Arunoday Developers Vs Gemini Arts Private Ltd., Green Gardens Private Limited and Justice Sri S. Ramalingam (Retired)

Court: Madras High Court

Date of Decision: Aug. 7, 2009

Acts Referred: Arbitration and Conciliation Act, 1996 â€" Section 11, 19, 28, 31, 31(3)
Constitution of India, 1950 â€" Article 14
Contract Act, 1872 â€" Section 23, 73
Evidence Act, 1872 â€" Section 1, 101, 102, 34, 67
Tamil Nadu Town and Country Planning Act, 1971 â€" Section 11(3)

Hon'ble Judges: P. Jyothimani, J

Bench: Single Bench

Advocate: Malini Ganesh, for the Appellant; T.V. Ramanujun for Y.N. Venkatraj, for Respondents 1 and 2, for the Respondent

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

P. Jyothimani, J.
This original petition is filed u/s 34 of the Arbitration and Conciliation Act, 1996 (for brevity, ""the Act"") against the award

of the learned Arbitrator dated 3.2.2007, granting the claimant before the Arbitral Tribunal an amount of Rs. 14,00,000/- and Rs. 90,11,070/-, in

total Rs. 1,04,11,070/- with interest at the rate of 6% from the date of the award till payment. The claimant before the Arbitral Tribunal has filed

this original petition.

2. The brief facts leading to the filing of the arbitration proceedings are as follows:

2.1. Respondents 1 and 2, which are Companies, owned lands in the city and wanted to promote the lands as commercial complex by name ""The

City Centre Point"". The petitioner is a property developer who wanted to extend area of its operation to Chennai. The said respondents have

represented to the petitioner that they will obtain necessary planning permission from the authorities concerned for construction of basement and

ground floor to third floor and have put up the construction accordingly and subsequently, obtained sanction for raising multistoried construction up

to 10 floors and that they were interested to assign the right of construction from fourth to tenth floors in favour of third party developers.

2.2. The petitioner has agreed to take up the construction right of fourth to tenth floors. Accordingly, the Development Agreement was entered on

17.3.1988 and the work was entrusted to the petitioner for a consideration of Rs. 2,88,22,140/-. As per the development agreement, the

construction was to the extent of 1,87,180 sq.ft. of FSI. A sum of Rs. 1,44,11,070/- which represents 50% of the total consideration was to be

paid by the petitioner on behalf of respondents 1 and 2 to the material suppliers involved in the supply of materials to the respondents up to third

floor. The balance 50% was agreed to be paid as follows: viz., (i) Rs. 14,00,000/- to be paid before the execution of the agreement, (ii) Rs.

90,11,070/- payable on signing the agreement; and (iii) Rs. 40,00,000/- payable on or before 13.4.1988. The Development Agreement dated

17.3.1988 and a memo of consideration dated 17.3.1988 formed part of the agreement.

2.3. It is stated that the petitioner has paid Rs. 1,10,61,070/- out of the 50% payable directly to respondents 1 and 2 and that apart the petitioner

has spent an amount of Rs. 73,44,618/-, which includes the payment made to the material suppliers on behalf of respondents 1 and 2. The

petitioner is stated to have spent a total amount of Rs. 1,84,05,688/- towards payments to respondents 1 and 2 under the Development

Agreement. The construction right from fourth to tenth floors became vested in the petitioner upon such payment. However, respondents 1 and 2

have informed that sanction in respect of fourth to tenth floors was withdrawn by the Government and there was considerable delay and it was at

that time respondents 1 and 2 executed a Supplementary Agreement dated 25.7.1990, agreeing to allot to the petitioner 35,450 sq.ft. of

constructed area comprised in 29 units in ground to third floor that was being constructed by them.

2.4. The Supplementary Agreement dated 25.7.1990 was entered into taking note of the delay in respect of the contractual obligations under the

Development Agreement and Rs. 2,02,16,000/- was agreed under the Supplementary Agreement as consideration for allotment of 29 units of

constructed portion from ground to third floor to the extent of 35,450 sq.ft. and 50% of the basement as car parking area. Respondents 1 and 2

also reserved the right to buy back the said allotted extent if they obtain revalidation on or before 30.6.1991 and on failure to perform the said

obligation of getting revalidation of sanction, the 29 units would vest with the petitioner. Respondents 1 and 2, who were not able to obtain

revalidation, by letter dated 13.6.1991 have confirmed allotment of 29 units stated above with specific earmarked portions.

2.5. However, respondents 1 and 2, thereafter, issued a legal notice on 23.5.1992 stating that there is a change in the management of the

respondents and there was no possibility of getting revalidation and wanted to drop the project. Since there was no termination clause, the

petitioner questioned the conduct of the respondents by way of reply dated 29.6.1992. Therefore, according to the petitioner, the present

Management of the respondents was aware of the Supplementary Agreement and they, by letter dated 1.8.1992, have requested the petitioner to

await the result of the writ proceedings filed in respect of the plan.

2.6. From the notification of the MMDA in the newspaper dated 26.10.1995, the petitioner came to know that respondents have unauthorisedly

proceeded to put up construction up to tenth floor without involving the petitioner, which is a total breach of Development Agreement as well as

Supplementary Agreement. The petitioner also learnt that respondents 1 and 2 have borrowed heavily from the Indian Bank. The petitioner issued

a legal notice on 19.5.1997 about the breach committed by respondents 1 and 2 of the Development Agreement and Supplementary Agreement

and invoked the arbitration clause.

2.7. Since respondents 1 and 2 have been prolonging, an application u/s 11 of the Act was filed before this Court and an arbitrator was appointed.

In the meantime, the petitioner also moved an application u/s 9 of the Act and this Court has passed an order dated 24.12.1997 in O.A. Nos. 566

and 567 of 1997 granting injunction against respondents 1 and 2 from in any manner dealing with the property or interfering with the ownership of

the petitioner in respect of 29 units and 50% of the basement area.

2.8. After filing of the claim statement and reply statement and rejoinder, the petitioner also filed additional documents and let oral evidence. The

respondents have not filed any document or let any evidence. The synopsis of the arguments were directed to be submitted before the Arbitral

Tribunal, which was submitted by the petitioner on 17.6.2006 and by respondents 1 and 2 on 12.9.2006 and thereafter, the learned Arbitrator

passed the award on 3.2.2007.

2.9. The award has proceeded mainly on the two issues, viz., (i) whether the petitioner had paid any amount to the respondents?; and (ii) whether

the Supplementary Agreement was true and valid?. The learned Arbitrator has found that the Supplementary Agreement is suspicious and has not

considered the amounts stated to have been indirectly paid by the petitioner on behalf of the respondents, even though accepted two out of three

payments made by the petitioner. However, interest was awarded on the said amount only from the date of the award.

