(2023) 05 DEL CK 0403

Delhi High Court

Case No: Original Miscellaneous Petition (COMM) No. 482 Of 2020

NHPC Limited	APPELLANT
Vs	
Jaiprakash Associates Ltd.	RESPONDENT

Date of Decision: May 26, 2023

Acts Referred:

- Limitation Act, 1963 - Article 18, 55, 137
- Arbitration and Conciliation Act, 1996 - Section 18, 28, 28(2), 28(3), 31, 31(2), 31(3), 34, 34(2)(a)(iii), 34(2)(b), 34(2A), 34(3)
- Indian Contract Act, 1872 - Section 55, 70, 73

Hon'ble Judges: Chandra Dhari Singh, J

Bench: Single Bench

Advocate: Gauhar Mirza, Prakhar Deep, Purnima Mathur, Lovkesh Sawhney, R. K. Mishra, Rohit Kumar, Navita Gupta

Final Decision: Allowed

Judgement

Chandra Dhari Singh, J

1. The instant petition has been filed on behalf of the petitioner under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter “the Act”) raising objections to the Award dated 7th October 2019, corrected on 18th December 2019, (hereinafter “the impugned Award”). The petitioner has prayed for the following reliefs:-

“Set aside the Impugned Majority Award passed by (Retd.) Justice B. P. Jeevan Reddy and Sh. K.K. Madan ("Ld. Majority Tribunal") to the extent that it allows the claims of the Respondent and rejected Counter-Claims No. 1,2,10,13,14,16 and 17;

(b) Set aside the Impugned Minority Award passed by the. V. K. Tyagi ("Ld. Minority Tribunal");”

FACTUAL MATRIX

2. The following course of events has led to the controversy and disputes between the parties which are before this Court:

a. The petitioner proposed a Hydro Electric Project on river Chenab at Kishtwar, Jammu and Kashmir (hereinafter "the work"). On 10th April 1995, the petitioner invited fresh bids for the work, after the same was abandoned by a previous awardee of the work, namely Dumaz-Sogea Borie SAE and was continued by the petitioner on its own between 1992 to 1995.

b. In the second phase, the work was divided into two packages, an Upstream Area Work and a Downstream Area Work. The Joint Venture of M/s Jaiprakash Industries Limited and M/s Statkraft Anlegg AS, subsequently amalgamated with M/s Jaypee Cement Limited and came to be known as M/s Jaiprakash Associates Limited, the respondent herein, also submitted its bid to the tender floated by the petitioner on 19th August 1995 and were awarded the work for the two packages on 3rd March 1997.

c. Accordingly, on 9th April 1997, the parties entered into a Contract, wherein the scope of work awarded was delineated including the time for completion of the work. However, due to certain hindrances, the respondent was not able to complete the work within the stipulated term of 33 months. Time extensions were also granted to the respondent to complete the work and hence, the project which was to be completed till the year 2000 was extended till 2007.

d. On 11th May 2007, the certificate of completion was issued to the respondent. Accordingly, the final bill for the two packages was also furnished by the respondent.

e. In the said bills produced by the respondent, there were additional costs which were said to have been incurred by the respondent. The respondent claimed a total amount of Rs. 360.56 Crores, which was rejected by the petitioner vide letter dated 25th January 2010 on the grounds that, first, the extension granted were as per the General Conditions of Contract entered into between the parties, second, the claim was not maintainable since it was put forth by M/s Jaiprakash Association Limited, whereas it was not an entity when the Contract was executed, and third, the respondent herein had submitted no claim undertaking as demanded by the petitioner. The respondent objected to the ground taken by the petitioner.

f. In the background of the aforesaid discrepancies, the respondent herein invoked Clause 39.2 of the Contract and invoked dispute resolution mechanism of arbitration to resolve and amicably settle the issues between the parties.

g. Accordingly, an Arbitral Tribunal was constituted comprising of three Arbitrators, including a Presiding Arbitrator, and arbitration proceedings were initiated between the parties.

h. Upon completion of pleadings and conclusion of arguments, the learned Tribunal passed the Minority and Majority Award dated 7th October 2019, which came to be corrected on 18th December 2019.

i. The petitioner, being aggrieved of both the Minority and Majority Award has approached this Court by way of the instant petition.

SUBMISSIONS

3. The learned counsel appearing on behalf of the parties were heard at length on the instant petition. Both the sides have also filed their written submissions, which are on record. A joint consideration of the arguments advanced, the pleadings as well as the written submissions sets out the following objections on behalf of the parties qua the dispute in question.

On behalf of the Petitioner

4. The learned counsel appearing on behalf of the petitioner submitted that the impugned Award has been passed in manifest disregard and in derogation of the binding terms of the Contract, on grounds of equity, rendering it as much assailable and liable to be set aside under Section 34(2)(b) and 34(2A) of the Act. It is submitted that the Award violates and derogates Section 28 and 31 of the Act.

5. It is submitted that the impugned Award is patently illegal as it is in violation of the statutory provisions viz. Section 28(3) of the Act which specifically mandates the arbitrator to adjudicate the dispute in accordance with the terms of the contract entered into between the parties. However, in the instant case, the learned Tribunal has overlooked the express terms of Contract as well as the documents placed before it.

