(2019) 10 DEL CK 0119

Delhi High Court

Case No: First Appeal From Order (OS) (COMM) No. 66 Of 2017

Theme Engineering Services Pvt. Ltd	APPELLANT
Vs	
M/S Rail Vikas Nigam Ltd	RESPONDENT

Date of Decision: Oct. 15, 2019

Acts Referred:

- Arbitration And Conciliation Act, 1996 - Section 11(6), 34, 34(2), 34(2)(b)(ii), 37, 37(1)(b)
- Commercial Courts Act, 2015 - Section 13(1)

Citation: (2019) 178 DRJ 5

Hon'ble Judges: G.S. Sistani, J; Sangita Dhingra Sehgal, J

Bench: Division Bench

Advocate: J.P. Sengh, Vibhor Verdhan, Yash Agarwal, Manish Mehta, Mrigna Shekhar, J.C. Seth

Final Decision: Dismissed

Judgement

G.S. Sistani, J

1. This is an appeal under Section 37 (1) (b) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as â€˜the Actâ€™) read with

Section 13 (1) of the Commercial Courts Act, 2015, directed against the order dated 21.11.2016 (impugned order) passed by a learned Single Judge in

O.M.P.(COMM) No. 506 of 2016, by which the Arbitral award dated 18.11.2015 and the rectified award dated 07.12.2015 passed by the sole

arbitrator has been upheld and the objections to the award stand dismissed.

2. The primary issues, which arose between the parties were whether the respondent (RVNL) had unilaterally terminated the contract without any

reasonable justification or reason and whether the Performance Bank Guarantee (PBG) had been wrongfully encashed.

3. Brief facts necessary to be considered for disposal of this appeal are that the appellant is a multidisciplinary organization, engaged in consultancy

work and the respondent is a public sector enterprise. The appellant applied for the respondentâ€™s business proposal for Project Management

Consultancy (PMC) for Construction of a Road bed, Major and Minor Bridges, Track Linking and other General Electrical Work etc., in connection

with Doubling works in Kharagpur Division of South Eastern Railway in the State of West Bengal. In response to the Request for Proposal

(â€œRFPâ€) dated 16.05.2011 of the respondent the appellant deposited a demand draft of Rs. 5000/- (Rupees Five Thousand) in lieu of RFP

documents downloaded from respondentâ€™s official website (www.rvnl.org) along with the bid proposal. A sum of Rs. 8.33 lacs (Rupees Eight

Lacs Thirty Three Thousand) was also submitted in the shape of Bank Guarantee (BG) dated 27.06.2011 issued by Punjab National Bank (PNB),

Jaipur.

4. The appellant submitted its bid towards RFP on 30.06.2011, floated by the Chief Project Manager of the respondent vide letter dated 28.06.2011.

Subsequently, the bids were opened on 1.7.2011.

5. The bid of the appellant was accepted and notified through a letter of acceptance (Award) issued on 7.11.2011. However, the inclusion of service

tax was not in conformity with the clause 4.3.6 contained in the RFP & Data Sheet document, read as under: -

â€œTax liability: - The consultant is liable to pay taxes as applicable. While the service tax will be reimbursed as applicable to the consultant by the

Employer, all other taxes shall be payable by the Consultant. RVNL shall be deducting tax to be deducted at source as per Tax laws in Indiaâ€

The appellant through letter dated 9.11.2011 requested the respondent to rectify the mistake and issue a fresh notification. Pursuant to this, the

respondent issued a corrigendum dated 28.11.2011. However, the contract remained unsigned by the parties.

6. According to the terms and conditions, the appellant submitted a PBG in the sum of Rs 20,75,200 (Rupees Twenty Lacs Seventy Five Thousand

Two Hundred) dated 7.12.2011 vide letter dated 12.12.2011. It is the case of the appellant that despite several reminders and personal visits, the

respondent did not sign the contract. The appellant commenced the work in terms of clause 11.12 of the ITC i.e. commencement of the services

within 15 days of the issue of the revised Letter of Acceptance (LOA). The respondent on 12.03.2012, issued a show cause notice to the appellant for

rectifications regarding the CVs of key personnel. The appellant denied all the charges vide letter dated 20.03.2012. Thereafter, the respondent vide

letter dated 4.04.2012 terminated the contract in terms of Section 15.01(a) of Article XV, GCC and forfeited the Bank Guarantee in terms of Section

15.03 on 5.04.2012. Upon failure of the parties to settle the dispute amicably, an arbitration petition under Section 11(6) was filed in this Court, on the

basis of which, a sole arbitrator was appointed by an order dated 14th August, 2013.

