**(2014) 08 CAL CK 0015**

**Calcutta High Court**

**Case No:** FMA 2536 of 2013

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| National Highway Authority of India | | APPELLANT |
| | Vs | |
| Gammon India Ltd. | | RESPONDENT |

**Date of Decision:** Aug. 21, 2014

**Acts Referred:**

- Arbitration and Conciliation Act, 1996 - Section 13(5), 16(6), 30, 31(3), 34
- Constitution of India, 1950 - Article 14
- Contract Act, 1872 - Section 23
- Evidence Act, 1872 - Section 1
- Limitation Act, 1963 - Section 5

**Citation:** (2015) 5 ARBLR 28 : (2015) 1 CALLT 39 : (2014) 3 CALLT 650 : (2014) 5 CHN 463

**Hon'ble Judges:** Arijit Banerjee, J; A.K. Banerjee, J

**Bench:** Division Bench

**Advocate:** Joy Saha, Aryak Dutt, Dipankar Das, and Ashish Shah, Advocate for the Appellant; Tilak Bose, Sr. Adv., Sabyasachi Chowdhury, Aniruddha Mitra and Sanchari Chakraborty, Advocate for the Respondent

**Final Decision:** Dismissed

**Judgement**

Arijit Banerjee, J.

This appeal arises out of a judgment and order dated 27th February, 2012 passed by the learned Additional District Judge, Fast Track, 4th Court, Paschim Medinipur, whereby the learned Judge dismissed the appellant''s application u/s 34 of the Arbitration and Conciliation Act, 1996, challenging the award dated 19th April, 2008 passed by the Arbitral Tribunal.

2. The respondent entered into a contract with the appellant for widening to 4/6 lanes and strengthening of existing 2 lane carriageway of NH-60 from 0.00 kilometer to 119.275 kilometer (Baleswer-Kharagpur) in the State of Orissa and West Bengal

for a total contract price of Rs. 75,76,80,755/-. As per the term of the contract, any dispute between the parties had to be first referred to the Dispute Review Board (DRB) for its recommendations. In the event, the parties were aggrieved by the recommendations of the DRB, the disputes would be referred to an Arbitral Tribunal consisting of three Arbitrators, one to be appointed by each party, and the third Arbitrator to be appointed by the two nominated Arbitrators.

3. Disputes and differences arose between the parties in connection with the said contract and the same was ultimately referred to arbitration. The appellant nominated Sri Vijoy Kumar, Engineer-in-Chief UPPWD (retired), Ex-Managing Director, UPSBC as its Arbitrator. The respondent nominated Sri N.H. Chandwani, Chief Engineer (retired), CPWD, as its Arbitrator. The two nominated Arbitrators appointed Sri K.K. Madan, Director General (retired), CPWD, former member UPSC as the Presiding Arbitrator. It may be noted that all the three Members of the Arbitral Tribunal were experts in their field with special knowledge in road construction works.

4. The Arbitral Tribunal entered upon reference on 11th June, 2005. 43 hearings were held before the Tribunal between 11th June, 2005 and 8th/9th June, 2007. During the hearings both parties argued their respective cases and produced documents/records. No oral evidence was adduced by either party.

5. The claimant and the respondent filed their respective claims and counter claims before the Arbitral Tribunal. The claimant''s first claim and the respondent''s first counter claim pertained to payment of reinforcement in pile. The second claim and counter claim pertained to reimbursement of excise duty. The third claim and counter claim pertained to payment of price adjustment. The fourth claim and counter claim related to construction of Embankment at Fly-02 and 03. The claimant had made a fifth claim pertaining to Subarnarekha Canal Bridge which it subsequently withdrew vide letter dated 24th June, 2005. The counter claim nos. 5 and 6 were on account of interest and cost of arbitral proceeding. During the pendency of the arbitral proceeding, the work was substantially completed and the respondent amended its counter claim nos. 1 to 4.

6. The Arbitral Tribunal examined the claims and counter claims of the parties in detail and after proper adjustment awarded various sums of money to the respondent on account of its counter claim. No award was made in favour of the claimant/appellant. The award on account of counter claim no. 1 was made by a majority of the Tribunal whereas the award on account of counter claim nos. 2 and 3 were unanimous.

