunal in the Award itself has noticed that in the criminal case relating to the fraudulent Bank Guarantees, the petitioner has been discharged on 08.09.2011.

20. Learned counsel for the respondent, per contra, contended that the petitioner had committed a breach of the contract. The respondent had fulfilled all its obligations. The main plank of the argument is that the contract was terminated on account of fraudulent practice adopted by the petitioner inasmuch as it had furnished two forged Bank Guarantees which was subsequently discovered and the respondent rightly invoked clause 59 of the contract.

21. Learned counsel further submitted that in matters of commercial contracts there is no place for principles of natural justice. This action cannot be compared to any other action of the Government or a Government Organisation, in exercise

of Administrative powers. It is also contended that the stand of the petitioner that it had learnt of the forged Bank Guarantee and had sent a letter dated 14.09.2002 informing the NHA is completely false inasmuch as when the respondent itself got information of the Bank Guarantees from the Bank only on 17.09.2002, how could the petitioner be aware of the fraud on 14.09.2002.

22. Learned counsel argued that once it was discovered that a fraud had been committed, there was no reason why fresh Bank Guarantees should have been accepted and, in any case, there was no obligation under the contract, to permit a party committing fraud to replace the Bank Guarantees. The fact of the matter is that the petitioner had defaulted in terms of the contract despite two extensions, one for completion of milestone 1, and the other for the total work and there was no reason why any further extension should have been provided or fresh Bank Guarantees taken.

23. The learned counsel for the petitioner next contends that the action of the respondent in confiscating the machinery and the equipment of the Company lying at the site was illegal after the termination on 11.10.2002. Since the respondent had taken action at their own risk and costs, the machinery etc. should have been returned to the petitioner. It is further argued that with the passage of time the respondent has allowed the machinery and equipment to depreciate. The machinery would have to be brought into working condition, on which a sum of about Rs.2 crores would be spent and, therefore, the petitioner had rightly claimed the return of the machinery as well as the cost for making it operational under counter-claim No.9.

24. Learned counsel for the respondent on the other hand, argued that the contract between the parties had an express provision under clause 61 of the GCC which reads as under:

"61. Property:

61.1- All materials on the site, plant, equipment temporary works and works are deemed to be the property of the employers if the contract is terminated because of a contractor's deficiency."

The entire property thus remaining at the site on the date of termination vested absolutely in the respondent and no grievance could be made by the petitioner on that count.

25. Learned counsel further submits that in 2002 the respondent had filed a petition under Section 9 of the Arbitration and Conciliation Act, 1996 seeking stay against the petitioner from removing, alienating etc. of the properties lying at the site. This Court had vide order dated 13.12.2002 restrained the petitioner and status quo was to be maintained. The respondent had in fact spend a sum of Rs.17,22,793/- on the security agency to guard the equipment and machinery. He thus, submits that the counter-claim no.9 was rightly rejected by the Arbitral Tribunal.

26. The next submission of the learned counsel for the petitioner is with regard to rejection of its counter-claim no. 10. The petitioner had claimed a sum of Rs.10,02,54,000/- on account of the loss of rent due to wrongful confiscation of the plant and machinery. Learned counsel contends that due to the confiscation of the machinery by the respondent, the petitioner was compelled to pay the rent as the machinery was hired on a rental basis. He submits that during the currency of the contract and even subsequently thereto, the petitioner notified the respondent on several occasions about the loss of rent, it was suffering.

27. Per contra, the respondent had contended that the machinery etc. had vested in the respondent under the terms of the contract and there was no question of the respondent paying rent to the petitioner or mitigating the losses. The petitioner had not challenged the termination for several months and this counter-claim is only an after-thought. Learned counsel also pointed out that the stand of the petitioner on this aspect was contradictory inasmuch as on one hand, the petitioner took a stand that he could have earned rent by renting the T&P etc. and on the other hand contended that since the machinery was fetching rent, the confiscation of the machinery caused loss of rent to the petitioner. Learned counsel also denied that the petitioner had ever notified the respondent about the loss of rent through any written/oral communications.