3. The award is questioned on various grounds, including:

(i) that there is an erroneous statement of fact to the effect that the petitioner has abandoned the contract and therefore, the respondents undertook

to finish the work in respect of fourth to tenth floors;

(ii) that the Arbitral Tribunal has held the Supplementary Agreement not acceptable having failed to take note of the fact that respondents 1 and 2

have not let in any evidence and the Arbitral Tribunal should have drawn an adverse inference against respondents 1 and 2 instead of placing

reliance on the arguments of respondents 1 and 2;

(iii) that the Arbitral Tribunal has failed to take note of the fact that while the Development Agreement was executed on 17.3.1988 and

immediately thereafter the Supplementary Agreement was entered on 25.7.1990, during the time when the construction activities were going on,

and chose to state that long after the construction, the Supplementary Agreement was brought, which creates suspicion that the material evidence

has not been considered by the Arbitral Tribunal;

(iv) that the Arbitral Tribunal has erred in stating that the Supplementary Agreement was not placed before the Board of Directors of the

respondents while that was not the pleading of the respondents at all;

(v) that the letter of allotment dated 13.6.1991 itself would show that the Supplementary Agreement was acted upon;

(vi) that the Arbitral Tribunal has relied upon the written arguments submitted by the respondents long after, i.e., on 12.9.2006 and passed the

award based on the written arguments;

(vii) that the Arbitral Tribunal ought to have considered that the main relief claimed is in respect of the right vested on the petitioner regarding 29

units to an extent of 35,450 sq.ft., including 50% of the car parking area, which was pursuant to the Supplementary Agreement dated 25.7.1990;

(viii) that the Arbitral Tribunal has failed to appreciate that, if respondents 1 and 2 plead fraud, they should have proved and there is absolutely no

proof on the side of respondents 1 and 2 in respect of the alleged fraud regarding the Supplementary Agreement;

(ix) that the award has been passed in disregard of Sections 28 and 31 of the Act; and

(x) that even in respect of the finding given in favour of the petitioner the award of interest at the rate of 6% from the date of award has no reason

at all.

4. The case of respondents 1 and 2 in the counter affidavit is:

(i) that the memo of consideration dated 17.3.1988 does not constitute a proof for payment and as per the memorandum an amount of Rs.

1,44,11,070/- is to be adjusted against the construction of ground to third floors and another sum of Rs. 40,00,000/- was to be paid, and the said

amounts were not paid and therefore, it is not correct for the petitioner to state as if the petitioner has spent Rs. 1,84,05,688/- and therefore, the

Arbitral Tribunal has found that the petitioner has failed to prove the indirect payment stated to have been made in respect of material suppliers and

since the petitioner has not paid the entire consideration, the petitioner cannot claim as a matter of right the construction right in respect of fourth to

tenth floors;

(ii) that the cancellation of permission was because of the Government Order and the order of the Hon''ble Supreme Court, which is beyond the

control of respondents and that when the performance of the Development Agreement became impossible there is no necessity for Supplementary

Agreement at all and therefore, the fixation of Rs. 2,02,16,000/- as consideration for allotment of 29 units of the constructed area and 50% of the

basement as car parking area are denied stating that the Supplementary Agreement is vitiated by fraud and the allotment letter dated 13.6.1991,

which is 15 days prior to the last date for revalidation is dubious in nature;

(iii) that after the Indian Bank, which is the main bank of respondents 1 and 2, invited the present promoter to take over the

respondents/Companies, notices were sent to all allottees terminating the agreement due to impossibility of performance of contract in view of the

Government Order as well as the order of the Hon''ble Supreme Court;

(iv) that when it is the case of the petitioner that after the Development Agreement they have established a site office, the petitioner has nevertheless

chosen to state as if they came to know about the construction up to tenth floor based on the caution notice issued by the MMDA in the Hindu,

which is false;

(v) that the Arbitral Tribunal has given a finding that the petitioner has approached belatedly and therefore, the rate of interest cannot be disputed

taking note of the delay caused by the petitioner;

(vi) that the petitioner failed to furnish any documentary proof for payment of money directly to the material suppliers and also failed to prove the

Supplementary Agreement supported by consideration for value of Rs. 2,02,16,000/- even though the respondents have questioned the

Supplementary Agreement and allotment letter at the earliest point of time; and

(vii) that since the performance of contract became impossible, there is no question of any claim of compensation and the Arbitral Tribunal has

correctly decided the same.

5.1. Mrs. Malini Ganesh, learned Counsel appearing for the petitioner would submit that respondents 1 and 2 have not let in any evidence or

produced any document while the petitioner has substantiated the entire claim and the Arbitral Tribunal decided the issue based on the reply filed

by the respondents belatedly. It is her submission that when the oral evidence has been permitted there is no reference to the same in the award.

5.2. It is her contention that the Development Agreement having not been disputed it is not open to the respondents to dispute the Supplementary

Agreement. She would submit that the finding of the Arbitral Tribunal that the Supplementary Agreement is suspicious is uncalled for.

5.3. She would further submit that when fraud is alleged the same has to be proved beyond reasonable doubt and the Arbitral Tribunal has not

taken note of the same.

5.4. To substantiate her contentions, she would rely upon the following judgments:

(i) Oil and Natural Gas Corporation Ltd. Vs. SAW Pipes Ltd., ;

(ii) McDermott International Inc. v. Burn Standard Co. Ltd. and Ors. 2006 (2) ALR 498 (SC);

(iii) AIR 1936 70 (Privy Council) ;

(iv) AIR 1941 93 (Privy Council) ;

(v) AIR 1940 98 (Privy Council) ;

(vi) Govinda Naik Gurunath Naik v. Gururao Puttanbhat Kadekar since deceased by L.Rs. Mrs. Padmavathi Gururao Kadekar and Ors. AIR

1971 Mysore 330;

(vii) Govindram Gordhandas Seksaria and Anr. v. State of Gondal by His Highness the Maharaja of Gondal and Ors. AIR 1950 PC 99;

(viii) Shri Krishnan Vs. The Kurukshetra University, Kurukshetra, ; and

(ix) Vijay Packaging (Dissolved Firm), rep. by its Former Partner Mr. R. Thiagarajan v. Spectra Packs Pvt. Ltd., Madras and Anr. 2002 (3) ALR

44 (Mad) (DB).

6.1. On the other hand, Mr. T.V. Ramanujun, learned Senior Counsel appearing for the respondents would submit that, on the facts of the case, it

is clear that the initial burden vested on the petitioner has not been discharged. It is stated that the copies of the agreements, which are produced

before the Arbitral Tribunal, are the photo stat copies attested and the petitioner has not taken any steps to prove that the original copies are not

available and in the absence of producing the originals it should be taken that the petitioner has not discharged the initial burden. He would also

submit that when photo stat copies attested of the original documents are filed there is a possibility of manipulation. He would also question the

veracity of the stamp papers on which the Supplementary Agreement has been entered, which has resulted in the suspicious character. It is his

contention that the Supplementary Agreement itself has not been proved by examining the person concerned.

6.2. It is his submission that u/s 34 of the Act, while deciding about the award, this Court cannot re-appreciate evidence even if another view is

possible and in spite of it, the Arbitral Tribunal has taken one view and it is not for the Court to interfere.