7. Being aggrieved by the award the appellant applied u/s 34 of the Arbitration and Conciliation Act, 1996 before the learned Court below for setting aside the award. The learned Judge after carefully considering the rival contentions of the parties and various case laws pertaining to the scope of Section 34 of the 1996 Act dismissed the

application. The operative portion of the judgment and order is quoted hereinbelow:-

"It is now well-settled that scope of Section 34 of the Arbitration and Conciliation Act, 1996 is only limited to the stipulations in clause 34(2) of the Act. The Court does not sit in appeal over the award and accordingly there is no scope of re-appreciation of evidence, re-evaluation of merits or re-interpreting terms of the contract. The Court is only called upon to examine whether there is a patent illegality on the face of the award or the interpretation is so palpably absurd that it can shock the conscience of the Court. In the instant case the Ld. Tribunal comprising of experts as referred earlier held 43 sittings attended by both parties wherein the respective cases and documents were considered. Thereafter the Ld. Tribunal assigning comprehensive reasons with plausible interpretation passed the award. The applicant could not produce any such cogent material facts those are relevant under the stipulations in clause 34(2) of the Act for setting aside the award. Neither it could place any such materials to prove that there is perversity apparent of the fact of the Award. Be that so the question of any interference is therefore uncalled for.

In light of the aforesaid discussion this Court refrains itself from interfering in the award which does not suffer from any perversity or patent illegality apparent on its face. As the question of any interference is unwarranted, consequently the application u/s. 34 of the Arbitration and Conciliation Act, 1996 bereft of any merit deserve to be dismissed."

8. Being aggrieved the appellant has come up on appeal against the order of the Learned Judge.

9. Before proceeding further let us briefly dilate on the extent of judicial intervention that is permissible in arbitration matters and the scope of Section 34 of the 1996 Act.

10. The United Nations Commission on International Trade Law (Uncitral) adopted the Uncitral Model Law on International Commercial Arbitration in 1985. The General Assembly of the United Nation recommended that all countries give due consideration to the said Model Law in view of the desirability of uniformity of the law of arbitral procedure and the specific needs of international commercial arbitration practice. The Indian Parliament thought it fit to adopt the Uncitral Model Law and the result was The Arbitration and Conciliation Act, 1996. One of the main objects of the said Act is to minimize the supervisory role of Courts in the arbitration process. Thus Section 5 of the said Act provides, "Notwithstanding anything contained any other law for the time being in force, any matters governing of this Part, no judicial authority shall intervene except where so provided in this part." Section 34 of the said Act provides for the grounds for setting aside an arbitral award. It also provides for a strict time limit for filing an application for setting aside an arbitral award. Such time limit cannot ordinarily be enlarged by application of Section 5 of the Limitation Act, 1963. The grounds provided are highly restrictive and

expecting on those grounds or any one of them an award cannot be set aside.

11. When a Court entertains an application for setting aside an arbitral award, it does not sit as a Court of appeal. In the case of Puri Construction Pvt. Ltd. Vs. Union of India (UOI), the Hon''ble Apex Court observed that when a Court is called upon to decide the objections raised by a party against an arbitration award, the jurisdiction of the Court is limited, as expressly indicated in the Arbitration Act, and it has no jurisdiction to sit in appeal and examine the correctness of the award on merits. For upholding an award the Court will not examine the merits of the award with reference to the materials provided before the Arbitrator. The Court cannot sit in appeal over the views of the Arbitrator by re-examining and re-assessing the materials. The scope for setting aside an award is limited to the grounds available under the Arbitration Act, which have been well defined by a long line of decided cases. It is not open to the Court to examine the correctness of the award on re-appraisal of the evidence.

12. In the case of Associated Engineering Co. Vs. Government of Andhra Pradesh and another, the Hon''ble Supreme Court held that if the Arbitrator commits an error in the construction of the contract, that is an error within his jurisdiction. But if he wanders outside the contract and deals with matters not allotted to him he commits a jurisdictional error. On the facts of that case, the Hon''ble Apex Court held that the umpire acted unreasonably, irrationally and capriciously in ignoring the limits on the clear provisions of the contract.