28. I have heard the learned counsels for the parties and examined their contentions. Claim no.8 was a claim made by the respondent/NHAI for recovery of Rs.6,06,10,60,643/- towards the balance work not completed @ 20% of the value of the uncompleted work. The finding of the Arbitral Tribunal on this claim is as under:

9.4.1 - It is undisputed that the Claimant made advance payment of Rs.3.98 crore towards mobilisation advance to the Respondent for which the Bank Guarantees (BGs) furnished by the Respondent were subsequently found to be forged. The Respondent for obtaining mobilisation advance of Rs 3.98 crore initially furnished BG no. 17/99 dated 24.8.99 for Rs 3.98 crore valid up to 31.12.2001 which was later extended up to 30.9.2002 by the BG no. 93/99-2001 dated 24.12.2001 and subsequently, as the completion of the work got delayed due to various reasons and the advance amount had not been fully repaid by that time, the Respondent applied for extension of time for completion and submitted a fresh BG bearing no. 265/2002 dated 21.08.2002 for Rs. 2 crore towards the balance mobilization advance of about Rs. 2 crore. The BGs were purportedly issued by Punjab and Sind Bank, Suryabagh, Visakhapatnam and Punjab and Sind bank, Pandurangapuram, Visakhapatnam respectively and were found to be forged on enquiry by the Claimant from the bank in September, 2002. It was also pointed out that for the aforesaid BGs no. 17/99 dated 24.08.1999 and no. 265/2002 dated 21.8.2002 confirmation was received purportedly by bank's letters dated 4.9.1999 and 11 .9.2002. It is obvious that the said confirmaion letters were also forged.

The fact that the BGs were forged is evident from the bank's letters dated

17.09.2002 and 20.09.2002 in response to the Claimant's letters dated 06.09.2002 from the Lucknow office and dated 19.09.2002 from the Head office of NHAI. The bank vide its letter dated 17.09.2002 informed the Claimant that they have not issued any BG for Rs. 2 crore on behalf of M/s Rana Projects Limited (Respondent) in favour of the Claimant. Further, in response to the Claimant's letter dated 19.09.2002 regarding invocation of the BG for Rs.3.98 crore, the bank vide its letter dated 20.09.2002 replied saying that the bank has not issued or extended any BG bearing no. 17/99 for Rs. 3.98 crore or extension BG no. 93/99-2001 for Rs. 3.98 crore or BG no 265/02 for Rs 2 crore on behalf of M/s Rana Projects International Limited and are obviously and prima facie forged and the bank is under no obligation to entertain any claim under the said BGs.

That the BGs were forged has not been disputed by the Respondent. The Respondent's plea that they were defrauded by some agents is an admission of the fact that the BGs were forged. The Respondent has not given any proof of any correspondence made or any bank charges deposited with the bank for obtaining the said BGs. Nor has the Respondent produced a copy of any FIR registered with Police in the matter. Irrespective of that, as per the Contract Act, 1872 the acts of agents of a party are the acts committed by the party and the plea that they were defrauded by some agent does not relieve the Respondent of his responsibilities and the act of forgery. The Respondent submitted forged BGs for mobilisation advance repeatedly right from the start and vitiated the Contract.

9.4.2 - Clause 59 of the Condition of Contract deals with termination of the Contract. In accordance with sub- Clause 59.1, the Employer or the Contractor may terminate the Contract if the other party causes a fundamental breach of ? the contract. Sub- Clause 59.2 specifies fundamental breaches of the contract. As per sub-Clause 59.2(h) it shall be a fundamental breach of the Contract, "if the Contractor, in the judgement of the Employer has engaged in corrupt or fraudulent practices in competing for or in the executing the Contract."

On finding that the Contractor has submitted forged BGs, the Claimant exercising its right under Clause 59 of the Conditions of Contract, terminated the contract vide notice of termination dated 11.10.2004 with immediate effect."