7. The Arbitrator while dismissing the claims filed by the appellant, noted that the material ground of termination was the non- deployment of the key

personnel. The relevant extract of the award is reproduced below: -

â€œA letter dated 20.03.2012 Ex. CW1/2 was forwarded by the Claimant in response denying the contents the show cause notice dated 12 th March,

2012. The response received to the notice was found by the Respondent to be unsatisfactory as the claimant could not even depute Project Manager,

as the main key personnel for the Project for the last 4 months. The Project was of much importance to the Respondent. The delay in execution of

work could not be settled despite efforts made by the parties However the Respondent played safe by terminating the contract vide letter dated 04th

April, 2012Ex. R-10/A-11. The issue is according decided in favour of Respondent.â€

.....

â€œIn the instant case, when the claimant was not in a position to submit list of key personnel within the stipulated period, the Bid security in the form

of Bank Guarantee dated 27th June, 2011 for Rs.8.33,000/- was not encashed and it automatically lapsed on 26th December, 2011 after expiry of its

validity period. The RVNL was not efficient to take advantage of the above instructions. Thus under the above instructions forfeiture of performance

guarantees not permissible to the Respondent. However, taking advantage of Section 3.04 of Article Ill of General Condition of Contract, the

Respondent forfeited the performance guarantee and encashed the same, when the contract was terminated under Section 15.01 of Article XV of

GCC. The claimant could not adduce reliable and strong proof for entitlement of this claim under the provision of the Bid document Ex.A-1.â€

8. Mr J.P. Sengh, learned Senior Counsel appearing for the appellant submits that issue No.3 pertains to the issue of deployment of key personnel,

which is an â€˜excepted matterâ€™. He submits that it is established law that â€˜excepted mattersâ€™ cannot be looked into by the Arbitrator in an

arbitration proceeding. Mr. Sengh in support of this submission has placed reliance upon General Manager, Northern Railways Vs. Sarvesh Chopra

(2002) 4 SCC 45 & Harsha Construction Vs. UOI (2014) 9 SCC 246, which reads as under:

â€œHeld, even if a non arbitrable dispute is referred to arbitration or even an issue is framed by arbitrator as to such dispute, it is not open for an

arbitrator to arbitrate since it is beyond its jurisdictionâ€¦ â€

9. Mr. Sengh further submits that once it has been held that the issue of deploying the key personnel and their selection is an â€˜excepted matterâ€™

then â€œFraming of Issueâ€ for the same is illegal and bad in law. Mr. Sengh submits that the learned Arbitrator should not have framed the issue at

the first instance and accordingly, should not have given a finding in favour of the respondent. He submits that even the learned Single Judge failed to

consider the same and the impugned judgement is totally silent upon the said issue.

10. The learned Senior Counsel for the appellant while dealing with the issue of invocation of the bank guarantee submits that the learned Sole

Arbitrator had failed to consider the law that a conditional Bank Guarantee can only be invoked on the basis of the express terms mentioned in it and

the invocation has to be in terms of the Bank Guarantee. Reliance is placed on para 9 of the judgement rendered in Hindustan Construction Co. Ltd.

Vs. State of Bihar reported at (1999) 8 SCC 436, the same reads as under:

â€œ9. What is important, therefore, is that the Bank Guarantee should be in unequivocal terms, unconditional and recite that the amount would be paid

without demur or objection and irrespective of any dispute that might have cropped up or might have been pending between the beneficiary under the

Bank Guarantee or the person on whose behalf the Guarantee was furnished. The terms of the Bank Guarantee are, therefore, extremely material.