13. In the case of Board of Trustees For The Port of Calcutta Vs. Mahalakshmi Constructions, in paragraphs 20 to 23 of the judgment, the Division Bench of this Court held as follows:-

"PERVERSITY:

20. It is possible, in a very rare handful of cases, that although misconduct or legal misconduct of the Arbitrator cannot be demonstrated, yet it can be demonstrated that the award is perverse, perversely high and so against contract, evidence, the documents and all the surrounding circumstances that no honest person in his senses could have made such an award. This is rare head of perversity. It should be demonstrable in a very stark and comparatively easy manner, without the Arbitration Court having to sit like a Court of Appeal over the Arbitrator''s award. On the ground of perversity, extraordinarily huge and large award can be struck out, and it is not outside the possibilities, that in the matter of arguing perversity, clauses like prohibition of escalation will be material. But this is quite separate from merely picking out one clause in the contract, showing it to Court, and treating it as if that is an end of the matter, and any award of escalation is bound to be perverse. Proceeding in this way would be proceeding to make elementary mistakes.

THE FACE OF THE AWARD:

21. There is a great problem in the Arbitration Court, which faced with an application for setting aside of the award, even to look at the commercial contract between the parties, which is separate form the arbitration contract. The arbitration contract can always be looked into. The arbitration clause is the foundation of the Arbitrator''s jurisdiction. But for the Arbitration Court to be able to look at the commercial contract, it must form part of the award. And, the part of the award must appear along with some proposition of law, which should also be a part of the award, which is wrong, and which is at the root of the award so that without such proposition the award is not sustainable. It might be that the commercial contract has to be looked into to demonstrate that the proposition of law contained in the award is wrong. It can be looked into only when the commercial contract or the required material part of it forms a part of the face of the award, otherwise, even if the error of law might be demonstrable with reference to it, the award is not vitiated.

22. The best and the oldest authority for our purpose for this, is the case of AIR 1923 66 (Privy Council)

23. Although the case is old, it is still good law. It should be read, and the judgment is not too long, just about three pages to understand the basics of arbitration law. It explains what is a part of the award. It explains that for setting aside an award for error apparent on its face the materials to be looked into must either form part of the award or be in some document or other paper appended or annexed to the award. It is not permissible for the Arbitration Court to rummage through the commercial contract even though it does not form part of the award. Thus, one cannot even look at the commercial contractual clause prohibiting grant of escalation, and thus come to the conclusion that the Arbitrator has erred in law, unless that prohibition clause is apparent on the face of the award itself."

14. In the case of Oil and Natural Gas Corporation Ltd. Vs. SAW Pipes Ltd., the Hon''ble Supreme Court after reviewing a plethora of decisions held in paragraph 31 as follows:-

"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''s case (supra), it is required to be held that the award could be set aside if it is patently illegal. Result would be-award could be set aside if it is contrary to:-

(a) fundamental policy of Indian law; or

(b) the interest of India; or

(c) justice or morality, or

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

Illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the Court. Such award is opposed to public policy and is required to be adjudged void."

In the same judgment, in paragraph 74 the Hon''ble Supreme Court concluded as follows:-

"74. In the result, it is held that:-

A. (1) The Court can set aside the arbitral award u/s 34(2) of the Act if 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 matters beyond the scope of the submission to arbitration;

2) The Court may set aside the award:-

(i) (a) if the composition of the arbitral tribunal was not in accordance with the agreement of the parties,

(b) failing such agreement, the composition of the arbitral tribunal was not in accordance with Part-I of the Act.

(ii) if the arbitral procedure was not in accordance with:-

(a) the agreement of the parties, or

(b) failing such agreement, the arbitral procedure was not in accordance with Part-I of the Act.

However, exception for setting aside the award on the ground of composition of arbitral tribunal or illegality of arbitral procedure is that the agreement should not

be in conflict with the provisions of Part-I of the Act from which parties cannot derogate.

(c) If the award passed by the Arbitral Tribunal is in contravention of provisions of the Act or any other substantive law governing the parties or is against the terms of the contract.