"Facts are not in dispute. The Respondent had applied for extension of time up to 31.03.2003 vide his letters dated 15.06.2002 and 19.06.2002. The request for extension of time was under process as evident from Engineer's letter dated 19.07.2002. The parties continued to perform the Contract. It is also evident from the terms of the Contract that time was not essence or the Contract as the Contract provided for extension of time for completion and also imposition of liquidated damages for delay in completion for reasons attributable to the Contractor. Hence, on the above facts, it would be incorrect to conclude that the terms of the Contract ceased to be in force immediately after expiry of the extended date of completion i.e. 28.06.2002. Reading the Contract as a whole, and in particular reading the clauses 28/49 and 59.2(g) together, the Contract

was to be in force till the completion of the work or its termination. We are, therefore, of the view that the Contract was in force till the Contract was terminated. The Contractor's contention that the currency of the Contract had expired on 28.06.2002 is not correct."

"9.4.4.- xxxx xxxxx xxxxxx

In the present case, the Contract Clause 59 specifies the procedure and fundamental breaches for termination of the Contract. The Employer or the Contractor may terminate the Contract if the other party causes a fundamental breach of the Contract. Fundamental breaches are specified in sub clause 59.2. The claimant having discovered that the Respondent has engaged in fraudulent practice and furnished forged BGs and committed fundamental breach of the contract, took the decision to terminate the Contract and communicated its decision to the Respondent vide letter dated 11.10.2002 indicating the specific reasons and material for terminating the Contract. The Contractor did not dispute the fact that the aforesaid BGs furnished by him to the Claimant for mobilisation advance were forged. Nor did he on receiving termination notice represent against termination of the Contract. First time the Respondent represented against termination was after more than 4 months vide his letter dated 25.02.2003. Given the above undisputed facts and applying the aforesaid test we find no arbitrariness in the Claimant's decision to terminate the Contract.

The decision to terminate has been governed by the terms of the contract and is based on informed reasons.

The contentions of the Respondent are not substantiated and rejected."

"9.4.5 - xxxx xxxx xxxx

A perusal of the data furnished by the Claimant in this regard reveals that the extra amount involved is much less than 20% claimed by the Claimant. The extra amount worked out by the Claimant is Rs.2,85,07,967.14. The AT accepts the same and awards Rs.2,85,07,967/- to the Claimant against this claim ."

29. It is not in dispute that the petitioner had received an advance payment of Rs.3.98 crores towards mobilisation advance from the respondent and had furnished a Bank Guarantee on 24.08.1999 for an equivalent amount, valid up to 31.12.2001, which was later extended up to 30.09.2002. It is also not in dispute that once the completion of work got delayed and the advance mobilisation amount had not been fully repaid by the petitioner to the respondent, the petitioner applied for extension of time for completion and submitted a fresh Bank Guarantee dated 21.08.2002. Since at that time, the balance mobilisation advance was about Rs. 2 crores, a Bank Guarantee of a like amount was furnished. The BGs were purportedly issued by Punjab and Sind Bank, Suryabagh, Visakhapatnam and Punjab and Sind bank, Pandurangapuram, Visakhapatnam, respectively. After the Bank Guarantees were furnished, the respondent had sought confirmation of the BGs and two letters dated 04.09.1999

and 11.09.2002 of the bank were sent by the petitioner in confirmation. As it transpired subsequently, both the Bank Guarantees were actually forged. The bank vide its letters dated 17.09.2002 and 20.09.2002 informed the respondent that the bank had never issued the said BGs on behalf of the petitioner Company and had in fact, even denied the existence of the said Branches of the Bank. It also came to light that the two letters purporting to be confirmation letters, were also forged.

30. It is significant to note that the petitioner had never denied the fact that the Bank Guarantees were forged. The only plea raised by the petitioner before the Arbitral Tribunal and before this Court is that they were not parties to the fraud and were in fact victims of fraud. The Arbitral Tribunal after a detailed analysis came to a finding that the petitioner had not given any proof of any correspondence made with the Bank or any Bank Charges deposited with the bank for obtaining the BGs, nor was any copy of the FIR placed on record. Irrespective of this conclusion, the Tribunal observed that as per the Contract Act, even assuming that the fraud was by the agent, the acts of the agents would bind the petitioner. In my view, this is a finding of fact rendered by the Tribunal and it is not open for this Court to interfere in the said finding of fact. The scope of jurisdiction under Section 34 of the Act is extremely narrow as held by the Apex Court in *Associate Builders(Supra)*. The Apex Court reiterated the parameters of judicial review in interpreting the terms of the contract while examining objections to an Arbitral Award as under:

"42. In the 1996 Act, this principle is substituted by the "patent illegality" principle which, in turn, contains three subheads:

XXXXXX

42.3. (c) Equally, the third subhead 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.- (1)-(2) * * *

(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 the terms of the contract, but if 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.