Since the Bank Guarantee represents an independent contract between the Bank and the beneficiary, both the parties would be bound by the terms

thereof. The invocation, therefore, will have to be in accordance with the terms of the Bank Guarantee; or else, the invocation itself would be bad.â€

11. Mr. Sengh has referred to Clause 2 of the PBG and submits that in the instant case, the learned Arbitrator and the Single Judge have failed to

consider Clause 2 of the PBG, which is reproduced below: -

â€œAfter the consultant has signed the contract with RVNL, the bank undertakes to immediately pay to Rail Vikas Nigam Limited, any amount up to

and inclusive of aforementioned full amount upon written order from Rail Vikas Nigam Limited, without any demur, reservation or recourse. â€

12. The learned senior counsel submits that the mere reading of the Clause 2 makes it clear that the signing of the Contract Agreement was an

essential part before the Bank Guarantee could be invoked, and this is an admitted fact that the contract remains unsigned. Therefore, invocation of

the Bank Guarantee is illegal and in contravention with law. Mr. Sengh further submits that even the LOA makes it explicit that the consultant is

required to furnish a Bank Guarantee, which is a condition precedent to the signing of the contract. However, in the instant case, the contract was

never signed by the parties, therefore, invocation of the Bank Guarantee was bad and the same has never been considered by the sole Arbitrator and

the learned Single Judge.

13. Mr. Sengh submits that signing of the contract is a condition precedent before invoking the Bank Guarantee, Reliance was placed on the LOA,

which reads as under: -

â€œWHEREAS the consultant is required to furnish a â€œPerformance Securityâ€ in the form of Bank Guarantee for the sum of Rsâ€¦. which is

condition precedent to the signing of the Contract Agreement

â€¦â€¦

2. After the consultant has signed the contract with RVNL, the bank undertakes to immediately pay to Rail Vikas Nigam Limited, any amount up to

and inclusive of aforementioned full amount upon written order from Rail Vikas Nigam Limited, without any demur, reservation or recourse.â€

14. The next submission of the learned Senior Counsel for the appellant is that as per Section 5, clause 10 (a) and 12 of the Request for Proposal, the

contract will be formed only after the Notice to Proceed was issued by the respondent. In case, if any default arises, any of the parties can terminate

the contract as per Section 5, clause 10 (b) of the Request for Proposal. He further states that, it is pertinent to mention that, in this case the

respondent never issued the Notice to Proceed to the consultant to enable them to commence their services. Moreover, as per Section 5, Clause 4 of

the Request for Proposal, it is clearly mentioned that the consultant shall commence the services within thirty days after receiving the Notice to

Proceed with the services from the employer. It is an admitted fact that the respondent never served the appellant with any such Notice and thus, the

respondent was at default and yet, the same was never considered by the Arbitrator or by the learned Single Judge. Additionally, the learned Senior

Counsel submits that the learned Arbitrator failed to consider the letter dated 09.11.2011, wherein, the appellant explicitly mentioned that the award

will be accepted only after the revised Letter of Award as per the terms of RFP documents will be issued and only then the appellant will start

mobilizing the team. He further submits that the respondent had accepted the PBG after the lapse of 28 days from the day of defective letter of award

i.e. 07.11.2011. Therefore, the acceptance on the part of the respondent, in itself, is a waiver to contest the delay on part of the appellant and the

respondent thus cannot take the plea that there was delay in submission of the Performance Security.

15. Mr. Sengh submits that on bare perusal of Section 2 clause 9 and 11 of the Request for Proposal, it can be ascertained that signing of the contract

is the condition precedent for the commencement of work, which has not been complied by RVNL. Moreover, it is pertinent to mention that RVNL

has accepted that they have not sent the agreement as they thought that the same could be lost during transit, which has also not been considered by

the Arbitral Tribunal.

16. Mr. Sengh contends that the learned Arbitrator held that the appellant has raised the issue of â€œservice taxâ€, wherein the inclusion of service

tax in the remuneration of the key personnel is a discrepancy and the same is not in accordance with the tax laws. The Arbitrator held that the

Consultant is liable to pay the taxes as applicable. While service tax will be reimbursed as applicable to the consultant by the employer, all other taxes

shall be payable by the consultant. RVNL shall deduct the tax at source as per the relevant tax provisions. Therefore, it was held that even if there

was a discrepancy, even then RVNL would be liable to pay the tax. Mr. Sengh submits that the finding of the learned Arbitrator is against the test of

public policy and thus, is bad in law. Reliance was placed upon M/S Meattles Pvt. Ltd vs. HDFC Bank Limited, CS (OS) 512/2012, reported at 2012

SCC online DEL 5508 the relevant paragraphs read as under: -

â€œIn Rashtriya Ispat Nigam Ltd. v. M/s Dewan Chand Ram Saran 2012 (4) SCALE 588, the court was of the view that the question as to whether

liability to pay service tax would be of the service provider or service recipient would be determined by the contract between the parties. The relevant

clause in the contract between Rashtriya Ispat Nigam Ltd. and the contractor in that case read as under: -

9.3 The Contractor shall bear and pay all taxes, duties and other liabilities in connection with discharge of his obligations under this order. Any income

tax or any other taxes or duties which the company may be required by law to deduct shall be deducted at source and the same shall be paid to the

Tax Authorities for the account of the Contractor and the Company shall provide the Contractor with required Tax Deduction Certificate.