6. The impugned Award granted an Award of Rs. 60 Crores for additional costs on account of overstay at the site of the work. It is submitted that the said Award was granted on the basis of “reasonable and proper estimate” despite holding that the respondent did not properly put forth its case and even though it was not possible for the Tribunal to indicate the amounts payable. This is contrary to the settled law that the arbitrator is bound to give a reasoned order and should not make an award based on equity.

7. It is further submitted that the Award is against the public policy of India as the claims by the respondent herein are barred by limitation in terms of the Limitation Act, 1963, since the claims arose during the period of execution of the Contract, which concluded on 11th May 2007 when the certificate of completion was issued. As per Clause 32.3 of the Contract, the respondent failed to submit the final bill within 30 days of issuance of the said completion certificate. Moreover, the respondent failed to submit any claim for additional costs during the currency of the Contract and raised the claim after more than 8 years since the grant of EOT-1.

8. The learned counsel submitted that it is an undisputed fact that the claims of the respondent relate to additional work done outside the contract price and therefore, the period of limitation for invoking the arbitration clause would be governed by Article 18 of the Schedule of the Limitation Act. The cause of action for invoking the arbitration clause arose when the work for the price of which the arbitration clause has been invoked was completed, which operated from the year 2000 to 2007, and therefore, invocation of the arbitration clause on 16th November 2010 is barred by the law of limitation.

9. The respondent was under obligation to invoke arbitration within three years of each breach, which would constitute a distinct cause of action. Hence, the claims of the respondent were barred in terms of Article 18, 55 and 137 of the Schedule to the Limitation Act, 1963.

10. The learned counsel for the petitioner submitted that the works were awarded at rates 85% higher than the estimated costs because the respondent offered to complete the works in a lesser period than the other bidders. As per the contract, the work was to be completed within 33 months, however, the respondent failed to complete the same within the said stipulated time.

11. The Arbitral Tribunal failed to appreciate the settled position of law that if a contract clearly states that after submission of the final bill no further claims can be submitted then, it is for the awarder of the contract to measure, check and make payment. After the submission of the final bill, no further or subsequent claims can be made by the contractor. If such claims cannot be made by the contractor, disputes regarding the same are not arbitrable. Claims after submission of final bill are barred and, therefore, no dispute can be raised with respect to such claims.

12. The learned Arbitral Tribunal failed to appreciate that the Respondent had no right to invoke the arbitration clause on the ground that the claim was under Section 70 of the Indian Contract Act, 1872. Therefore, adjudication of the claims of the respondent was beyond the jurisdiction of the Arbitral Tribunal. Moreover, the Arbitral Tribunal failed to appreciate that its mandate was circumscribed by the written Contract inter se the parties and being a creature of the contract, the learned Arbitral Tribunal was not permitted in law and/or otherwise to resile from the same and re-write the contract between the parties. Thus, allowing the claims of the respondent amounted to re-writing of the Contract, which is beyond the jurisdiction the Arbitral Tribunal.

13. It is submitted that the instant case is a case of no evidence and no reasoning, where the Arbitral Tribunal has passed the Award without appreciating the material before it, without giving any observations based on the documents and without substantiating the observations and the Award thereto.

14. There were delays caused in the completion of the Project, according to the respondent, which were on account of natural causes. Clause 37.1 of the General

Conditions of Contract (GCC) states that in this event loss sustained by party shall be borne by them. Further, Clause 8 and 10.2 of GCC and 8 of ITT state that the contractor shall be deemed to have inspected, examined and satisfied with site surroundings and environment. The respondent also submitted a "Warranty" to this effect. The Arbitral Tribunal ignored the aforesaid provisions and erroneously awarded the claims in favour of the respondent. It is a settled position of law that arbitrator cannot decide contrary to the terms of the Contract. Further, the Arbitral Tribunal failed to appreciate the evidence that the respondent gave an express No-Claim Undertaking vide letter dated 3rd June 2006.

15. The respondent never alleged any breach or delay attributable to the petitioner in extension of time, therefore, it was precluded from arguing that the claim was based on Section 55 or 73 of the Indian Contract Act. Furthermore, the respondent miserably failed to establish a link between the alleged hindrances and any breach by the petitioner giving rise to any cause of action. It is submitted that Arbitral Tribunal failed to appreciate that since the delay events were not attributable to either party, no cost claim can be granted except for grant of extension of time as stated in terms of Clause 25 and 37 of the Contract. The learned Tribunal failed to appreciate that the respondent was estopped from bringing the claim in view of the fact that it had waived its right to do so by way of furnishing the undertaking dated 3rd June 2006.

16. Relying upon the judgment of National Highways Authority of India V. M. Hakeem & Anr., 2021 SCC Online SC 473, Cybernetics Network Pvt. Ltd. & Ors. v. Bisquare Technologies Pvt. Ltd., 2012 SCC OnLine Del 1155, Mcdermott International Inc. v. Burn Standard Co. Ltd, (2006) 11 SCC 181 and Managing Director v. Asha Talwar, 2009 SCC Online All 624 the learned counsel for the petitioner submitted that law has been settled that Section 34 of the Act does not extend the power of Courts to modify or vary an award. It has also been settled that the Minority Award is merely a dissenting opinion. It is submitted that the opinion of the Minority Arbitral Tribunal is not binding and has no bearing on the rights and obligations of the parties. In terms of Section 31(2) of the Act, the impugned Minority Award is liable to be set aside and cannot be construed as an Award. Therefore, modification sought by the respondent in its Section 34 petition is prima facie misconceived and meritless. Further, it is barred by limitation in terms of Section 34(3) as it was filed after a delay of 147 days.