43. In *McDermott International Inc. v. Burn Standard Co. Ltd.* [*McDermott International Inc. v. Burn Standard Co. Ltd.*, (2006) 11 SCC 181] , this Court held as under: (SCC pp. 225-26, paras 112-13)

"112. 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. [See *Pure Helium India (P) Ltd. v. Oil and Natural Gas Commission* [(2003) 8 SCC 593 : 2003 Supp (4) SCR 561] and *D.D. Sharma v. Union of India* [(2004) 5 SCC 325] .]

113. Once, thus, it is held that the arbitrator had the jurisdiction, no further question shall be raised and the court will not exercise its jurisdiction unless it is found that there exists any bar on the face of the award."

44. In *MSK Projects (I) (JV) Ltd. v. State of Rajasthan* [(2011) 10 SCC 573 : (2012) 3 SCC (Civ) 818] , the Court held: (SCC pp. 581-82, para 17)

"17. If the arbitrator commits an error in the construction of the contract, that is an error within his jurisdiction. But if he wanders outside the contract and deals with matters not allotted to him, he commits a jurisdictional error. Extrinsic evidence is admissible in such cases because the dispute is not something which arises under or in relation to the contract or dependent on the construction of the contract or to be determined within the award. The ambiguity of the award can, in such cases, be resolved by admitting extrinsic evidence. The rationale of this rule is that the nature of the dispute is something which has to be determined outside and independent of what appears in the award. Such a jurisdictional error needs to be proved by evidence extrinsic to the award. (See *Gobardhan Das v. Lachhmi Ram* [AIR 1954 SC 689] , *Thawardas Pherumal v. Union of India* [AIR 1955 SC 468] , *Union of India v. Kishorilal Gupta & Bros.* [AIR 1959 SC 1362] , *Alopi Parshad & Sons Ltd. v. Union of India* [AIR 1960 SC 588] , *Jivarajbhai Ujamshi Sheth v. Chintamanrao Balaji* [AIR 1965 SC 214] and *Renusagar Power Co. Ltd. v. General Electric Co.* [(1984) 4 SCC 679 : AIR 1985 SC 1156])"

45. In *Rashtriya Ispat Nigam Ltd. v. Dewan Chand Ram Saran* [(2012) 5 SCC 306] , the Court held: (SCC pp. 320-21, paras 43-45)

"43. In any case, assuming that Clause 9.3 was capable of two interpretations, the view taken by the arbitrator was clearly a possible if not a plausible one. It is not possible to say that the arbitrator had travelled outside his jurisdiction, or that the view taken by him was against the terms of contract. That being the position, the High Court had no reason to interfere with the award and substitute its view in place of the interpretation accepted by the arbitrator.

44. The legal position in this behalf has been summarised in para 18 of the

judgment of this Court in *SAIL v. Gupta Brother Steel Tubes Ltd.* [(2009) 10 SCC 63 : (2009) 4 SCC (Civ) 16] and which has been referred to above. Similar view has been taken later in *Sumitomo Heavy Industries Ltd. v. ONGC Ltd.* [(2010) 11 SCC 296 : (2010) 4 SCC (Civ) 459] to which one of us (Gokhale, J.) was a party. The observations in para 43 thereof are instructive in this behalf.

43. ... The umpire has considered the fact situation and placed a construction on the clauses of the agreement which according to him was the correct one. One may at the highest say that one would have preferred another construction of Clause 17.3 but that cannot make the award in any way perverse. Nor can one substitute one's own view in such a situation, in place of the one taken by the umpire, which would amount to sitting in appeal. As held by this Court in *Kwality Mfg. Corpn. v. Central Warehousing Corpn.* [(2009) 5 SCC 142 : (2009) 2 SCC (Civ) 406] the Court while considering challenge to arbitral award does not sit in appeal over the findings and decision of the arbitrator, which is what the High Court has practically done in this matter. The umpire is legitimately entitled to take the view which he holds to be the correct one after considering the material before him and after interpreting the provisions of the agreement. If he does so, the decision of the umpire has to be accepted as final and binding."''