(3) The award could be set aside if it is against the public policy of India, that is to say, if it is contrary to:-

(a) fundamental policy of Indian law;

(b) the interest of India; or

(c) justice or morality, or

(d) if it is patently illegal.

(4) It could be challenged:-

(a) as provided u/s 13(5); and

(b) Section 16(6) of the Act."

15. In the case of McDermott International Inc. Vs. Burn Standard Co. Ltd. and Others, the Hon''ble Apex Court held as follows:-

"52. The 1996 Act makes provision for the supervisory role of courts, for the review of the arbitral award only to ensure fairness. Intervention of the court is envisaged in few circumstances only, like, in case of fraud or bias by the arbitrators, violation of natural justice, etc. The court cannot correct errors of the arbitrators. It can only quash the award leaving the parties free to begin the arbitration again if it is desired. So, scheme of the provision aims at keeping the supervisory role of the court at minimum level and this can be justified as parties to the agreement make a conscious decision to exclude the court''s jurisdiction by opting for arbitration as they prefer the expediency and finality offered by it.

58. In Renusagar Power Co. Ltd. v. 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 ONGC Ltd.-v.-Saw Pipes Ltd. (for short ''ONGC''). This Court therein referred to an earlier decision of this Court in Central Inland Water Transport Corporation Ltd. v. Brojo Nath Ganguly 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 (supra), this Court, apart from the three grounds stated in Renusagar (supra), added another ground thereto for exercise of the court''s jurisdiction in setting aside the award if it is patently arbitrary.

59. 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.

60. 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 v. Basant Nahata,)"

16. In the case of Damodar Vally Corporation-v.-Central Concrete and Allied Constructions Ltd. reported in 2007 2 CHN 441 a Division Bench of this Court held, inter alia, in an application u/s 34, the Court shall not exercise appellate powers but that proposition cannot be extended to the extent of providing an umbrella to those awards where justice has been a casualty.

17. In the case of Union of India (UOI) Vs. Ajabul Biswas, a Division Bench of this Court to which one of us (Ashim Kumar Banerjee, J.) was a party, in paragraph 24 of the judgment held as follows:-

"24. The contract was for setting up guard wall to stop erosion of embankment of river. The work was to be completed within 90 days. The contractor was not only to supply materials but also to execute the work with the help of the labour force to be provided by him. For the entire job he was to get Rs. 30 lacs. Hence, we can safely presume that Rs. 30.00 lacs would include not only the cost of material but also his technical expertise and cost of the labour force and obviously his profit at the end of the day. Keeping this, in view, a claim for Rs. 18.36 lacs made by the claimant only on account of idle labour for 46 days, is something which is difficult for any prudent man to conceive. The Arbitrator while examining such claim put emphasis on the number of days and not on the number of work force actually kept idle according to the claimant. In paragraphs 16-22 of the Judgment in Saw Pipes case the Apex Court observed that the words "public policy of India" occurring in Section 34(2)(b) was not defined in the Act. The concept "public policy" is considered to be vague susceptible

to narrow or wider meaning depending upon the context in which it is used. Hence, it should be given a meaning in the context and also considering the purpose of the section and scheme of the Act. The Apex Court also observed that in case where validity of the award is challenged there is no necessity of giving a narrower meaning to the term "public policy". On the contrary wider meaning is required to be given so that patently illegal award passed by the arbitral tribunal could be set aside. If an award is patently perverse the same, in our view, is open for review u/s 34 by giving wider meaning of the phrase "public policy". The word "perverse" is meant contrary to that is accepted or expected against the weight of evidence. "Which is expected" is a relative term. In common parlance it means what a prudent man thinks keeping in view the fact as discussed above. Our conscience pricks as to how we can put our approval to a part of the award which was based on no evidence on the number of work force and the rate at which they had been paid. The Apex Court observed that an award could be set aside by the Court of law if it offends justice and morality. Our conscience pricks to give approval to this part of the award without having a proper clarification on that score from the Arbitrator. Hence, we take recourse to Section 34(4) of the said Act which empowers the Court to refer the matter, rather to give an opportunity to the Arbitral Tribunal to eliminate grounds for setting aside of the award. The Learned Judge could do so. We exercise the same power in this appeal being an extension of the original proceeding."