17. Therefore, it is submitted that the impugned Award may be set aside for being patently illegal and liable to be set aside.

On behalf of the Respondent

18. The learned senior counsel for the respondent vehemently opposed the instant petition and submitted that there is no merit in the objections raised to the impugned Award by the petitioner and hence, the same is liable to be dismissed.

19. It is submitted that the delay in carrying out the work and the completion thereto, was caused due to adverse geological conditions, law and order situation in the erstwhile Jammu & Kashmir and hence, the same was not attributable to the respondent. Due the said hindrances, the project was completed in 119 months instead of 33 months. Therefore, the respondent had to remain at the site and also retain all its resources for execution and completion of the work which resulted in huge expenditure which the respondent had to incur which was not envisaged at the time of the bid.

20. The respondent sought extension of time at different occasions when the work could not be carried out within the time frame for reasons not attributable to the respondent. The petitioner appreciating the adverse geological conditions and prevailing law and order situation acknowledged the facts brought before it by the respondent and granted the extension of time. The petitioner, therefore, not only allowed extension of time but also permitted price adjustment on the value of work done during this period up to 31st July 2006, without levy of any liquidated damages. This is clear from petitioner's letter dated 2nd May 2006. However, while granting extension of time, the petitioner unilaterally imposed the condition that the respondent must furnish an undertaking to the effect that it shall not raise any claim for the reasons/grounds against which time extension was granted. The respondent submitted its reservations against such an undertaking but it was of no help as the petitioner had refused to clear pending payments to the respondent, unless the aforesaid undertaking was furnished.

21. It is submitted that the respondent furnished the undertaking since it was at a crucial juncture and in dire need of money to continue with the works, therefore, it had no other option but to furnish the undertaking. Accordingly, the same was furnished by the respondent vide its letter dated 3rd June 2006 and only thereafter, the payments to the respondent were released by the petitioner.

22. The respondent stayed at the site for an additional 86 months than the stipulated time which resulted in incurring substantial costs towards time-related expenses, head office expenses, etc. related expenses and head office expenses include costs such as camp construction, its maintenance, consultancy, visit of experts, salary and emoluments of managerial staff, local conveyance, general administration, office expenses, etc., which were incurred in the extended period and which were not part of the bid/quoted amounts. Accordingly, the respondent, vide its letter dated 19th October 2009 submitted its claim and requested the petitioner to release the additional cost incurred by it during the extended period, which came to be rejected by the petitioner vide letter dated 25th January 2010.

23. It is submitted that the Arbitral Tribunal, by way of both Majority and Minority Award, rightly held that the respondent was entitled for the additional costs incurred due to the overstay. The Arbitral Tribunal granted the costs on reasonable estimates.

24. The respondent has also filed its objection by way of an OMP (COMM) 505/2020 wherein it has assailed the impugned Award on the quantum of the Majority Award. However, there is no challenge to the finding that the respondent is entitled to additional costs.

25. Therefore, it is prayed that the instant petition be dismissed for being devoid of merit.

26. Heard the learned counsel for the parties at length and perused the record.

FINDINGS AND ANALYSIS

27. The petitioner has invoked Section 34 of the Act for raising objections to the impugned Award. A consideration of the submissions raised on behalf of the parties and contentions raised in the pleadings, the controversy in the instant case is largely narrowed down to findings of the Arbitral Tribunal in the impugned Award regarding additional costs granted to the respondent towards the overstay at the site of work.

28. A perusal of the aforesaid facts and submissions shows that the petitioner"s objections to the Award are two-fold. At the first instance, the petitioner has argued that the instant is a case of no-evidence as the Arbitral Tribunal has made the Award of additional costs of Rs. 60 Crores without any substantiating documents, material or evidence. Secondly, the petitioner has argued that, in the absence of any substantiating evidence for the amount granted, the Arbitral Tribunal was barred by law to pass an award on the basis of equity under Section 28 of the Act since there was no express consent for passing an award on equity as per the mandate of the said provision. Based on the said two objections, it is submitted that the Award being patently illegal is liable to be set aside.

29. The Majority Award notes that the claim of the respondent before the Arbitral Tribunal was limited to the amount which was said to be due on account of overstay at the site due to reasons not attributable to the respondent. The petitioner has not challenged the Award in its entirety but has only assailed the findings passed in the Award where the learned Arbitral Tribunal has awarded an amount of Rs. 60 Crores for additional costs to the respondent for overstay at the site. Therefore, the issues which shall determine the propriety or impropriety of the impugned Award before this Court are as follows:

I. Whether the findings of the Arbitral Tribunal qua additional costs are based on no evidence or no reasons.

II. Whether the Arbitral Tribunal was barred in terms of the Act and the Contract between the parties to pass the Award on the basis of equity and good conscience.

30. Accordingly, these issues are considered hereinafter for proper adjudication of the objections brought before this Court by the petitioner.