31. The Tribunal in my view posed itself the right question and answered the same as per the procedure of furnishing Bank Guarantees and admission of the petitioner that Bank Guarantees were forged. Even otherwise, if one was to test this argument of the petitioner, in my view, it is bereft of any merit. It is a matter of common knowledge that if a Bank furnishes a Bank Guarantee on behalf of a party, several steps and procedures would have to be undertaken and the party would be required to sign on several documents.

The concerned bank would only furnish the Bank Guarantee if the party has a viable account, with sufficient money in the said Bank and even after the Bank Guarantee is furnished, bank charges are payable. Therefore, it cannot be believed that for several months, the petitioner was unaware that the Bank Guarantee was a forged document as he had, admittedly, not signed any documents nor paid any Bank charges. Clause 59.1 of the contract entered into between the parties entitled the respondent to terminate the contract if the petitioner committed a fundamental breach of the contract. Clause 59.2 specifies the fundamental breaches under the contract and 59.2(h) provides that if the contractor engages itself in corrupt or fraudulent practice in executing the contract, the same can be terminated. The relevant clauses are extracted herein as under:-

"59. Termination

59.1 The Employer or the Contractor may terminate the Contract if the other party causes a fundamental breach of the Contract.

59.2 Fundamental breaches of Contract include, but shall not be limited to the following:

XXXX XXXX XXXX

(h) If the Contractor, in the judgment of the Employer has engaged in corrupt or fraudulent practise in competing for or in the executing the Contract.

For the purpose of this paragraph; "corrupt practice" means the offering, giving, receiving or soliciting of anything of value to influence the action of a public official in the procurement process or in contract execution. "Fraudulent practice" means a misrepresentation of facts in order to influence a procurement process or the execution of a contract to the detriment of the Employer, and includes collusive practice among Bidders (prior to or after bid submission) designed to establish bid prices at artificial non-competitive levels and to deprive the Employer of the benefits of free and open competition".

In my opinion, the view of the Tribunal that once the petitioner had submitted forged Bank Guarantees, the respondent had rightly invoked Clause 59 and terminated the contract is not only a possible but a plausible view. Thus, Claim No.8 has rightly been allowed by the Tribunal in favour of the respondent. The Tribunal has interpreted the terms of the contract and based on the documents, has come to a finding holding the petitioner responsible for furnishing forged Bank Guarantees. It is a settled law that the Tribunal is the master of facts and evidence led before it.

32. Insofar as counter-claim no.9 is concerned, the Tribunal has held as under:-

"21.4.3.1 As already decided under Claim No.8, termination of the Contract is valid.

21.4.3.2 In accordance with Clause 61.1 of General Conditions of Contract, all materials on the site, plant, equipment, temporary works and works are deemed to be the property of the Employer, if the Contract is terminated because of a Contractor's default.

Hence, the Claimant's taking over the plant, equipment and machinery of the Respondent lying at the site(s) on the date of termination of the Contract is justified and the same become the property of the Claimant. All the plant, machinery etc. have since been disposed off. The question of returning of the same, even otherwise does not subsist.

(iii) The Respondent's counter-claim for return of plant, machinery and equipment and a sum of Rs. 2 crore to bring the same to working condition is not justified and rejected."

33. Counter-claim No. 9 was raised by the petitioner for return of its plant, machinery and equipment lying at the site as well as the cost for repairing and making it operational. The Tribunal has rejected the said counter-claim on the ground that the termination was on account of default of the petitioner. Thus the property lying at the site had vested in the respondent in view of the specific clause 61 of the GCC between the parties. The said clause reads as under:-

"61. Property

61.1 All materials on the Site, Plant, Equipment, Temporary Works and Works are deemed to be the property of the Employer, if the Contract is terminated because of a Contractor's fault."

34. Insofar as the claim for the money to be spent on the machinery to bring it into working condition is concerned, the Tribunal has come to a finding that since the petitioner had no right, title or interest in the machinery etc., there was no question of granting any amount towards its repairs to bring it in working condition. The Tribunal further observed that the respondent had put the machinery under the watch and guard of a Government run Security Agency. Reference is also made to the various orders passed by this Court with respect to the preservation of the machinery.