18. In the case of Union of India-v.-Associated Construction Co. reported in 2008(2) Arbitration Law Reported 526, a learned Single Judge of the Delhi High Court in paragraphs 7 and 8 of the judgment held as follows:

"7. Having considered the arguments raised by the Counsel for the parties and after examining the decisions cited at the bar, I am of the view that this Court, in the facts of the present case, cannot have a re-look into the conclusions arrived at by the arbitrator insofar as Claim No. 2 is concerned. This is so because the arbitrator has interpreted Clause 4.4.2(a) in a particular manner and this court would not interfere with such an interpretation. It is important to note that while considering the objections u/s 34 of the said Act this court does not sit as a court of appeal. As such, each of the claims need not be considered as if the Court were examining a first appeal against a judgment and/or a decree. The arbitrator has examined the evidence and has come to a certain finding or fact. The learned arbitrator has also interpreted Clause 4.4.2(a) in a particular manner and this court would not substitute its views in place of the arbitrator''s in such a case.

8. In any event, there is no patent illegality that has been committed by the arbitrator in considering and constructing such a clause in the manner that he did. The decision in the case of ONGC would only be applicable where a patent illegality is noted by the court. I see no such patent illegality in the award insofar as this claim is concerned. The observations of the Supreme Court in the case of Sudarsan

Trading Co. as also of the High Court in Ingersoll Rand India Ltd. are noteworthy. In Sudarsan Trading Co. the Supreme Court observed that the court had no jurisdiction to substitute its own evaluation of the conclusion of law as arrived at by the arbitrator. The Supreme Court also observed that once there is no dispute as to the contract, what is the interpretation of that contract is a matter for the arbitrator and on which the court cannot substitute its own decision. This court is also mindful of the following observation of the Supreme Court in Sudarsan Trading Co. (para 36 of Arb. LR):

''....The High Court, in our opinion, had no jurisdiction to examine the different items awarded clause by clause by the arbitrator and to hold that under the contract these were not sustainable in the facts found by the arbitrator.''

In Ingersoll Rand Indian Ltd. a learned judge of this court observed that it is the settled position of law that the arbitrator has the power and jurisdiction to appreciate the evidence on record and is also empowered to interpret a particular clause in the light of the documents on record, thereafter, record his reasons. Although the said decision in Ingersoll Rand India Ltd. as well as the decisions in Sudarsan Trading Co. were rendered in respect of the Arbitration Act of 1940, the observations would be equally applicable to petitions u/s 34 of the 1996 Act. In Ingersoll Rand India Ltd. this court observed that the Court does not sit over the reasoning and the ''appreciations'' of the learned arbitrator on the record and the clauses of the contract so as to come to a contrary finding."

19. In the case of National Highways Authority of India-v.-Afcons Infrastructure Ltd. reported in 2008(3) Arbitration Law Reporter, 56 a learned Single Judge of the Delhi High Court in paragraph 14 of the judgment held as follows:-

"14. Considering the declaration of the law by the Supreme Court in ONGC vs. Saw Pipes Ltd. (Supra), I find that the present case is not one where the arbitral tribunal has ignored the terms of the contract. What the arbitral tribunal has done is to arrive at a particular interpretation after considering the relevant terms of the contract and, just because the interpretation that has been arrived at by the tribunal is not palatable to the petitioner, is not ground enough for interfering with the award. Such interference can only be justified where the award is contrary to the substantive provisions of law or the provisions of the Act or if it is against the terms of the contract. The award must be so patently illegal that it goes to the root of the matter. If the illegality is of a trivial nature, the award cannot be said to be against public policy. The award must be so unfair and unreasonable that it shocks the conscience of the Court. It is then that such an award can be said to be opposed to Public Policy of India. I do not find the present award to contain any such patent illegality, much less an illegality which goes to the root of the matter. The award is also not of such a kind that it shocks the conscience of the Court. The arbitral tribunal has merely interpreted Clauses 32.1 and 45.1 in a manner which is plausible. This being the case, no interference is called for."