ISSUE NO. I

31. It has been repeatedly stated by the Hon”ble Supreme Court that the scope of interference of a Court in an award passed by an arbitral tribunal is limited by the mandate of Section 34 of the Act. There are a few grounds which, when invoked and established, allow the Court to interfere with an arbitral award. The Arbitration Act was enacted for providing a mechanism to the public to resolve their disputes in a process less rigorous, technical and formal than that of a litigation. It has proven to be easier, more accessible, efficient and even cost effective for the parties involved, whether at an individual level or at the level of a business or corporation. The alternative dispute mechanism is not only advantageous for the people involved in disputes but has also been aiding the effective disposal and release of burden on the Courts of the Country. To fulfil the objective of introducing the Act, it has been deemed necessary by the legislature as well as the Hon”ble Supreme Court to limit interference by the Courts in the process of arbitration, whether before, during or after the conclusion of the proceedings.

32. An arbitral tribunal, which in its wisdom, passes an award, upon conducting the arbitration proceedings with the participation of parties to the dispute, considering the Statement of Claim and Statement of Defence presented by and on behalf of the parties, the relevant documents placed on record by the parties, is considered a Court for the purposes of adjudicating the dispute before him. An unfettered intervention in the functioning of the arbitral tribunal would defeat the spirit and purpose of the Act.

33. Therefore, the Hon”ble Supreme Court, by way of various judgments, has laid down the grounds for which an arbitral award may be interfered with by the Court. Keeping in view the principle of limited and restricted intervention by the Courts, the decisive test for validity of an award is rigorous. The Court is to see whether the party which is aggrieved by an arbitral award is able to show that the award suffers from illegality, which is patent, on the face of the record, and of the nature which shocks the conscience of the Court. The intent is also to see whether the findings given by a tribunal are such that no reasonable person could arrive at that conclusion. Thereafter, the tests, as elaborately laid down by the Hon”ble Supreme Court in Associate Builders vs. DDA, (2015) 3 SCC 49, have become extensive and the Courts are required to see whether the award against which objections under Section 34 of the Act are brought before Court or the findings of the said award are against the public policy, the fundamental policy of India, are not supported by reasons unless otherwise agreed between the parties etc. The case of the petitioner before this Court is that the findings and conclusion of the Tribunal of awarding a sum of Rs. 60 Crores towards additional costs in favour of the respondent is patently illegal since it is clear that the same is not supported by material or evidence.

34. The principle of no evidence and no reasons emanates from Section 31 of the Act, which under Sub-section 3 provides as under:

“31. Form and contents of arbitral award.—

(3) The arbitral award shall state the reasons upon which it is based, unless—

(a) the parties have agreed that no reasons are to be given,

or

(b) the award is an arbitral award on agreed terms under section 30.”

35. Therefore, there is an obligation on the arbitral tribunal to state reasons for its award unless the parties have expressly agreed to the contrary or if the parties have settled their disputes and the arbitration proceedings are terminated as a consequence. It is hence incumbent, as provided under the provision, that the arbitral tribunal concerned passes an award which is supported by reasons.

36. The Hon”ble Supreme Court in State of Rajasthan & Ors. v. Ferro Concrete Construction Pvt. Ltd., (2009) 12 SCC 1, regarding the validity of an award made without evidence held as under:

“55. While the quantum of evidence required to accept a claim may be a matter within the exclusive jurisdiction of the arbitrator to decide, if there was no evidence at all and if the arbitrator makes an award of the amount claimed in the claim statement, merely on the basis of the claim statement without anything more, it has to be held that the award on that account would be invalid. Suffice it to say that the entire award under this head is wholly illegal and beyond the jurisdiction of the arbitrator, and wholly unsustainable.”

37. The Hon”ble Supreme Court in the said judgment held in clear and unequivocal terms, that stating reasons and evidence to support a finding is essential with regard to findings pertaining to quantum of any claim along with the finding on the validity of that claim. A decision on a claim and its rightful quantum must be backed and supported by reasons and must not only be a reiteration of the claims raised by a party.

38. In Som Datt Builders Ltd. vs. State of Kerala, (2009) 10 SCC 259, the Hon”ble Supreme Court was of the following opinion:

“20. Section 31(3) mandates that the arbitral award shall state the reasons upon which it is based, unless—(a) the parties have agreed that no reasons are to be given, or (b) the award is an arbitral award under Section 30. …

21. In Union of India v. Mohan Lal Capoor [(1973) 2 SCC 836 : 1974 SCC (L&S) 5] this Court said: (SCC p. 854, para 28)

“28. … Reasons are the links between the materials on which certain conclusions are based and the actual conclusions.”

22. In Woolcombers of India Ltd. v. Workers' Union [(1974) 3 SCC 318 : 1973 SCC (L&S) 551 : AIR 1973 SC 2758] this Court stated: (SCC pp. 320-21, para 5)

"5. ... The giving of reasons in support of their conclusions by judicial and quasijudicial authorities when exercising initial jurisdiction is essential for various reasons. First, it is calculated to prevent unconscious unfairness or arbitrariness in reaching the conclusions. The very search for reasons will put the authority on the alert and minimise the chances of unconscious infiltration of personal bias or unfairness in the conclusion. The authority will adduce reasons which will be regarded as fair and legitimate by a reasonable man and will discard irrelevant or extraneous considerations."