It was held by the Apex Court that the contractor had under the above referred clause, accepted the liability to pay service tax since the liability had

arisen out of discharge of his obligations under the contract. The Court also felt that the rationale behind the above referred clause was that petitioner

as a Public Sector Undertaking should be exposed only to a known and determined liability under the contract and all other risks regarding taxes

arising out of the obligations of the contractor, should be borne by the contractor. It was also held by the Apex Court that there was nothing in law to

prevent the appellant from entering into an agreement with the respondent handling contractor that the burden of any tax arising out of obligations of

the respondent under the contract would be borne by him. Since there is no agreement between the parties to this suit, for shifting the ultimate liability

towards service tax to the plaintiff, nothing in law prevents it from recovering the same from the defendant.â€

17. While referring to the above stated judgement, Mr. Sengh contends that if there is a contract between the parties then the burden of service tax

can be shifted as per the terms of the contract. For instance, in order to clarify the same, the appellant wrote a letter to RVNL and duly mentioned

that the Letter of Award will be accepted only after the same is corrected. Therefore, the finding of the Arbitrator that RVNL was bound to pay

service tax as per tax law of the country is contrary to the law and thus, illegal.

18. Mr. Sengh has laboured hard to submit that the learned Arbitrator and the learned Single Judge failed to consider that in the instant case, in order

to form a binding contract between the parties, there should be meeting of minds, which would have only happened when RVNL had issued the

corrigendum correcting the discrepancy in Letter of Award.

19. Per contra Mr. Seth, learned counsel for the respondent, while dealing with the issue No.1 submits that the letter dated 07.11.2011 reads as

Notification of Award for the construction contract and provides the reference to the bid documents dated 16.05.2011 and 28.06.2011. Note 1 of the

Notification of Award dated 07.11.2011 wrongly records service tax will not be reimbursed to the appellant. This minor typographical error was

immediately corrected through a corrigendum dated 28.11.2011, which itself specifically refers to the Notification of Award.

Furthermore, the Corrigendum clearly records that apart from Note No.1, â€œthe remaining part of the Notification of Award remains the same.â€

Thus, even the corrigendum refers to the notification of Award itself. Hence there is no doubt that the service tax was payable under the bid

documents and also the bid submitted by the appellant, which was accepted by the respondent vide Notification of Award dated 07.11.2011 read with

Note No. (v) thereunder. He further submits that appellant has wrongly submitted that the Contract Agreement was not signed and as such there is no

contract between the parties, which is emphatically denied. In the first instance, appellant did not depute a competent person to Kolkata for signing the

Contract Agreement. Furthermore, the notification of award itself says that till such time a formal Contract Agreement is prepared and executed, this

notification of Award shall constitute a binding contract. Secondly, the contract need not be written and signed by the contractor in all cases, it can be

a verbal agreement (though the mandate of Section 7(3) of the Act only recognizes written agreement). He submits that the Contract in this scenario

was contained in the Award notification read with bid (tender) document and Bid, which was submitted by the appellant. Mr. Seth further contents

that the learned Single Judge clearly held that the compensatory nature of service tax is a minor typographical error of the document and the appellant

could not have taken advantage of this minor mistake to delay the discharge of its obligations under the contract.

20. Mr. Seth while dealing with the issue of appointment of competent personnel for the performance of the contract submits that the project involved

a capital at the expense of Rs. 1300 crores. It was a national project and crucial for the safety of human lives, for which Project Management

Consultancy of high order was essential but the appellant did not provide a Single key personnel as per contract dated 7.11.2011. He further submits

that it is an established fact that the appellant could not even depute the manager for the consultancy work as per the contract.