6.3. According to him, there is no violation of principles of natural justice before the Arbitral Tribunal.

6.4. He would rely upon the judgments in:

(i) J. Naval Kishore Vs. D. Swarna Bhadran, J. Parasmul, P. Prasanth Kumar and M. Vijayakumar, ;

(ii) Ircon International Limited v. Arvind Construction Company Limited and Anr. 2000 (1) RAJ 111 (Delhi);

(iii) Tamil Nadu Civil Supplies Corporation Ltd., Chennai-10 Vs. M/s Albert and Co., Egmore, Chennai-8, ;

(iv) Sarkar Enterprise Vs. Garden Reach Shipbulders and Engineers Ltd., ;

(v) Brick Steel Enterprises Vs. The Superintending Engineer, Public Works Department, ;

(vi) Union of India v. India Proofing and General Industries, Kanpur 2000 (2) RAJ 502 (Bom);

(vii) India Tourism and Development Corporation Ltd. v. T.P. Sharma 2002 (3) RAJ 360 (Delhi);

(viii) Kanha Credit and Holding Pvt. Ltd. Vs. Janacim Electronics, ;

(ix) Larsen and Toubro v. Puri Construction Limited and Ors. 2009 (1) RAJ 654 (Delhi);

(x) Himachal Joint Venture v. Panilpina World Transport (India) Pvt. Ltd. 2008 (4) RAJ 669 (Delhi);

(xi) Gurdeep Kaur v. C.K. Bedi and Anr. 2008 (4) RAJ 448 (Delhi);

(xii) National Highways Authority of India v. Afcons Infrastructure Limited 2008 (4) RAJ 381 (Delhi);

(xiii) Delhi Development Authority v. Anand and Associates 2008 (2) RAJ 594 (Delhi);

(xiv) Govt. of NCT of Delhi Vs. Shri Khem Chand and Another, ;

(xv) Anil Rishi Vs. Gurbaksh Singh, ;

(xvi) Thyssen Stahlunion GmbH Vs. The Steel Authority of India, ;

(xvii) Em and Em Associates Vs. Delhi Development Authority and Another, ; and

(xviii) S.P. Puri v. Alankit Assignments Ltd. 2009 (1) RAJ 243 (Delhi).

7. I have heard the learned Counsel for the petitioner and the learned Senior Counsel for the respondents, perused the documents as well as the

pleadings and given my anxious thoughts to the issue involved in this case.

8. It is seen, on fact, that respondents 1 and 2, which are companies connected to each other, owned 13 grounds and 18.03 sq.ft. and 7 grounds

and 597 sq.ft. in Mylapore. They have applied for the sanction of construction of a multistoried building and that was sanctioned in G.O.Ms. No.

1729, dated 16.11.1987 and respondents 1 and 2 have put up part construction in the basement and three floors. The agreement entered into

between the petitioner and the respondents, which is called a Development Agreement, shows that the petitioner has approached respondents 1

and 2 to acquire the rights to construct from fourth to tenth floors in the complex named ""The City Centre Point"" and it was agreed that the cost

payable by the petitioner towards consideration, for the transfer by the respondents in respect of 1,87,180 sq.ft. of FSI has to be worked out at

the rate of Rs. 153/- per sq.ft. of FSI and that in respect of the basement car parking area, the same has to be enjoyed equally in common

between the petitioner and the respondents and the cost has to be borne on the same basis, viz., 50% to be met by the petitioner and the remaining

50% by the respondents, and the petitioner has agreed to acquire the said construction right for a consideration of Rs. 2,86,38,540/-.

9. In respect of the agreed consideration, which was to be paid, the petitioner paid an advance amount of Rs. 14,00,000/- and another amount of

Rs. 90,11,070/- at the time of signing of the agreement, which amount has also been found by the Arbitral Tribunal to have been paid by the

petitioner to respondents 1 and 2 and another amount of Rs. 40,00,000/- was to be paid on or before 13.4.1988, stating that if there is any delay

the petitioner shall be liable to pay interest at the rate of 24% per annum and a further sum of Rs. 1,44,11,070/- was to be paid by the petitioner

directly to the material suppliers involved in the supply of materials for the construction up to third floor on behalf of respondents 1 and 2.

10. While the petitioner has paid the first two amounts of Rs. 14,00,000/- and Rs. 90,11,070/-, the balance amount has not been paid due to the

reason that the Government has issued a show cause notice dated 28.4.1989 questioning the validity of construction from fourth to tenth floors and

subsequently, withdrew the sanction in respect of fourth to tenth floors based on the order of the Hon''ble Supreme Court.

11. It is the case of the petitioner, as a claimant before the Arbitral Tribunal, that it was due to the above said reason a Supplementary Agreement

was entered on 25.7.1990 between the petitioner and respondents 1 and 2, in which it was agreed that the petitioner and respondents 1 and 2

shall jointly agitate the matter in the Court against the show cause notice of MMDA and in the meantime, respondents 1 and 2 have agreed to allot

in the basement to third floor, which was by that time put up by respondents 1 and 2, in favour of the petitioner or its nominees 29 units containing

35,450 sq.ft. valued at Rs. 2,02,16,000/- and the consideration for the transfer of the said units was agreed by respondents 1 and 2 to be set-off

against the claims of the petitioner.

12. As per the said Supplementary Agreement, there is a further clause that the petitioner shall have the first charge and/or lien over the said units

till revalidation of the MMDA sanction to the fourth to tenth floors is obtained before 30.6.1991 and if such revalidation is obtained, the units shall

stand released from the charge and the petitioner shall handover the allotment letters to the respondents, in which event the petitioner, being

developer, should pay the balance amount to the respondents in terms of the Development Agreement dated 17.3.1988 and continue the

construction from fourth to tenth floors. In case of failure to obtain revalidation of MMDA sanctioned plan, the units shall be deemed to have

vested with the petitioner. Therefore, it was the case of the petitioner, as a claimant before the Arbitral Tribunal, that the said Supplementary

Agreement dated 25.7.1990 was made due to contingency and the relief claimed is that, since as per the Supplementary Agreement revalidation of

MMDA plan was not obtained by the respondents regarding the construction of fourth to tenth floors, the petitioner is entitled to vesting of 29 units

comprised in 35,450 sq.ft., including 50% of car parking area, also claiming that the said units must be made fit for use and occupation or direction

to be given to the respondents to pay the amount towards the cost of completion of such works in the ground to third floors. In addition to that

compensation has been claimed by the petitioner on the basis of deprivation of the right to construct fourth to tenth floors, apart from claiming

interest for all the said amounts payable.

13. On the other hand, it was squarely the case of respondents 1 and 2 before the Arbitral Tribunal that the petitioner has paid only the first

amount of Rs. 14,00,000/- and no further amount was paid. However, the Arbitral tribunal, based on Ex.C3, viz., memorandum of consideration

entered into between the parties, and taking note of the fact that respondents 1 and 2 have not filed any books of accounts relating to the

transactions, has decided that the second amount of Rs. 90,11,070/- has also been paid by the petitioner to respondents 1 and 2. Therefore, on

fact, it was found that apart from an amount of Rs. 14,00,000/- paid by the petitioner as per Ex.C2, viz., the Development Agreement dated

17.3.1988, the petitioner has paid another amount of Rs. 90,11,070/- under Ex.C3, thus making a total payment of Rs. 1,04,11,070/- and in the

absence of any challenge on the side of respondents 1 and 2 in respect of the said two payments, it has to be taken that the finding of fact by the

Arbitral Tribunal regarding payment of the said amount remains uncontroverted.