23. In S.N. Mukherjee v. Union of India [(1990) 4 SCC 594 : 1990 SCC (Cri) 669 : 1991 SCC (L&S) 242 : (1991) 16 ATC 445] the Constitution Bench held that recording of reasons

"(i) guarantee consideration by the authority; (ii) introduce clarity in the decisions; and (iii) minimise chances of arbitrariness in decision-making." (SCC p. 612, para 35)

25. The requirement of reasons in support of the award under Section 31(3) is not an empty formality. It guarantees fair and legitimate consideration of the controversy by the Arbitral Tribunal. It is true that the Arbitral Tribunal is not expected to write a judgment like a court nor is it expected to give elaborate and detailed reasons in support of its finding(s) but mere noticing the submissions of the parties or reference to documents is no substitute for reasons which the Arbitral Tribunal is obliged to give. Howsoever brief these may be, reasons must be indicated in the award as that would reflect the thought process leading to a particular conclusion. To satisfy the requirement of Section 31(3), the reasons must be stated by the Arbitral Tribunal upon which the award is based; want of reasons would make such award legally flawed."

39. The Hon"ble Supreme Court has held that an award which does not give out any reason is patently illegal. The said observation was passed in Associate Builders (Supra) as under:

"42.2. (b) A contravention of the Arbitration Act itself would be regarded as a patent illegality - for example if an arbitrator gives no reasons for an award in contravention of Section 31(3) of the Act, such award will be liable to be set aside."

40. The judgment passed in Associate Builders (Supra) is one of the most comprehensive judgments decoding Section 34 of the Act and settling the law on the objections which may be raised against an arbitral award. With patent illegality being one of the principal grounds for interfering with an arbitral award by a Court,

the judgment holds that an award without reasons shall be considered an award patently illegal and hence liable to be set aside. It is hence clear that the requirement of stating reasons while passing an award is indispensable, with the only exception being the consensus amongst the parties involved. Any award passed without the support of reasons is thus considered a legally flawed award and may be interfered with by the Court on the said ground.

41. In the judgment of PSA SICAL Terminals (P) Ltd. v. Board of Trustees of V.O. Chidambranar Port Trust Tuticorin, 2021 SCC OnLine SC 508, the Hon"ble Supreme Court observed as under:

"43. It will thus appear to be a more than settled legal position, that in an application under Section 34, the court is not expected to act as an appellate court and reappreciate the evidence. The scope of interference would be limited to grounds provided under Section 34 of the Arbitration Act. The interference would be so warranted when the award is in violation of "public policy of India", which has been held to mean "the fundamental policy of Indian law". A judicial intervention on account of interfering on the merits of the award would not be permissible. However, the principles of natural justice as contained in Section 18 and 34(2)(a)(iii) of the Arbitration Act would continue to be the grounds of challenge of an award. The ground for interference on the basis that the award is in conflict with justice or morality is now to be understood as a conflict with the "most basic notions of morality or justice". It is only such arbitral awards that shock the conscience of the court, that can be set aside on the said ground. An award would be set aside on the ground of patent illegality appearing on the face of the award and as such, which goes to the roots of the matter. However, an illegality with regard to a mere erroneous application of law would not be a ground for interference. Equally, reappreciation of evidence would not be permissible on the ground of patent illegality appearing on the face of the award.
44. A decision which is perverse, though would not be a ground for challenge under "public policy of India", would certainly amount to a patent illegality appearing on the face of the award. However, a finding based on no evidence at all or an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside on the ground of patent illegality.

45. To understand the test of perversity, it will also be appropriate to refer to paragraph 31 and 32 from the judgment of this Court in Associate Builders (supra), which read thus:

"31. The third juristic principle is that a decision which is perverse or so irrational that no reasonable person would have arrived at the same is important and requires some degree of explanation. It is settled law that where:

(i) a finding is based on no evidence, or

(ii) an Arbitral Tribunal takes into account something irrelevant to the decision which it arrives at; or

(iii) ignores vital evidence in arriving at its decision, such decision would necessarily be perverse.

32. A good working test of perversity is contained in two judgments. In Excise and Taxation Officer-cum-Assessing Authority v. Gopi Nath & Sons [1992 Supp (2) SCC 312], it was held : (SCC p. 317, para 7)

"7. ... It is, no doubt, true that if a finding of fact is arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant material or if the finding so outrageously defies logic as to suffer from the vice of irrationality incurring the blame of being perverse, then, the finding is rendered infirm in law."

In Kuldeep Singh v. Commr. of Police [(1999) 2 SCC 10 : 1999 SCC (L&S) 429], it was held : (SCC p. 14, para 10)

"10. A broad distinction has, therefore, to be maintained between the decisions which are perverse and those which are not. If a decision is arrived at on no evidence or evidence which is thoroughly unreliable and no reasonable person would act upon it, the order would be perverse. But if there is some evidence on record which is acceptable and which could be relied upon, howsoever compendious it may be, the conclusions would not be treated as perverse and the findings would not be interfered with."

42. In Dyna Technologies Pvt. Ltd. v. Crompton Greaves Ltd., 2019 SCC OnLine SC 1656, the Hon"ble Supreme Court laid down the following observation:

"36. The mandate under Section 31(3) of the Arbitration Act is to have reasoning which is intelligible and adequate and, which can in appropriate cases be even implied by the Courts from a fair reading of the award and documents referred to thereunder, if the need be. The aforesaid provision does not require an elaborate judgment to be passed by the arbitrators having regards to the speedy resolution of dispute."