Reliance was placed on the Bid documents, which read as under: -

â€œThe qualifications and experience of the person proposed for each of the key post should meet at least the minimum requirement specified in the

relevant form No.8A Section 3; and the persons who do not fulfil conditionsâ€¦. Will not be permitted to be any of the key posts.â€

Further Section 4.0 Para 1.8 of Terms of Reference (TOR) provided as under: -

â€œPrior approval of the Employer should be taken before any Personnel is actually employed by the Consultant shall be dependent on satisfactory

performance of duties. Decision of the Employer shall be final and binding in this regard.â€

21. Mr. Seth submits that learned counsel for appellant objected to the words â€œdecision of the employer shall be final and binding in this regardâ€

and termed the same as â€˜excepted matterâ€™. He submits that, it is a misconception as the day-to-day matters like measurement book of work

done, attendance of employees etc. or rate for small extra work done over the agreed rate, are left to be decided by the employer, whose decision is

final and binding on the contractor. Moreover, the â€˜excepted mattersâ€™ are decided by Competent Authority of higher level. He placed reliance

upon the case of Harsha Construction Vs. UOI reported at (2014) 9 SCC 246 held as under: -

â€œâ€¦Arbitrator is not empowered to arbitrate upon disputesâ€¦.as specifically excludes certain disputes as â€œexcepted disputesâ€ from arbitration-

Since arbitrator exceeded his jurisdiction by rendering award on non arbitrable dispute, that part of award is bad in law and is quashedâ€.

22. Mr. Seth also placed reliance upon the relevant para of the Arbitral Award, which has been reproduced below: -

â€œThe decision of RVNL with respect to the approval of CVs of key personnel is final and it does not bestow power to others to adjudicate in the

matter. In the result the claimant had failed to submit key personnel as contemplated in Annexure-3 (section 4) of ITC and Project Management

Consultancy could not be initiated for the contract work, in consequence the consultancy services came to an end on implementation of termination by

the Employer under Section 15.01 (e)(II) Article XV of the Bid documents. The issue is accordingly decided in the favour of the Respondent an

against the Claimantâ€ (i.e. Appellant).

23. Mr. Seth while contesting the delay in enforcement of the contract and entitlement to recover the performance guarantee on account of wrongful

encashment submits that the contract stood terminated on 04.04.12, after giving show cause notice on 12.03.12 to the appellant. The Counsel further

submits that the termination was on account of â€˜fundamental breachâ€™ of the contract for non- deployment (within stipulated period) of the key

personnel approved by the respondent, which was specifically provided in Section 15.01 of the GCC. Mr. Seth submits that the respondent had

rejected the key personnel offered by appellant, keeping in mind their qualifications and experience, for which sufficient reasons were made known to

the appellant, in terms of relevant Form 8A, Section 3 and that such persons were not allowed to be employed on any of the key posts. Mr. Seth also

highlighted that the bid document required the prior approval of the respondent of as a pre-requisite before employing any key personnel. It was stated

that rejection of CVs has been done strictly in terms of the bid documents. Further, it was submitted that pursuant to the show cause notice, the

appellant assured that the defect of non-deployment will be removed and the appellant will rectify the default. However, no person was actually

deployed. Mr. Seth contented that termination was not on peripheral issues of delay in submission of the performance guarantee etc., as detailed by

the appellant.

24. Mr. Seth has laboured hard to submit that the termination was fully justified as there was a â€œfundamental Breachâ€ in non- deployment of key

personnel, as without the same, the work for the National Project could not be commenced for four months of the working season. As regards to the

invocation of PBG, Section 15.03(a) specifically provides: -

â€œIf the termination has been occasioned by the default of the Consultant (Appellant herein) as per section 15.01 (a) to (h) except (c), the Employer

shall encash the performance Guarantee and forfeit the Performance Security in fullâ€.

25. It is pertinent to note that the abovementioned Section provides for invocation of the Bank Guarantee on account of non-performance of the

contract by the appellant, although the counsel for the appellant has submitted that there was no contract. Mr. Seth contends that the Bank Guarantee

was payable on demand, it is therefore an unconditional guarantee, which was encashed by Punjab National Bank on 04.04.2012. Lastly, Mr. Seth

submits that the learned Arbitral Tribunal also concludes that the respondent forfeited the PBG and enchased the same, when the contract was

terminated under Section 15.01 of Article XV of GCC and the appellant could not adduce reliable and strong proof for entitlement of the claim under

the provision of the bid document.