14. It has been the further case of respondents 1 and 2 before the Arbitral Tribunal that, after the sanction was withdrawn by the Government

based on the MMDA notification in respect of the construction from fourth to tenth floors, the petitioner has abandoned the contract since any

such construction would be liable to be demolished and therefore, respondents 1 and 2 themselves have undertaken at their own risk to finish the

remaining portion of ground to third floors, apart from fourth to tenth floors. It is also found, on fact, that the petitioner has not put up construction

from fourth to tenth floors and the said floors are in skeleton form.

15. Respondents 1 and 2 have also taken a specific stand before the Arbitral Tribunal, while denying the Supplementary Agreement dated

25.7.1990, that the previous Managing Director, who had no right has signed in the Supplementary Agreement by anti-dating the same. Therefore,

in such a situation, the Arbitral Tribunal has rightly taken up two issues for consideration, viz.,

(i) whether the claimant (petitioner) had paid any amount to the respondents, if so what amount; and

(ii) whether the supplemental agreement is true and valid.

16. As stated above, in respect of the first issue, the Arbitral Tribunal has found, on fact, agreeing with the petitioner that as per Exs.C2 and C3,

an amount of Rs. 14,00,000/- and Rs. 90,11,070/- respectively has been paid to respondents 1 and 2. In respect of the second issue, viz.,

Supplementary Agreement dated 25.7.1990, the Arbitral Tribunal found that the said agreement is suspicious and was not acted upon. To arrive at

such a conclusion, the Arbitral Tribunal has taken note of the fact that the Government which has granted exemption to respondents 1 and 2 from

the provisions of the Development Control Rules in G.O.Ms. No. 1729, Housing and Urban Development, dated 16.11.1987, has issued a show

cause notice as to why exemption should not be withdrawn and the said show cause notice was issued by the MMDA on 28.4.1989, which was

nearly sixteen months after the exemption granted. It is not in dispute that when the said show cause notice was challenged in the High Court, the

same was given a quietus due to the decision of the Supreme Court in a batch of cases challenging the validity of Section 11(3) of the Tamil Nadu

Town and Country Planning Act, wherein the Supreme Court has struck down various Government Orders, including the G.O.Ms. No. 1729,

dated 16.11.1987.

17. It was taking note of the said fact, the Arbitral Tribunal has found that there was no necessity for such a Supplementary Agreement dated

25.7.1990, apart from finding that the same is suspicious. The Arbitral Tribunal has also found, on fact, that there was no evidence to show that the

said Supplementary Agreement was placed before the Board of Directors of respondents 1 and 2/Companies. The Arbitral Tribunal has also

taken note of the stand of respondents 1 and 2 that the erstwhile Managing Director of respondents 1 and 2/Companies has acted in collusion with

the petitioner and the erstwhile Managing Director, Palaniappan Ramasamy has no authority to enter into any such Supplementary Agreement.

These are the findings on fact by the Arbitral Tribunal, which, in my considered view, need no interference.

18. It is relevant to point out that it is not as if respondents 1 and 2 have not denied the validity of the Supplementary Agreement. In the reply filed

by respondents 1 and 2 before the Arbitral Tribunal, they have taken a specific stand that the execution of the Supplementary Agreement dated

25.7.1990 is a collusive action of the erstwhile Managing Director of respondents 1 and 2 and the petitioner and that the said agreement is hit by

fraud. That apart, the allotment letter dated 13.6.1991, marked as Ex.C5, is also specifically denied in the reply. Even in the legal notice issued by

respondents 1 and 2 dated 23.5.1992 addressed to the petitioner, marked as Ex.C6, respondents 1 and 2 have invoked Clause 18 of the

Development Agreement dated 17.3.1988 for revocation due to impossibility of performance.

19. It is true that by way of reply dated 29.6.1992 to the said notice, the petitioner, through their counsel, has referred about the said

Supplementary Agreement dated 25.7.1990 and also the letter dated 13.6.1991, which is stated to be the allotment letter of various portions. But,

in the light of the specific denial of the allotment letter as well as the Supplementary Agreement, especially in the circumstances that, by that time,

by virtue of the order of the Hon''ble Supreme Court and the State Government Order the object of putting up fourth to tenth floors has in fact

frustrated, the onus was certainly on the part of the petitioner to prove that the Supplementary Agreement dated 25.7.1990 is valid and has been

acted upon. It is not in dispute that in the meantime the constitution of the Board of respondents 1 and 2 has changed and the previous Managing

Director, Palaniappan Ramasamy was no more in the Management of the Company.

20. It is relevant to point out that in the original Development Agreement dated 17.3.1988, the Directors of both the first and second respondent

companies, viz., Palaniappan Ramasamy and K. Mohamad Ali have signed along with the authorized signatory of the petitioner, however in the

Supplementary Agreement dated 25.7.1990, relied upon by the petitioner, marked as Ex.C4, which is stated to be a photostat copy-attested,

shows that the said Palaniappan Ramasamy, who has signed as Palaniappan Ramasamy in the Development Agreement dated 17.3.1988, has

chosen to sign as Ramasamy in Ex.C4, Supplementary Agreement. That apart, there is nothing to show that he has signed on behalf of respondents

1 and 2/companies. Further, the Director of M/s. Green Gardens Private Limited has not signed. The non-judicial stamp paper also does not

contain any number, date or signature of the authorized agent. In such circumstances, it would have been proper on the part of the petitioner to

examine the said Palaniappan Ramasamy or to prove that he was authorized to sign on behalf of respondents 1 and 2 on the date of execution of

Ex.C4, the Supplementary Agreement.

21. A comparison of the original Development Agreement dated 17.3.1988 and Supplementary Agreement dated 25.7.1990 certainly creates a

suspicion, apart from the fact that the signature of the said Ramasamy itself has been put below the term ""second party"". Therefore, it cannot be

said that the petitioner has proved the said document.

22. u/s 67 of the Indian Evidence Act, 1872, secondary evidence could be looked into only when the non production of original is satisfactorily

explained. Based on that, a Division Bench of this Court in J. Naval Kishore Vs. D. Swarna Bhadran, J. Parasmul, P. Prasanth Kumar and M.

Vijayakumar, , of course in the context of a family arrangement in respect of which a xerox copy was sought to be produced, held as under:

44. For more than one reason, we are unable to accede to the above contention. During trial, only Xerox copy of the alleged family arrangement

[Ex.P-8] was produced. Though the original is said to be in the possession of Shri Sumerji brother-in-law [sister''s husband], neither the original

was produced, nor the Shri Sumerji was examined. As per Section 67 of the Evidence Act, unless the non-production of original is satisfactorily

explained, secondary evidence cannot be looked into. The possibility of manipulation in Xerox copy cannot be ruled out. In The Tamil Nadu

Industrial Investment Corporation Ltd., Chengai Transport Branch, rep. by its Branch Manager v. N. Swaminathan and Ors. 2003 (1) CTC 33 :

2002 (4) LW 147, one of us [F.M.I.K.J.] has observed that xerox copy is inferior in character vis-a-vis the originals and held as under:

It will have to be borne in mind that xerox copies will not always tally with the originals and we cannot rule out the possibility of any interpolation

being made in the xerox copies. In other words, xerox copies being inferior in character vis-a-vis originals, the dispensation of filing of the originals

can be considered only under exceptional circumstances and not as a matter of routine.