43. A perusal of the aforesaid judgements shows that an award based on no evidence is foundationally patently illegal and may not be sustained by a Court adjudicating objections to the same.

44. Reason is the soul of justice. Any order passed, in the exercise powers vested in an authority, must be speaking. As goes the judicial precedents, an order disposing of an application necessarily requires recording of reasons in support of the conclusions arrived at in the order and failure to give reasons tantamount to denial of justice.

45. While exercising jurisdiction under Section 34 of the Act, so long as the findings of the arbitrator are supported by reasoning, a Court is not to examine the validity of reasons provided by an arbitrator. The only test in this respect remains whether the arbitrator has provided any reasons for the conclusion reached at and not whether such reasoning is sound. The Hon”ble Supreme Court in the case titled Anand Brothers (P) Ltd. vs. Union of India & Ors., (2014) 9 SCC 212, has settled the position in this regard.

46. The principle shall now be applied to the facts of the instant case and the contents of the Award impugned in the instant petition. The relevant portion of the Award is as under:

“It must be appreciated that what we are concerned with is an estimate of the Additional cost that must have been incurred by the Claimant on account of overstaying for more than 80 months at the site, along with his machinery, equipment, labour and all other incidental items. Precise ascertainment is not possible since the said amount was not claimed during the currency of the contract and was therefore not estimated simultaneously with other expenses incurred from time to time which expenses were audited by the statutory auditor. Had the Claimant so claimed during the implementation of the contract, the amount of additional cost could probably have been ascertained with some level of accuracy. Now, more than two years after the work has been completed, an estimate is sought to be made. For this purpose, while the Claimant bases its claim on the estimates prepared or approved by the Auditors and the certificates said to have been issued by the Auditors, on the basis of accounts of the Claimant for the years 2001 to 2007 (which have not been proved according to law, as pointed put hereinbefore, the Respondent seeks to arrive at the estimate applying CWC guidelines which too have not been properly proved/ explained by the Respondent's witness (RW 1). The difference between the two figures - one by the Claimant and the other by the Respondent - is too vast. There is also no material before us to decide whether the Time related cost claimed by the Claimant is part of Overheads, as asserted by the Respondent or not. According to CWC guidelines extracted in the Defence Statement, overhead charges do include "office expenses". Probably "Head office expenses" are included within the ambit of office expenses". It is equally relevant to notice that time extensions were granted mainly for HRT work and not for other works. How was the ratio of expenditure between HRT and other works - set out in the Rejoinder filed by the Claimant – was determined is also a relevant aspect, which has remained unexplained. Then, there is the issue of depreciation. The Respondent stated that the machinery/equipment made over to the Claimant, by the Respondent at the Inception of the contract, had already earned depreciation for several (six) years and that the Claimant can claim depredation only for one year, whereas the Claimant says that this machinery/ equipment was "refurbished" by the

Claimant and hence he is entitled to claim depreciation. No material has been placed before us in support of 'refurbishing' except oral assertions. Undoubtedly, the Claimant had claimed depreciation on all relevant machinery/ equipment during the years 2001 to 2007. in the respective years and. had availed Now, the claim in effect is for additional depreciation for overstaying on a retrospective basis. Not only depreciation, the Claimant has claimed "escalation" on depredation - the basis of which is not clear. The Respondent further says rightly that the claim for depreciation too, if any, has to be restricted to HRT work only since the extension of time was mainly with regard to HRT only. In short, case put-forward by the Claimant cannot be said to have been properly explained and / or established by it. Even so, in the light of the undeniable fact that the Claimant had to overstay at the site, together with his equipment etc. wherever it may be, for a period of more than 80 months beyond the scheduled period, must necessarily have caused additional cost/expense to it, which has to be recompensed, even though the Respondent was also not responsible for the said overstay - as discussed hereinbefore.

The Claimant has claimed Additional costs under three heads as mentioned above, the Respondent has, however, disputed the said categorization into three heads and says that there are only two heads of expenses. In the light of the imperfect evidence led by the Claimant, it is not possible for the Tribunal to indicate the amounts payable to the Claimant separately under each head - whether there are three heads or two heads, as the case may be. Be that as it may, having regard to all the aforementioned circumstanc.es including the pleadings, oral and documentary evidence adduced by the parties and merits and demerits of each party''s case, we are of the opinion that an amount of Rs. 60,00 Crores (Rupees sixty crores only), (as the additional cost incurred by the Claimant on account of overstay at the site) would be a reasonable and proper estimate."

47. A perusal of the relevant portion of the Award shows that the Majority Tribunal clearly noted that the respondent failed to produce any material basis which the quantum of the award could be arrived at. In the absence of any material substantiating the claim of the respondent, which was originally of more than 300 Crores, was decided to be fixed at 60 Crores. This amount of compensation has been fixed despite there being a clear contradictory finding that the case put forward by the respondent herein was not established. At this juncture, this Court refers to the judgment passed by the Calcutta High Court in State of West Bengal vs. Tapas Kumar Hazra, AP 1036/2011 dated 25th August 2022, wherein it was found the arbitral tribunal had given award in contradiction to its findings and hence it was set aside for the same reason.