26. We have heard learned counsels for both the parties and considered their rival submissions. This court is of the view that both the Arbitral Tribunal

and the learned Single Judge have considered the documents and evidence placed before them and have rightly rejected the claims of the appellant.

We do not find any infirmity in the award passed by the sole Arbitrator or the impugned order passed by the learned Single Judge.

27. The scrutiny of the notification of Award dated 07.11.2011 shows no material irregularity but a mere typographical discrepancy. The said

discrepancy was corrected by the subsequent corrigendum dated 28.11.2011. Even if the corrigendum was not issued, it would not have made a

significant impact in the case. Beside this, if the notification dated 07.11.2011 includes service tax in the remuneration, it also provides for service tax,

cess and other reimbursable expenditures, as stipulated in the bid document to be over and above this. Thus, the minor typographical mistake would

not have weakened the principal content of the notification of the Award. Therefore, there can be no doubt that the contract stood concluded between

the parties vide notification of the award.

28. A reading of Section 4 of Terms of Reference speaks about the decision of the respondent as being final and binding in itself, it further states that

the ultimate and last decision in this matter shall rest with the respondent for approval of CVs of the key personnel. The word â€œfinal and bindingâ€

convey the same meaning as â€˜excepted matterâ€™, which implies that the decision of the respondent is final and does not bestow power to others

to adjudicate the matter. The appellant committed the default by not appointing the key personnel for the project, without which the contract work

could not be initiated. In consequence, the consultancy services came to an end on implementation of termination by the respondent as per Section

15.01 (e) (II) Article XV of the documents.

29. Therefore, in our view, the learned Arbitrator and the learned Single Judge have rightly upheld the validity of the contract and the inclusion of

service tax as not reimbursable to be a mere discrepancy in the Notification of Award dated 07.11.2011. The appellant has clearly not acted in

accordance with the RFP documents, which gives the absolute right to the respondent to terminate the same and encash the Bank Guarantee. Thus,

the learned Single Judge has rightly upheld that the Arbitrator, while deciding the award had strictly adhered to the contract between the parties and

that the appellant has failed to prove the contrary.

30. The position of law stands crystallized today, that findings of fact as well as of law, of the arbitrator/Arbitral Tribunal are ordinarily not amenable

to interference either under Section 34 or Section 37 of the Act. The scope of interference is only where the findings of the tribunal are either

contrary to the terms of the contract between the parties, or ex facie, perverse. Only in such cases, interference by this Court, is absolutely necessary.

The Arbitrator/ Tribunal is the final arbiter on facts as well as in law, and even errors, factual or legal, which stop short of perversity, do not merit

interference under Sections 34 or 37 of the Act.

31. The scope of judicial scrutiny and interference by an appellate court under Section 37 of the Act is even more restricted when deciding a petition

under Section 34 of the Act. The Honâ€™ble Supreme Court in the case of McDermott International Inc. v. Burn Standard Co. Ltd. And Ors,

reported at (2006)11 SCC 181 held as under:

52. The 1996 Act makes provision for the supervisory role of courts, for the review of the arbitral award only to ensure fairness. Intervention of the

court is envisaged in few circumstances only, like, in case of fraud or bias by the arbitrators, violation of natural justice, etc. The court cannot correct

errors of the arbitrators. It can only quash the award leaving the parties free to begin the arbitration again if it is desired. So, scheme of the provision

aims at keeping the supervisory role of the court at minimum level and this can be justified as parties to the agreement make a conscious decision to

exclude the court's jurisdiction by opting for arbitration as they prefer the expediency and finality offered by it.

32. Moreover, it has been a well-established principle in International Arbitration that the courts cannot interfere with the subject matter of an award.

As an illustration, the Singapore High Court in Government of the Republic of the Philippines v Philippine International Air Terminals Co, Inc (2007)

held that:

â€œan arbitral award is not liable to be struck down on application in the courts because of allegations that it was premised on incorrect grounds

whether of fact or of law. An application to set aside an award made in an international arbitration is not an appeal on the merits and cannot be

considered in the same way as the court would consider the findings of a body over whom it had appellate jurisdiction.â€

To justify this premise, it has been reasoned that Section 34 of the Act (based on the UNCITRAL Model) does not give the court the power to hear

an issue in appeal.