23. In Anil Rishi Vs. Gurbaksh Singh, , the Supreme Court has distinguished between ""burden of proof"" and ""onus of proof"" as follows:

19. There is another aspect of the matter which should be borne in mind. A distinction exists between a burden of proof and onus of proof. The

right to begin follows onus probandi. It assumes importance in the early stage of a case. The question of onus of proof has greater force, where the

question is which party is to begin. Burden of proof is used in three ways : (i) to indicate the duty of bringing forward evidence in support of a

proposition at the beginning or later; (ii) to make that of establishing a proposition as against all counter evidence; and (iii) an indiscriminate use in

which it may mean either or both of the others. The elementary rule is Section 101 is inflexible. In terms of Section 102 the initial onus is always on

the plaintiff and if he discharges that onus and makes out a case which entitles him to a relief, the onus shifts to the defendant to prove those

circumstances, if any, which would disentitle the plaintiff to the same.

24. In such circumstances, it cannot be said that the decision arrived at by the Arbitral Tribunal can be interfered under any one of the grounds

contemplated u/s 34 of the Act.

25. Again, in respect of the claim of damages by the petitioner, the Arbitral Tribunal has held that by virtue of the order of the Supreme Court in

setting aside the exemption granted by the Government, the construction of the building could not be finished due to reasons beyond the control of

the parties and therefore, the petitioner was not entitled to any damages. In fact, Clause 24 of the Development Agreement dated 17.3.1988

specifically states that the parties shall not be liable for any breach in cases of force majeure, which is beyond the reasonable control of the owners

and the developer. Clause 24 reads as follows:

24. OWNERS and DEVELOPER shall not be considered to be in breach of any obligations hereunder to the extent that the performance of the

relative obligation is prevented by the existence of a force majeure, with a view that the obligation effected by the force majeure shall be suspended

for the duration of the force majeure to the extent affected by the force majeure.

Force Majeure"" shall mean flood, earthquake, riot, war, storm, tempest, civil commotion, strike, lock-out and any other act or omission beyond

the reasonable control of the OWNER and DEVELOPER.

26. The Supreme Court in Oil and Natural Gas Corporation Ltd. Vs. SAW Pipes Ltd., , while deciding about the purport of Section 34 of the

Arbitration and Conciliation Act, apart from other provisions, as relied upon by the petitioner, has held that the terms of the contract are to be

taken into consideration for the purpose of deciding an issue, as follows:

69. From the aforesaid discussions, it can be held that:

(1) Terms of the contract are required to be taken into consideration before arriving at the conclusion whether the party claiming damages is

entitled to the same;

(2) If the terms are clear and unambiguous stipulating the liquidated damages in case of the breach of the contract unless it is held that such estimate

of damages/compensation is unreasonable or is by way of penalty, party who has committed the breach is required to pay such compensation and

that is what is provided in Section 73 of the Contract Act.

(3) Section 74 is to be read along with Section 73 and, therefore, in every case of breach of contract, the person aggrieved by the breach is not

required to prove actual loss or damage suffered by him before he can claim a decree. The Court is competent to award reasonable compensation

in case of breach even if no actual damage is proved to have been suffered in consequences of the breach of a contract.

(4) In some contracts, it would be impossible for the Court to assess the compensation arising from breach and if the compensation contemplated

is not by way of penalty or unreasonable, Court can award the same if it is genuine pre-estimate by the parties as the measure of reasonable

compensation.

In the said judgment, while considering about the public policy of India, as enshrined u/s 34 of the Act, the Supreme Court has, no doubt, held that

the Court, while deciding about the validity of the arbitral award, would be well within its right in upholding the challenge on the ground that it is in

conflict with the public policy of India. The operative portion is as follows:

27. On this aspect, eminent Jurist & Senior Advocate Late Mr. Nani Palkhivala while giving his opinion to ''Law of Arbitration and Conciliation''

by Justice Dr. B.P. Saraf and Justice S.M. Jhunjhunuwala, noted thus:

I am extremely impressed by your analytical approach in dealing with the complex subject of arbitration which is emerging rapidly as an alternate

mechanism for resolution of commercial disputes. The new arbitration law has been brought in parity with statutes in other countries, though I wish

that the Indian law had a provision similar to Section 68 of the English Arbitration Act, 1996 which gives power to the Court to correct errors of

law in the award.

I welcome your view on the need for giving the doctrine of ""public policy"" its full amplitude. I particularly endorse your comment that Courts of law

may intervene to permit challenge to an arbitral award which is based on an irregularity of a kind which has caused substantial injustice.

If the arbitral tribunal does not dispense justice, it cannot truly be reflective of an alternate dispute resolution mechanism. Hence, if the award has

resulted in an injustice, a Court would be well within its right in upholding the challenge to the award on the ground that it is in conflict with the

public policy of India.

27. But, it is not known as to what sort of public policy is involved in the facts of the present case. On the other hand, when the contract itself

provides for unforeseen circumstances, as stated above, wherein the obligations of the parties to the contract come to an end, by applying the

same to the facts of the present case wherein due to the contingency of the ultimate decision of the Supreme Court in withdrawing the exemption

granted by the State Government for putting up fourth to tenth floors, the concept of public policy is, in fact, taken care of in the impugned arbitral

award.

28. As far as the decision of the Arbitral Tribunal regarding the Supplementary Agreement, it may be true that the point in that regard could have

been analysed in more detail by the Arbitral Tribunal. But still, on the crux of the issue, the Arbitral Tribunal has formed an opinion on the factual

matrix. Simply because there can be another possible opinion in this regard cannot by itself be a ground for this Court to set aside the award u/s 34

of the Act. That was also the view of the Delhi High Court in Gurdeep Kaur v. C.K. Bedi and Anr. 2008 (4) RAJ 448 (Delhi), wherein the High

Court has reaffirmed the well celebrated concept that u/s 34 of the Act, the Court cannot sit in appeal over the award unless there is a jurisdictional

error, illegality or perversity. It was also held in that case that possibility of two views cannot be a ground to decide that there is an error apparent

on the face of the award by relying upon the judgments of the Supreme Court reported in M/s. Hind Builders Vs. Union of India, and Bijendra

Nath Srivastava (Dead) through LRs. Vs. Mayank Srivastava and others, . It was further held that the Court cannot substitute its own view on the

Arbitrator"s award, in the following words:

10. The Supreme Court in the case of Sudarsan Trading Co. v. The Government of Kerala and Anr. reported as AIR 1989 SC 890 held that

once there is no dispute as to the contract, what is the interpretation of that contract, is a matter for the Arbitrator to consider and decide, on which

the Court cannot substitute its own decision. If on a view taken of a contract, the decision of the arbitrator on certain aspects, is a possible view,

though perhaps not the only correct view, the award cannot be examined and set aside by the Court on the said ground.

11. It is also a settled legal proposition that where two views were possible, it could not be predicated that there was an error apparent on the face

of the award. (Refer: M/s. Hind Builders Vs. Union of India,). In Bijendra Nath Srivastava (Dead) through LRs. Vs. Mayank Srivastava and

others, , the view expressed by the Supreme Court was that the reasonableness of reasons given by the Arbitrator were not open to challenge and

that the proper approach would be for the Court to support the award.