48. Every judicial authority is required to apply its mind to the case at hand while adjudicating the same, and to furnish the reasons for its findings. An arbitral

tribunal is also considered a court for the purposes of adjudication of claims before it and is often subject to the requirement of providing reasons while granting a party any relief, not for the purposes of adjudicating the validity of an order but for the satisfaction, understanding and notional justice for all the parties involved. In the instant case, providing reasons was imperative especially because the learned Arbitral Tribunal specifically noted that the claimant, i.e. respondent herein, had not properly established its case and also that the petitioner herein was not responsible for the overstay of the respondent at the site. Without fixing responsibility of payment of compensation, a significant amount of Rs. 60 Crores, without any basis, has been levied upon the petitioner.

49. Certainly, there is nothing in the language of the Award which shows that any reasonable considerations to the claim have been given to say that the respondent was entitled to a sum of Rs. 60 Crores. As per the mandate of law, by the plain reading of the Section 31(3) of the Act and by the reference to judicial pronouncement reproduced above, it is evident that the case of the petitioner falls under the principle of no-evidence. The Arbitral Tribunal has failed to delineate and specify any reason for fixing the amount of Rs. 60 Crores as additional cost in favour of the respondent and against the petitioner.

50. Accordingly, this Court finds force in the case presented on behalf of the petitioner qua Issue No. I.

ISSUE NO. II

51. The second issue which remains for the consideration of this Court is that whether the Arbitral Tribunal could pass an award, after observing that there was no material on record to substantiate the claims of the respondent, on the basis of equity.

52. To adjudicate upon this issue, it is pertinent to reproduce the relevant provision, that is, Section 28(2) of the Act, which reads as under:

“28. Rules applicable to substance of dispute. —

(2) The arbitral tribunal shall decide ex aequoet bono or as amiable compositeur only if the parties have expressly authorised it to do so.”

53. The provision refers to the legal principle of ex aequo et bono which in its literal translation means “according to the right and good”. The spectrum of what may be considered to be done in observance of equity and conscience is exceptionally wide. The principle in itself may allow an adjudicating authority to grant or deny diverse and dynamic variety of reliefs or penalties. Therefore, a check on decisions based on equity is imperative.

54. The principle refers to the universal and eternal principle of equity and good conscience. The grant of claim of compensation, especially, often stands on the

principles of equity, good conscience and natural justice. However, the ancient principle of ex aequo et bono although considered a benefactor, is often circumvented when it comes to arbitration proceedings.

55. The principle is not only applied domestically all over the world but has gained wide recognition in international law as well and universally, this kind of consideration typically requires the consent of all parties. The provision under Section 28(2) of the Act clearly stipulates that the arbitral tribunal may act on the principle of ex aequo et bono, or equity and good conscience, only when the parties expressly authorize it to do so. The keyword here is "only" which places an express bar on the Tribunal to act and award anything solely on the basis of equity.

56. The Courts of the Country have expressed their opinion on the principle and its applicability. In P. Radhakrishna Murthy v. National Buildings Construction Corp. Ltd., (2013) 3 SCC 747, the Hon"ble Supreme Court had held as under:

"15. The High Court has rightly held that the arbitrator is not a conciliator and his duty is to decide the disputes submitted to him according to the legal rights of the parties and not according to what he may consider to be fair and reasonable. The High Court has further rightly made observation in the impugned judgment1 that an arbitrator cannot ignore law or misapply it, nor can he act arbitrarily, irrationally, capriciously or independent of the contract while passing the award. The courts of law have a duty and obligation to maintain purity of standards and preserve full faith and credit as well as to inspire confidence in the minds of litigants while adjudicating the claims of the parties by resorting to alternate dispute redressal method of arbitration under the provisions of the Arbitration Act."

57. Recently, in DMRC vs. Kone Elevators India (P) Ltd., 2021 SCC OnLine Del 5048, this Court held as under:

"50. It is also relevant to refer to Section 28(2) of the A&C Act. The Arbitral Tribunal might decide "ex aequo et bono or as amiable compositeur" only if the parties have expressly authorized it to do so and not otherwise. The phrase "ex aecquo et bono" means according to equity and conscience. It empowers the arbitrator to dispense with consideration of the law and to take decisions on notions of fairness and equity. The term "amiable compositeur" is a French term and means an unbiased third party who is not bound to apply strict rules of law and who may decide a dispute according to justice and fairness. In view of Section 28(2) of the A&C Act, the Arbitral Tribunal was required to decide the disputes in accordance with law and not render a decision in disregard of the same, in the interest of justice and equity."

58. The Bombay High Court in Board of Control for Cricket in India vs. Deccan Chronicle Holdings Ltd., 2021 SCC OnLine Bom 834, held as under:

"229. At a minimum, one would have expected an arbitral tribunal asked to decide on a question of "unfair discrimination" to address itself to the private law/public law interface. The Award has none. It simply assumes the investiture in it of those powers, and the power to invoke public law principles, in aid of an astonishing conclusion — that a party making out a case need not put in a sufficient pleading. There is so thorough a logical disconnect here that the finding is not even stateable:"because a public law principle is invoked, therefore the objection as to lack of pleading is rejected". The finding is not implausible. It is impossible.