33. In Arbitration Appeal No. 23 of 2016 titled Madhya Pradesh Road Development Corporation Limited vs. Jabalpur Corridor (India) Pvt. Ltd, the

Madhya Pradesh High Court held as under: -

â€œBefore adverting to consider various questions canvassed before us, it would be appropriate to take note of the definition and meaning of certain

words, which are relevant for deciding the issue in question and the law with regard to scope of interference by this Court in an appeal under Section

37, of the Act of 1996.

â€¦

It is a well settled principle of law that the jurisdiction available to this Court and the scope of interference under Section 37 is extremely limited. This

Court does not exercise appellate jurisdiction, on the contrary the jurisdiction available to this Court is akin to revisional jurisdiction and is a supervisory

jurisdiction. In the modern day commercial litigation and looking to the development of the law of arbitration and resolution of arbitral dispute it has to

be kept in mind that parties have opted for arbitration and it is understood by them that they have entered into the arbitration agreement with full

knowledge of the risks attached to such proceedings and the limited recourse available to them by way of appeals or approach to Courts of law.â€

34. In FAO (OS)(COMM) No. 107 of 2017, titled NHAI v. M/s. BSC-RBM-PATI Joint Venture, the division bench of this Honâ€™ble Court

delineates the scope of judicial interference and challenge under Sections 34 and 37 of the Act. It holds that any factual interference under Sections

34 and 37 of the Act would be a gross disservice to the very institution of arbitration.

35. This court, has time and again emphasized the narrow scope of interference under Section 37. In the case of MTNL Vs. Fujitshu India Private

Limited, reported at 2015(2) ARB LR332(Delhi), in paragraph 17 and 19, the Division Bench held as under:

â€œ17.The law is settled that where the Arbitrator has assessed the material and evidence placed before him in detail, the court while considering the

objections under Section 34 of the said Act does not sit as a court of appeal and is not expected to re- appreciate the entire evidence and reassess the

case of the parties. The jurisdiction under Section 34 is not appellate in nature and an award passed by an Arbitrator cannot be set aside on the ground

that it was erroneous. It is not open to the court to interfere with the award merely because in the opinion of the court, another view is possible. The

duty of the court in these circumstances is to see whether the view taken by the Arbitrator is a plausible view on the facts, pleadings and evidence

before the Arbitrator. Even if on the assessment of material, the court while considering the objections under Section 34 is of the view that there are

two views possible and the Arbitral Tribunal has taken one of the possible views which could have been taken on the material before it, the court

would be reluctant to interfere. The court is not to substitute its view with the view of the Arbitrator if the view taken by the Arbitrator is reasonable

and plausible Jhang Cooperative Group Housing Society v. P.T Munshi Ram & Associates Private limited: MANU/DE/1282/2013: 202(2013) DLT

218.

19.The extent of judicial scrutiny under Section 34 of the Act is limited and scope of interference is narrow. Under Section 37, the extent of judicial

scrutiny and scope of interference is further narrower. An appeal under Section 37 is like a second appeal, the first appeal being to the court by way

of objections under Section 34. Where there are concurrent findings of facts and law, first by the Arbitral Tribunal which are then confirmed by the

court while dealing with objections under Section 34, in an appeal under Section 37, the Appellate Court would be very cautious and reluctant to

interfere in the findings returned in the award by the Arbitral Tribunal and confirmed by the court under Section 34.â€

36. The abovementioned view was further upheld by the Division Bench of this court in Mahanagar Telephone Nigam Ltd. vs Finolex Cables Limited

FAO(OS) 227/2017 reported at 2017(166) DRJ1, stated as follows: -

â€œIt is apparent, therefore, that, while interference by court, with arbitral awards, is limited and circumscribed, an award which is patently illegal, on

account of it being injudicious, contrary to the law settled by the Supreme Court, or vitiated by an apparently untenable interpretation of the terms of

the contract, requires to be eviscerated. In view thereof, the decision of the ld. Single Judge that reasoning of the arbitral award in this regard was

based on no material and was contrary to the contract, cannot be said to be deserving of any interference at our hands under Section 37 of the Act. In

a pronouncement reported at MANU/DE/0459/2015, MTNL v. Fujitshu India Pvt. Ltd. (FAO(OS) No. 63/2015), the Division Bench of this court has

held that ""an appeal under Section 37 is like a second appeal, the first appeal being to the court by way of objections under Section 34"". Being in the

nature of a second appeal, this court would be hesitant to interfere, with the decision of the learned Single Judge, unless it is shown to be palpably

erroneous on facts or in law, or manifestly perverse.â€

37. In the case of FAO(OS) 192/2017 NHAI vs. Hindustan Construction Co. Ltd, the Division Bench of this court upheld the view taken in