29. Since, on the facts of the case, it cannot be said as if respondents 1 and 2 have admitted the Supplementary Agreement dated 25.7.1990, as it

is seen in various pleadings, the reliance placed on the decisions in Ramachandra Aiyar (deceased) and Others Vs. Ranganayaki Ammal and

Others, , and Ponnuswami Chettiar Vs. Kailasam Chettiar, by the learned Counsel for the petitioner have no application. The same is also

applicable to the judgment in Fauja Singh and Ors. v. Allah Ditta and Anr. AIR 1931 Lahore 722.

30. It is relevant to point out at this stage that before the Arbitral Tribunal the strict principles of CPC and Indian Evidence Act cannot be insisted,

as it is seen u/s 19 of the Act, which is as follows:

19. Determination of rules of procedure.:

(1) The arbitral tribunal shall not be bound by the Code of Civil Procedure, 1908 or the Indian Evidence Act, 1872.

(2) Subject to this Part, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting its proceedings.

(3) Failing any agreement referred to in Sub-section (2), the arbitral tribunal may, subject to this Part, conduct the proceedings in the manner it

considers appropriate.

(4) The power of the arbitral tribunal under Sub-section (3) includes the power to determine the admissibility, relevance, materiality and weight of

any evidence.

31. Again, the reliance placed on by the learned Counsel for the petitioner on the judgment of the Supreme Court in Shri Krishnan Vs. The

Kurukshetra University, Kurukshetra, has no application to the facts of the case on hand. In that case, the Supreme Court has held that if a person

on whom fraud is committed is in a position to discover the truth by due diligence, it should be construed that fraud is not proved on the basis that

it is neither a case of suggestio falsi nor suppressio veri. That was in the context of the University examinations wherein there was a duty on the part

of the Head of the Department of Law, before submitting the application forms to the University, to see that the form complied with all the

requirements of law and the Head of Department has not taken care in spite of the fact that there was sufficient time of four months available

before submitting the application to the University. It was in those circumstances held that the University authorities acquiesced in the infirmities

which the application form contained and allowed the student to appear for the examination and as per the statute in existence at that time, the

University had no power to withdraw the candidature of the student. It was in those circumstances, the Supreme Court made the following remark:

7. ... We find ourselves in complete agreement with the reasons given by the Madhya Pradesh High Court and the view of law taken by the

learned Judges. In these circumstances, therefore, once the appellant was allowed to appear at the Examination in May 1973, the respondents had

no jurisdiction to cancel his candidature for that examination. This was not a case where on the undertaking given by a candidate for fulfilment of a

specified condition a provisional admission was given by the University to appear at the examination which could be withdrawn at any moment on

the non-fulfilment of the aforesaid condition. If this was the situation then the candidate himself would have contracted out the statute which was for

his benefit and the statute therefore would not have stood in the way of the University authorities in canceling the candidature of the appellant.

Therefore, the said judgment relied upon by the learned Counsel for the petitioner has no application to the facts of the present case.

32. In the judgment in Vijay Packaging (Dissolved Firm), rep. by its Former Partner Mr. R. Thiagarajan v. Spectra Packs Pvt. Ltd., Madras and

Anr. 2002 (3) ALR 44 (Mad) (DB), relied upon by the learned Counsel for the petitioner, in fact, the Division Bench has held that the Indian

Evidence Act has no application to the arbitral proceedings and the observations of the Bench in paragraphs (11) and (12), which are as follows,

are, in fact, not in favour of the petitioner:

11. Counsel also relied upon the decision of the Apex Court in the case of Seth Thawardas Pherumal Vs. The Union of India (UOI), , wherein it

was observed that an arbitral award must be based upon the facts ascertained on the basis of evidence or on admission and cannot be found to

exist from a mere contention by one side, especially when they are expressly denied by the other.

12. The submission made by placing reliance on Section 34 of the Evidence Act is not very well founded as Section 1 of the Indian Evidence Act,

1872 provides that the Act applies to judicial proceedings in or before any Court, including Courts martial. The Act in terms does not apply to

arbitral proceedings. It is clear that the Arbitrator is not confined by the technical rules of evidence and so long as the basic principle of fairness and

the well established principles of evidence are not violated, it cannot be held that the Arbitrator has failed to act in accordance with law.

33. The finding of the Arbitral Tribunal that the Supplementary Agreement is suspicious cannot be said to be without any basis, for the reasons

which I have stated above, when there are lot of discrepancies between the original Development Agreement dated 17.3.1988 and the

Supplementary Agreement relied upon by the petitioner dated 25.7.1990 and in such view of the matter, the observation of the Division Bench of

the Karnataka High Court in Govinda Naik Gurunath Naik v. Gururao Puttanbhat Kadekar since deceased by L.Rs. Mrs. Padmavathi Gururao

Kadekar and Ors. AIR 1971 Mysore 330, wherein the Division Bench has observed as follows, is again of no help to the petitioner:

The party alleging fraud is bound to establish it by cogent evidence and even if he creates some suspicion that cannot be accepted as proof. Unless

the proved circumstances are incompatible with the hypothesis of the person charged with fraud having acted in good faith they cannot be

accepted as sufficient proof of fraud.

34. In McDermott International Inc. v. Burn Standard Co. Ltd. and Ors. 2006 (2) ALR 498 (SC), relied upon by the learned Counsel for the

petitioner, while construing the provisions of Section 34 of the Act, particularly as per the term ""public policy"", it was held that the test of public

policy should be that it should shock the conscience of the Court and it depends upon the nature of transaction and the statute. The Supreme Court

has held that on the public policy, the award can be set aside only if it is contrary to (a) fundamental policy of Indian Law; (b) interest of India; or

(c) justice or morality, in addition to patent illegality. The Supreme Court has held as follows:

Public Policy

61. In Renusagar Power Co. Ltd. Vs. General Electric Co., , this Court laid down that the arbitral award can be set aside if it is contrary to - (a)

fundamental policy of Indian Law, (b) the interests of India; or (c) justice or morality. A narrower meaning to the expression "public policy" was

given therein by confining judicial review of the arbitral award only on the aforementioned three grounds. An apparent shift can, however, be

noticed from the decision of this Court in Oil and Natural Gas Corporation Ltd. Vs. SAW Pipes Ltd., . This Court therein referred to an earlier

decision of this Court in Central Inland Water Transport Corporation Limited and Another Vs. Brojo Nath Ganguly and Another, , wherein the

applicability of the expression "public policy" on the touchstone of Section 23 of the Indian Contract Act and Article 14 of the Constitution of India

came to be considered. This Court therein was dealing with unequal bargaining power of the workmen and the employer and came to the

conclusion that any term of the agreement which is patently arbitrary and/or otherwise arrived at because of the unequal bargaining power would

not only be ultra vires Article 14 of the Constitution of India but also hit by Section 23 of the Indian Contract Act. In ONGC, this Court, apart

from the three grounds stated in Renusagar, added another ground thereto for exercise of the court"s jurisdiction in setting aside the award if it is

patently arbitrary.