20. In the case of Cmdr. S.P. Puri Vs. Alankit Assignments Ltd., a learned Single Judge of the Delhi High Court in paragraph 9 of the judgment held as follows:-

"9. Arbitrators are not required to give elaborate judgments dealing with each and every ground or reason. They have to consider the entire facts in proper perspective and give an indication of the grounds and reasons that prevailed upon them to decide the matter. Law requires arbitrators to give reasons and nothing more. If the reasons are clear and indicate the basis for the decision, the award should be upheld and cannot be set aside. Law does not require arbitrators to give detailed judgments dealing with each and every contention raised by the parties. What is required to be indicated is the basis on which the arbitrators have taken a particular view. Arbitrators need not be legal luminaries, well versed with legal skills and having benefit of legal training. Arbitrators can be men from the trade or relatives, etc. and enjoy substantial latitude and flexibility in deciding matters in a just and equitable manner. If the arbitrators have set out grounds and reasons in the award why they are taking a particular view while deciding claims, the award will be a reasoned award. Requirement in law is that the arbitrators must give reasons. It is not the requirement of Section 31(3) of the Act that the arbitrator must elaborately discuss all contentions raised by the parties. To satisfy the requirements of the Act, reasons should be intelligible and comprehensible, but need not be unnecessarily lengthy or elaborate. Reasons should indicate and provide a precise link between questions/issues and the conclusion reached in regard thereto. It is sufficient if the arbitrator makes his mind clear in the award on what and why decision is made. Short intelligible indications of the grounds should be discernible to indicate the mind of the arbitrator. Sufficiency of reasons depends upon facts of each case. [Ref.: Em and Em Associates Vs. Delhi Development Authority, Bank of Baroda Vs. B.J. Bhambani and Another, Indian Oil Corporation Ltd. Vs. Indian Carbon Ltd., and Gujarat Water Supply and Sewerage Board Vs. Unique Erectors (Gujarat) (P) Ltd. and Another,

21. In the case of Himachal Joint Venture Vs. Panilpina World Transport (India) Pvt. Ltd., , a Division Bench of the Delhi High Court held that when the view taken by the Arbitrator is a plausible view, it is not permissible for the court to interfere with the Arbitrator''s view merely because another view of the matter is possible. It is not permissible for the Court to re-appreciate the evidence placed before the Arbitrator. It is well-settled that the Arbitrator is the best Judge of the quality as well as quantity of evidence and it will not be for the Court to take upon itself a task of being a Judge of the evidence before the Arbitrator.

22. Another factor that cannot be lost sight of is that each of the three members of the Arbitral Tribunal were well-experienced in their trade. The parties must have chosen them consciously so that they could draw upon their special knowledge in resolving the disputes between the parties. The knowledge and experience of the Members of the Tribunal should be given credence. In the case of Municipal

Corporation of Delhi Vs. Jagan Nath Ashok Kumar and Another, in paragraph 5 of the judgment the Hon''ble Apex Court quoted with approval a passage from the judgment of Lord Goddard, CJ. in an English decision, which in our opinion, is extremely apt to the point any issue. The said paragraph from the Apex Court judgment is reproduced hereinunder:-

"5. It is familiar learning but requires emphasis that section 1 of the Evidence Act, 1872 in its rigour is not intended to apply to proceedings before an arbitrator. P.B. Mukharji, J. as the learned Chief Justice then was, expressed the above view in Haji Ebrahim Kassam Cochinwalla Vs. Northern Indian Oil Industries Ltd., and we are of the opinion that this represents the correct statement of law on this aspect. Lord Goddard, C.J. in Mediterranean & Eastern Export Co. Ltd. v. Fortress Fabrics Ltd., [1948] 2 All ER 186observed at pages 188/189 of the report 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 endeavour 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.''
This in our opinion is an appropriate attitude."

23. Appearing on behalf of the appellant Mr. Aryak Dutt, learned Counsel submitted that the respondent''s counter claim was on the basis of ''Deemed Export''. This, according to him, was not tenable as value of the contract awarded to the respondent was only approximately Rs. 76 crores. Mr. Dutt also relied on the cases of Oil and Natural Gas Corporation Ltd. v. Saw Pipes (supra) and Mcdermott International INC-v.-Burn Standard Co. Ltd. (supra).