(e) The Arbitrator as "amiable compositeur" : decision ex aequo et bono

230. Sections 28(2) and 28(3) of the Arbitration Act say:

(2) The arbitral tribunal shall decide ex aequo et bono or as amiable compositeur only if the parties have expressly authorised it to do so.

(3) While deciding and making an award, the arbitral tribunal shall, in all cases, take into account the terms of the contract and trade usages applicable to the transaction.

(Emphasis added)

231. We also find both these provisions reflected in Article 28 of the UNCITRAL model law and the UNCITRAL 2010 Rules.

232. Mr. Mehta points out that the terms ex aequo et bono and amiable compositeur have a specific legal connotation. The first means "according to what is equitable (or just) and good". A decision-maker (especially in international law) who is authorized to decide ex aequo et bono is not bound by legal rules and may instead follow equitable principles. An amiable compositeur in arbitration law is an arbitrator empowered by consensus of parties to settle a dispute on the basis of what is "equitable and good".

233. Given the wording of the Arbitration Act, a longer examination of the antecedents of these concepts is unnecessary. The statute itself is clear and unambiguous; and in Associate Builders, the Supreme Court in paragraph 42.3 extracted Section 28 and said that a contravention of it is a sub-head of patent illegality. Ssangyong Engineering does not change this position. Given this now-settled position in law, it is unnecessary to examine the additional authorities on which Mr. Mehta relies, all to the same effect. They also say this : commercial arbitrators are not entitled to settle a dispute by applying what they conceive is "fair and reasonable," absent specific authorization in an arbitration agreement. Section 28(3) also mandates the arbitral tribunal to take into account the terms of the contract while making and deciding the award. Section 28 is applicable to all stages of proceedings before the arbitral tribunal and not merely to the making of the award. Under Section 28(2), the

Arbitral Tribunal is required to decide ex aequo et bono or as amiable compositeur only if the parties expressly authorize it to do so. The Arbitrator is bound to implement the contractual clauses and cannot go contrary to them. He cannot decide based on his notions of equity and fairness, unless the contract permits it."

59. Therefore, the position is no more res integra that in the absence of an express authorization an arbitrator shall not act merely on the principles of justice, equity and good conscience. The law prevailing shall be applied justly, duly and impartially, before reaching a conclusion and granting a monetary relief of compensation to a party.

60. In the instant case, it is evident that the parties had not expressly authorized the Arbitral Tribunal to act on the principle of equity. The express bar of the Tribunal prohibited the Tribunal to pass an award on the basis of equity. A perusal of the portion of the Award, which is reproduced as above, shows that the Tribunal has done exactly so. When the respondent herein failed to produce any material before the Tribunal to substantiate its claims of costs and the quantum thereof, which has been categorically observed by the Tribunal in its findings, the Tribunal proceeded with granting an award based on estimates and equity after taking note of the absence of any evidence or material.

61. This is expressly in contradiction to the mandate of Section 28(2) of the Act. The Tribunal was barred from acting in the manner as it did in absence of an express authority by the parties. Neither in the contract nor by way of any communication it has been shown that the Tribunal was authorized to act on the basis of equity. Therefore, there is force in the arguments on behalf of the petitioner that the learned Tribunal was barred from granting an award ex aequo et bono.

62. Accordingly, in terms of Issue No. II, this Court finds that the Tribunal has acted beyond the mandate of law.

CONCLUSION

63. During the course of the arguments, the learned counsel for the petitioner did not press upon the objections pertaining to the counter claims decided by the Arbitral Tribunal. Therefore, limiting itself to the questions and objections raised to the grant of additional costs, this Court has only adjudicated upon the issue pressed. Moreover, the law is settled regarding a Minority Award being a mere supporting Award, and it has no sanction and is neither binding in nature. Hence, the said impugned Award passed by the Minority Tribunal is not entered into to complicate the proceedings, the law regarding which stands absolutely settled.

64. Keeping in view the aforesaid facts, circumstances, contentions raised on behalf of the parties, arguments advanced, law reiterated and analysis made, this Court is of the considered view that findings of the Tribunal pertaining to the grant of

additional cost must not survive.

65. The impugned Award does not set forth the reasons for the grant of award of additional costs of Rs. 60 Crores in favour of the respondent and against the petitioner. At the first instance, there was no material on record to substantiate the quantum of the additional costs claimed and at the second stage, it was not within the scope of the Arbitral Tribunal to grant an award on the basis of estimates made on equity.

66. It is also noted that the respondent has raised objections to findings in the Award qua the quantum of the additional costs granted in the favour of the respondent and has accordingly filed OMP (COMM) 505/2020 under Section 34 of the Act. Hence, it is evident that the respondent is also is also aggrieved of the findings given by the Tribunal.

67. Therefore, considering the entirety of the matter and the analysis made in the foregoing paragraphs, this Court is inclined to set aside the Award qua additional costs of Rs. 60 Crores granted in favour of the respondent herein, i.e., Jaiprakash Associates Limited.

68. Accordingly, the instant petition is allowed to the extent that the findings in the impugned Award dated 7th October 2019, corrected on 18th December 2019, qua additional costs of Rs. 60 Crores granted in favour of the respondent herein, i.e., Jaiprakash Associates Limited, is set aside.

69. The petition is allowed in the terms as aforesaid and pending applications, if any, stand disposed of.

70. The judgment be uploaded on the website forthwith.