62. Such patent illegality, however, must go to the root of the matter. The public policy violation, indisputably, should be so unfair and

unreasonable as to shock the conscience of the court. Where the Arbitrator, however, has gone contrary to or beyond the expressed law of the

contract or granted relief in the matter not in dispute would come within the purview of Section 34 of the Act. However, we would consider the

applicability of the aforementioned principles while noticing the merit of the matter.

63. What would constitute public policy is a matter dependant upon the nature of transaction and nature of statute. For the said purpose, the

pleadings of the parties and the materials brought on record would be relevant to enable the court to judge what is in public good or public interest,

and what would otherwise be injurious to the public good at the relevant point, as contradistinguished from the policy of a particular government.

[See State of Rajasthan and Others Vs. Basant Nahata,].

64. In ONGC, this Court observed:

31. Therefore, in our view, the phrase ""public policy of India"" used in Section 34 in context is required to be given a wider meaning. It can be

stated that the concept of public policy connotes some matter which concerns public good and the public interest. What is for public good or in

public interest or what would be injurious or harmful to the public good or public interest has varied from time to time. However, the award which

is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is likely to

adversely affect the administration of justice. Hence, in our view in addition to narrower meaning given to the term ""public policy"" in Renusagar

Power Co. Ltd. Vs. General Electric Co., , it is required to be held that the award could be set aside if it is patently illegal. The result would be -

award could be set aside if it is contrary to:

(a) fundamental policy of Indian law; or

(b) the interest of India; or

(c) justice or morality, or

(d) in addition, if it is patently illegal.

Illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy. Award

could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court. Such award is opposed to public policy and is

required to be adjudged void.

35. The proceedings of the Arbitral Tribunal are not governed by the procedure contemplated under the CPC or the Indian Evidence Act, as it is

made clear in the Arbitration and Conciliation Act, 1996, as stated above, and therefore, it is clear that the learned Arbitrator cannot be expected

to write a detailed judgment like the Court by elaborately discussing the various points and submissions and it is sufficient if the Tribunal arrives at a

finding on an overall situation and if it gives reasons for such conclusion. The sufficiency of reason is not for the Court to decide, as it was held by

S.K. Mahajan, J. in Ircon International Limited v. Arvind Construction Company Limited and Anr. 2000 (1) RAJ 111 (Delhi). The relevant

portion is as follows:

11. The next submission of the petitioner is that the arbitrator has ignored and disregarded the mandate of Section 31(3) of the Arbitration and

Conciliation Act, 1996 as it does not state the reasons upon which it was based. I am not in agreement with Mr. Singla inasmuch as the arbitrator

while deciding the issue before him has elaborately discussed the respective contentions of the parties and has given his reasons for arriving at the

decisions he has taken. The arbitrator is not expected to write judgment like a court of law but has only to state as to how he has come to the

finding arrived at by him. No particular form is required for giving reasons. The arbitrator is not expected to record at great length the

communications exchanged or submissions made by the parities nor he is expected to analyse the law and the authorities. It is sufficient for him to

explain what his findings are and how he reached at the conclusions. Sufficiency of reasons is not to be gone into by the Court. The arbitrator in

this case was an expert being a retired Financial Commissioner of the Railway Board and was appointed by the petitioner. He, after hearing the

parties, has given his decisions and also recorded reasons. May be, in the opinion of the petitioner, the arbitrator has not analyzed the law and has

not elaborately discussed the various contentions of the parties, but that in itself, in my opinion, is not sufficient to set aside the award of the

arbitrator. The arbitrator having given reasons for arriving at the decision taken in the award, there is no force in the submission of Mr. Singla that

award is liable to be set aside on any alleged ground.

36. On the facts of the present case, the learned Arbitrator, has taken a decision based on the overall situation, by assigning reasons and therefore,

I am of the considered view that it is not for this Court, exercising the jurisdiction u/s 34 of the Act, either to re-appreciate the evidence or to go

into the sufficiency of reason assigned by the learned Arbitrator.

37. Now, by referring to the provisions of the Act in relation to the setting aside of the arbitral award, Section 34(2) of the Act indicates various

circumstances for this Court to set aside the award, which are as follows:

34. Application for setting aside arbitral award.:

(1) ...

(2) An arbitral award may be set aside by the Court only if:

(a) the party making the application furnishes proof that:

(i) a party was under some incapacity, or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the

time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise

unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains

decisions on matter beyond the scope of the submission to arbitration:

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award

which contains decisions on matters not submitted to arbitration may be set aside; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement

was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this

Past; or

(b) the Court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii) the arbitral award is in conflict with the public policy of India.

Explanation.- Without prejudice to the generality of Sub-clause (ii) of Clause (b), it is hereby declared, for the avoidance of any doubt, that an

award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption or was in violation of

Section 75 or Section 81.

38. By applying the statutory provision to the facts and circumstances of the case, it is not possible to hold that the decision of the Arbitral Tribunal

is either patently illegal or opposed to public policy or perverse.

39. The restrictive power of this Court u/s 34(2) of the Act has been reiterated in series of judgments. A. Ramamurthi, J., as he then was, in Tamil

Nadu Civil Supplies Corporation Ltd., Chennai-10 Vs. M/s Albert and Co., Egmore, Chennai-8, , has observed as follows:

12. It is clear from Section 34(2) of the Arbitration and Conciliation Act that the award may be set aside by the court only under certain

contingencies. The party making the application must furnish proof that the party was under some incapacity or the arbitration agreement is not

valid under law or the party making the application was not given proper notice of the appointment of an arbitrator. According to Sub-clause (4),

the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions

on matters beyond the scope of the submission to arbitration and according to Section 34(2)(b), the party must establish that the arbitral award is

in conflict with the public policy of India. It is therefore, clear that only limited ground is available to enable the party to set aside the award passed

by the arbitrator. It is settled position of law that the award cannot be interfered with simply because another view is possible on the available

things. Only if the petitioner is able to establish that his case falls within the category of Section 34, this Court can interfere.

13. Normally, the general principles which the court dealing with the application to set aside the award has to consider, whether the view of the

arbitrator on the evidence is justified; the court has to confine itself to the restrictions enumerated therein and where the parties get the matter

adjudicated through the arbitrator of their own choice and the arbitrator gives a detailed award, the court can interfere in the decision only if the

conscience of the court is in any sense touched by palpable injustice. The Arbitrator is a Judge of the choice of the parties and his decision unless

there is an error apparent on the face of of the award which makes it unsustainable, is not to be set aside even the court as a court of law would

come to a different conclusion on the same facts. The court cannot reappraise the evidence and it is not open to the court to sit on the appeal over

the conclusion of the arbitrator. It is not open to the court to set aside a finding of fact arrived at by the arbitrator and only grounds on which the

award can be cancelled are those mentioned in the Arbitration Act. Where the arbitrator assigns cogent grounds and sufficient reasons and no

error of law or misconduct is cited, the award will not call for interference by the court in exercise of the power vested in it. Where the arbitrator is

a qualified technical person and expert, who is competent to make assessment by taking into consideration the technical aspects of the matter, the

court would generally not interfere with the award passed by the arbitrator.