24. Appearing on behalf of the respondent Mr. Tilak Kumar Bose, learned Senior Counsel submitted that three competent persons who are all engineers have upheld the respondent''s counter claims. Even if it be contended that the Arbitral Tribunal went wrong in interpreting the contract, the same would be an error of law within

jurisdiction and will not be a ground for setting aside the award u/s 34 of the 1996 Act. He drew our attention to the findings of the Dispute Resolution Board. He further submitted that on account of reinforcement of piles, installation beyond a certain depth has been charged for and there is nothing wrong with the same. He took us through various paragraphs of the award and submitted that the Tribunal took great pain in considering in detail every aspect of the matter and published the award on the basis of the documentary evidence that the parties adduced before the Tribunal.

25. Mr. Bose has relied on the following cases:-

(a) National Highways Authority of India-v.-Afcons Infrastructure Ltd. reported in 2008(3) Arbitration Law Reporter, 56.

(b) National Highways Authority of India-v.-M/s. Oriental Structure Engineers Ltd.-Gammon India Ltd. (JV).

(c) National Highways Authority of India Vs. Unitech-NCC Joint Venture,

(d) National Highways Authority of India-v.-Andhra Expressway Ltd. (unreported).

26. Relying on the aforesaid decisions Mr. Bose has submitted that the scope of interference by the Court u/s 34 of the 1996 Act is very limited. Unless the action of the Arbitrator is illegal, that is, it is beyond the law of the land or that the same is beyond contractual provisions or that the findings/conclusions are so perverse which shocks the judicial conscience, the award cannot be interfered with. In order to deserve interference the award must be so patently illegal that it goes to the root of the matter. If the illegality is of a trivial nature the award cannot be said to be against public policy. The award must be so unfair and unreasonable that it shocks the conscience of the Court. It is then that such an award can be said to be opposed to public policy of India. Mr. Bose submitted that there is no such patent illegality in the award under discussion and just because interpretation given to the contractual terms by the Tribunal is not palatable to the appellant, the award should not be interfered with.

27. Mr. Bose also relied on a Division Bench decision of this Court in the case of Union of India Vs. Binod Kumar Agarwal, wherein, a Division Bench after discussing the case law on the subject culled out the principle in paragraph 19 of the judgment which is set out hereunder:-

"19. The principle that that could be culled out from the decisions are as follows:-

i) The award of the arbitrator is ordinarily final and the courts hearing applications u/s 30 of the Arbitration Act, 1940 do not exercise any appellate jurisdiction. Reappraisal of evidence by the court is impermissible. Interpretation of a contract is a matter for the arbitrator to determine. Even in a case where the award contained reasons, the interference therewith would still be not available within the

jurisdiction of the court unless the reasons are totally perverse or award is based on wrong proposition of law. Errors of law as such are not to be presumed. M.P. Housing Board Vs. Progressive Writers and Publishers, Madhya Pradesh Housing Board Vs. Progressive Writers and Publishers)

ii) The Arbitrator is the sole Judge of the quality as well as the quantity of evidence. It may be possible that on the same evidence, the Court might have arrived at a different conclusion than the one arrived at by the arbitrator but that by itself is no ground for setting aside the award of the arbitrator.

Municipal Corporation of Delhi Vs. Jagan Nath Ashok Kumar and Another,

iii) It is well-settled that when the parties choose their own arbitrator to be the Judge in dispute between them, they cannot, when the award is good on the face of it, object to the decision either upon law or on facts. Therefore, when arbitrator commits a mistake either in law or in fact in determining the matters referred to him, where such mistake does not appear on the face of the award and the documents appended to or incorporated so as to form part of it, the award will neither be remitted nor set aside. ( State of Orissa Vs. Dandasi Sahu,

iv) The award would not be open to challenge on the ground that the arbitrator has reached a wrong conclusion or failed to appreciate facts, as under the law, the arbitrator is made the final arbiter of the disputes between the parties. The Court will not sit in appeal over the award nor re-appreciate the evidence for the purpose of finding whether on the facts and circumstances, the award in question could have been made. Unless there is any allegation of moral misconduct against the arbitrator with reference to the award and where the arbitrator has not been superseded.

v) There are only two grounds of attacks, namely, the legal misconduct on the part of the arbitrator in making the award and secondly if there was an error apparent on the face of the award.