Mahanagar Telephone Nigam Ltd. vs Finolex Cables Limited reported at 2017(166)DRJ1 and MTNL Vs. Fujitshu India Private Limited, reported at

2015(2)ARB LR332(Delhi) and opined on the restricted intervention power of the courts under Section 37 and 34 of the Act.

38. Further, his Court in its earlier judgements, FAO (OS) (COMM) 86/2016 M/S. L.G. Electronics India Pvt. Ltd. Vs. Dinesh Kalra, FAO(OS)

(COMM) 55/2018 M L Lakhanpal vs. Darshan Lal & Anr. As well as in FAO(OS)(COMM) 201/2017 ADTV Communication Pvt. Ltd Vs. Vibha

Goel & Ors., repeatedly mapped the limited scope of intervention under Section 37 of the Act and held as under: -

â€œIt has been repeatedly held that while entertaining appeals under Section 37 of the Act, the Court is not actually sitting as a Court of appeal over

the award of the Arbitral Tribunal and therefore, the Court would not re-appreciate or re-assess the evidence. In the case of State Trading

Corporation of India Ltd. v. Toepfer International Asia Pte. Ltd., reported at 2014 (144) DRJ 220 (DB), in para 16 it has been held as under:

â€œ16. The senior counsel for the respondent has in this regard rightly argued that the scope of appeal under Section 37 is even more restricted. It

has been so held by the Division Benches of this Court in Thyssen Krupp Werkstoffe v. Steel Authority of India and Shree Vinayaka Cement

Clearing Agency v. Cement Corporation of India 147 (2007) DLT 385. It is also the contention of the senior counsel for the respondent that the

argument made by the appellant before the learned Single Judge and being made before this Court, that the particular clause in the contract is a

contract of indemnification, was not even raised before the Arbitral Tribunal and did not form the ground in the OMP filed under Section 34 of the Act

and was raised for the first time in the arguments.â€

In the case of Steel Authority of India v. Gupta Brothers Steel Tubes Limited, (2009) 10 SCC 63, the Supreme Court has laid down that an error

relatable to interpretations of the contract by an Arbitrator is an error within his jurisdiction and such error is not amenable to correction by Courts as

such error is not an error on the face of the award. The Supreme Court has further laid down that the Arbitrator having been made the final arbiter of

resolution of disputes between the parties, the award is not open to challenge on the ground that the Arbitrator has reached a wrong conclusion. The

courts do not interfere with the conclusion of the Arbitrator even with regard to the construction of contract, if it is a plausible view of the matter.

The Apex Court in J.G. Engineers (P) Ltd. v. Union of India, reported at (2011) 5 SCC 758, demarcated the boundary while explaining the ambit of

Section 34(2) of the Act. The Court in the aforesaid judgement relied upon the pronouncement of ONGC Ltd. v. Saw Pipes, in paragraph 19, held as

under: â€

27. Interpreting the said provisions, this Court in ONGC Ltd. v. Saw Pipes Ltd. [(2003) 5 SCC 705] held that a court can set aside an award Under

Section 34(2)(b)(ii) of the Act, as being in conflict with the public policy of India, if it is (a) contrary to the fundamental policy of Indian law; or (b)

contrary to the interests of India; or (c) contrary to justice or morality; or (d) patently illegal. This Court explained that to hold an award to be opposed

to public policy, the patent illegality should go to the very root of the matter and not a trivial illegality. It is also observed that an award could be set

aside if it is so unfair and unreasonable that it shocks the conscience of the court, as then it would be opposed to public policy.â€

39. Having regard to the law laid down by this Court as well as the Apex Court in a number of decisions rendered and applying the law laid down to

the facts of the present case, we do not find any merit in the appeal. Hence, no grounds are made out to interfere with the impugned order passed by

the learned Single Judge under Section 34 of the Act.

40. Resultantly, we find no merit in the appeal. The appeal is, accordingly, dismissed.