35. The counter-claim has been rejected by the Tribunal after appreciating the terms of the agreement as well as the documents brought on record by the parties. The Tribunal having held under Claim no.8, that the termination of the contract was valid, rightly relied on clause 61 and held that the plant and machinery was the property of the respondent. There is no error in the finding of the Tribunal against counter-claim no.9.

36. Counter-claim no. 10 was a claim by the petitioner on account of loss of rent with respect to the machinery and equipment on the site of the respondent. The Arbitral Tribunal has rejected the counter-claim on the ground that the termination of contract was upheld by it and since the property in terms of clause 61 vested in the respondent, it could not be said that the property was wrongly confiscated by the respondent. This Court is of the view that once the termination of contract has been upheld and the property vests in the respondent by virtue of clause 61 of the contract, the petitioner could not have claimed loss of rent. Thus, there is no merit in the contention of the petitioner on this aspect and the finding of the Arbitral Tribunal calls for no interference.

37. One of the arguments raised by the petitioner at the outset was that the hearing in the Arbitral proceeding was completed on 28.07.2014, yet behind the back of the petitioner information was called from the respondent and the award was rendered without giving the petitioner a chance to rebut the said information. Attention of this Court was drawn to page 194, which is the dissent note of one of the Arbitrators with respect to Claim no.8. A perusal of the dissent note would show that it is true that the Arbitral Tribunal had called some additional information from the respondent, but what is significant is that this information was regarding their claim for additional cost involving the completion of the balance work. Claim no.8 was for recovery at the rate of 20% of the value of work not completed. Respondent had sought to claim for additional cost beyond the 20% provided under the contract. The Tribunal on an initial analysis found that no details of additional cost were given by the respondent in the pleadings or during the hearing and neither in the synopsis. It was on this

account that information was sought. However, after analysing the information given by the respondent, the Tribunal came to a conclusion that the information given by the respondent did not entitle it for any additional cost beyond the 20% that had been awarded under claim no.8. Thus, in my view, no prejudice has been actually caused to the petitioner even though this information was called for by the Tribunal after two years and behind the back of the petitioner. Surely, the argument of the petitioner would have had merit, if the Tribunal would have awarded the additional cost against the petitioner. In this background, reliance of the petitioner on the judgment of ONGC Ltd. (supra) as well as Section 18 of the Act would thus not inure to his advantage. This argument of the petitioner thus deserves to be rejected.

38. Learned counsel for the petitioner has relied on the judgment of the Apex Court in the case of Indian Bank v. Godhara Nagrik Cooperative Credit Society Ltd. & Anr.; (2008) 12 SCC 541 and on the judgment of Andhra Pradesh High Court in M/s Tech Mahindra Limited v. Venture Global Engineering LLC.; 2014 (3) ALD 177 on the issue of the fraudulent Bank Guarantees. In my view, the said judgments would have no application to the present case as the petitioner had candidly admitted before the Tribunal that the Bank Guarantees were forged and the only plea sought to be raised was that the respondent had not permitted the petitioner to replace the forged BGs with fresh BGs. Since the petitioner had admittedly not denied that the BGs were forged, no further evidence was required on this issue. The Tribunal, in my view, rightly observed that since there were several formalities required to be undertaken when BGs are furnished, the petitioner could not have feigned ignorance of the forgery in the said documents.

39. Learned counsel for the petitioner has relied on the judgments in the case of Kailash Nath Associates v. DDA & Anr.; (2015) 4 SCC 136 and Fateh Chand v. Bal Kishan Dass; AIR 1963 SC 1405 to contend that clause 61, provides for "penalty" and therefore, the said clause is not enforceable in law. This argument of the petitioner deserves to be rejected as the said clause forms a part of the agreement between the parties which was signed by both the parties with open eyes. Having signed the agreement and accepted all its terms and conditions, it is not open for the petitioner to argue at this stage that the clause was not enforceable.

40. In view of the above, I find no merit in the petition and the same is hereby dismissed.