40. It was held in Sarkar Enterprise Vs. Garden Reach Shipbulders and Engineers Ltd., that the Court cannot probe into the mental process of the

Arbitrator about sufficiency of evidence, holding that mere insufficient evidence cannot nullify an award. In the said judgment it was held as under:

5. Factually the petitioner made an agreement with the respondent basically for the purpose of making dredging work in dry dock so that the ship

can be brought In for the purpose of cleaning and push back to the water. Therefore, upon making such contract, one can require appropriate

performance of the contractor. Incapacity to perform obligation under the contract by a contracting party in distinct and different feature from

incapacity in law. The Court is concerned about second type of incapacity but not the first one. So far next point is concerned, the petitioner

contended that the Arbitrator''s decision in the matter is beyond the scope of the jurisdiction. The main contention of the petitioner is that the

Arbitrator being the Chairman-cum-Managing Director of the Respondent company cannot visualise the dredging work without making any sound

check. According to the petitioner sounding check should be produced from the log book for the purpose of coming to a conclusion which was

not done. I cannot probe the mental process of an Arbitrator in an application u/s 34 of the Arbitration and Conciliation Act, 1996 about

sufficiency of evidence. Had it been the case of no evidence there would have been element of consideration. Therefore insufficiency of evidence, if

any, cannot nullify the award.

41. That was also the view of the Bombay High Court in Union of India v. India Proofing and General Industries, Kanpur 2000 (2) RAJ 502

(Bom), wherein it was held as under:

7. The aforesaid award is a subject matter of challenge in the present petition. It is urged by the learned Counsel appearing for the petitioner that

the aforesaid award is liable to be quashed and set aside in exercise of power u/s 34 of the Arbitration and Conciliation Act, 1996 (for short ""Act"")

being in conflict with the public policy in India. The learned Counsel submitted that rejection of the claim set up by the petitioner has resulted in loss

to the public exchequer and, therefore, it would be in public interest to set aside the said award. I am afraid, this line of argument is not open on the

face of the provisions of Section 34 of the Act. The learned Counsel for the petitioner also wanted to canvass a contention that the approach

adopted by the arbitrator while appreciating the evidence was not proper. It is now well settled that reappraisal of evidence by the court u/s 34 of

the act is not permissible. It is not open to the court to deduce reasons in the award and proceed to examine whether those reasons are right or

erroneous. The arbitrator is the sole Judge of the quality as well as quantity of the evidence and it is not for the court to take upon itself the task of

being a Judge of the evidence before the arbitrator. The petitioner also contended that u/s 73 of the Contract Act actual purchase of goods is not

at all necessary. The petitioner sought to place reliance on the decision of the Supreme Court in Murlidhar Chiranjilal Vs. Harishchandra

Dwarkadas and Another, . However, in the instant case, a categorical finding has been recorded by the arbitrator that even applying the ratio of

decision of the Supreme Court in Murlidhar Chiranjilal v. Harishchandra Dwarakadas (supra) the claim has not been proved by the petitioner. No

cogent evidence has been produced by the petitioner to prove the rate prevailing at Kanpur at the time of the breach committed by the respondent.

It is thus not open to this Court to reassess the evidence or to decide the question of adequacy of evidence. The courts while exercising powers u/s

34 of the Act are expected to be very circumspect in respect of the award delivered by the arbitrator. The award of the arbitrator is binding

between the parties since he is the tribunal selected by the parties. The power of the court to set aside an award is restricted to the grounds set out

in Section 34 of the Act.

42. In Kanha Credit and Holding Pvt. Ltd. Vs. Janacim Electronics, , the Delhi High Court has taken the stand that even if the finding of fact

recorded by the arbitrator was faulty, the same is not amenable to the jurisdiction of the Court u/s 34 of the Act. The relevant portion is as follows:

8. The petitioner''s plea that there was default found by the arbitrator and at the same time there was also a finding that the default committed by

the petitioner was wrongly found, cannot be entertained because the finding as to who had committed the default in respect of a contract is a pure

finding of fact. Assuming that the finding of fact recorded by the arbitrator was faulty, such a finding is not amenable to the exercise of limited

jurisdiction available to a Court u/s 34 of the Act in respect of a reasoned award.

43. One other submission made by the learned Counsel for the petitioner that the Arbitral Tribunal has excluded some of the evidence placed

before it and therefore, the award should be treated as illegal cannot also be countenanced for more than one reason. First of all, it has been an

established judicial precedent that any illegality or patent illegality should go into the root of the matter and should not be trivial in nature. That

apart, the award should be in contravention of the provisions of the Act or substantive law governing the parties or against the terms of the contract

binding on the parties and in the absence of any of such serious infirmities in the award, it is not possible to accept the contention of the learned

Counsel for the petitioner. The serious circumstances may include misconduct, corruption, bias or a proceeding conducted against the principles of

natural justice, etc. In the absence of such serious allegations against the arbitral award, simply because the learned arbitrator has taken a decision

that the object of the contract for the purpose of putting up fourth to tenth floors has become frustrated because of subsequent event, which

includes the show cause notice issued by the Government as against the exemption granted earlier from the Development Control Rules based on

the judgment of the Supreme Court, there is absolutely nothing warranting this Court to take as if the conduct of the learned arbitrator has been

serious enough to exercise the jurisdiction u/s 34 of the Act.

44. It is worthwhile to refer to a significant observation of the English Court in respect of the arbitrators selected by the parties holding that the

days have gone when the Courts looked on the jurisdiction of the arbitrators with jealousy. That was the observation made in Mediterraneam and

Eastern Export Co. Ltd. v. Fortress Fabrics Ltd. [1948] 2 All ER 186, wherein it was observed as follows:

A man in the trade who is selected for his experience would be likely to know and indeed to be expected to know the fluctuations of the market

and would have plenty of means of informing himself or refreshing his memory on any point on which he might find it necessary so to do. In this

case according to the affidavit of sellers they did take the point before the Arbitrator that the Southern African market has slumped. Whether the

buyers contested that statement does not appear but an experienced Arbitrator would know or have the means of knowing whether that was so or

not and to what extent and I see no reason why in principle he should be required to have evidence on this point any more than on any other

question relating to a particular trade. It must be taken I think that in fixing the amount that he has, he has acted on his own knowledge and

experience. The day has long gone by when the Courts looked with jealousy on the jurisdiction of the Arbitrators. The modern tendency is in my

opinion more especially in commercial arbitrations, to endeavor to uphold awards of the skilled persons that the parties themselves have selected

to decide the questions at issue between them. If an arbitrator has acted within the terms of his submission and has not violated any rules of what is

so often called natural justice the Courts should be slow indeed to set aside his award.

45. The oft quoted observation of the Courts that the arbitrators are to give reasons and nothing more and if such reasons are clear and indicate

the basis for a decision the award cannot be interfered with, in my view squarely applies to the present award in question before this Court wherein

the Arbitral Tribunal has taken the overall situation and has come to a conclusion which can neither be treated as perverse nor illegal. Even if some

of the minor factual matters have not been explained in detail, in my view the same has no tendency to affect the legality of the award.

Taking note of the above said facts and the legal position, I do not see any reason to interfere with the award of the Arbitral Tribunal. The Original

Petition stands dismissed. Consequently, O.A. No. 300 of 2009 is closed.