(i) AIR 1923 66 (Privy Council)

(ii) Municipal Corporation of Delhi Vs. Jagan Nath Ashok Kumar and Another,

(iii) State of Rajasthan and Another Vs. Ferro Concrete Construction Pvt. Ltd.,

(iv) Bhagawati Oxygen Ltd. Vs. Hindustan Copper Ltd.,

vi) Intervention of the Court is envisaged and in few circumstances only to ensure fairness like in case of fraud or bias by the arbitrators, violation of natural justice etc., the Court cannot correct errors of the arbitrators. The scheme even aims at keeping the supervisory role of the Court at minimum level and this can be justified as parties to the agreement, make a conscience decision to exclude the Court''s jurisdiction by opting for arbitration as they prefer the expediency and finality offered by it. ( McDermott International Inc. Vs. Burn Standard Co. Ltd. and Others,

(vii) In a case where it is found that the Arbitrator has acted without jurisdiction and has put an interpretation on the clause of the agreement which is wholly contrary to law then in that case there is no prohibition for the Courts to set things right ( Numaligarh Refinery Ltd. Vs. Daelim Industrial Company Ltd.,

(ix) If an award is based on erroneous legal proposition and in a case of reasoned award if it is, on the face of it, erroneous on the proposition of law or its application; the award can be set aside. However, if a specific question of law is submitted to the Arbitrator, erroneous decision on point of law does not make the award bad, so as to permit it to be set aside, unless the Court is satisfied that the Arbitrator had proceeded illegally. It has to be a patent illegality and in the sense that it must go to the root of the matter and if the illegality is on trivial nature, it cannot be held that award is against the public policy. An award could also be set aside for itself so unfair and unreasonable that it shocks the conscience of the Court since such an award would be opposed to public policy and is required to be adjudged void. ( Oil and Natural Gas Corporation Ltd. Vs. SAW Pipes Ltd.,

(x) The interpretation of a contract may fall within the realm of the Arbitrator. An award containing reasons also may not be interfered with unless they are found to be perverse or based on a wrong proposition of law and if two views are possible, it is trite that the Court shall refrain itself from interfering. ( G. Ramachandra Reddy and Co. Vs. Union of India (UOI) and Another,

(xi) The distinction between an error within the jurisdiction and error in excess of jurisdiction has been recognized in a number of decisions and it has been held that the role of an arbitrator is to arbitrate within the terms of the contract. He has no power apart from what the parties have given him under the contract and accordingly he cannot travel beyond the contract; if he does so, then he would be travelling beyond the contract and an award passed would be without jurisdiction since in that case he would be acting without jurisdiction. ( Rashtriya Chemicals and Fertilizers Ltd. Vs. Chowgule Brothers and Others,

28. We have heard the learned Counsel for the parties at length. Detailed submission was made on the merits of the disputes between the parties. Although we did not stop the learned Counsel from making their submission, we do not think that the same is very germane since this Court while exercising jurisdiction u/s 34 of the 1996 Act does not sit as the Court of appeal. It is settled law that the Arbitral Tribunal is the final adjudicator of the facts and evidence adduced before it. We do not find any perversity or anything contrary to public policy or the law of the land in the award. The view taken by the Arbitral Tribunal is a plausible view and just because the Court may have a different view, the arbitral award should not be interfered with u/s 34 of the 1996 Act. The scope of Section 34 is very limited and advisedly so. When two commercial parties agree to have their disputes resolved

through arbitration reference, they should be bound by the award of the Arbitral Tribunal unless, of course, rules of natural justice have been breached or there is something so shocking in the award staring at the face of the court that would prompt the Court to interfere. We find nothing like that in the instant case.

29. We are of the considered view that the Learned Judge applied the correct principles of law as discussed by us above and rightly refused to interfere with the arbitral award. We are in complete agreement with the judgment and order of the learned Judge in the Court below. This appeal fails and is dismissed without, however, any order as to costs.

Ashim Kumar Banerjee, J.

I agree.