(2017) 1 ArbiLR 90 : (2016) 3 CalHCN 634 : (2016) 3 CalLT 434 : (2017) 1 WBLR 358

CALCUTTA HIGH COURT

Case No: F.M.A.T. No. 1294 of 2014

Orissa Minerals Development Co. Ltd.	APPELLANT
Vs	
Balbir Sharma	RESPONDENT

Date of Decision: May 2, 2016

Acts Referred:

- Arbitration and Conciliation Act, 1996 - Section 34, 37, 5

Citation: (2017) 1 ArbiLR 90 : (2016) 3 CalHCN 634 : (2016) 3 CalLT 434 : (2017) 1 WBLR 358

Hon'ble Judges: Indira Banerjee and Sahidullah Munshi, JJ.

Bench: Division Bench

Advocate: Mr. Somnath Bose, Mr. Bhaskar Prosad Banerjee and Mr. Sonia Sharma, Advocates, for the Appellant; Mr. Rakesh Kumar, Mr. Pallav Banerjee and Mr. N.C. Manna, Advocates, for the Respondent

Final Decision: Dismissed

Judgement

Indira Banerjee, J.—This appeal filed by Orissa Minerals Development Company Limited, hereinafter referred to as the appellant OMDC, is against a judgment and order dated 17th August, 2013 passed by the learned Additional District and Sessions Judge, 4th Court, North 24 Parganas at Barasat, rejecting Misc. Case No. 28 of 2012, being an application filed by the appellant OMDC under Section 34 of the Arbitration and Conciliation Act, 1996, hereinafter referred to as the 1996 Act, for setting aside of an award dated 2nd March, 2012 made and published by the sole Arbitrator.

2. The appellant OMDC is a Government of India Enterprise, having its registered office at AG 104, Sector 2 (Sourav Avasan), Salt Lake City ï¿½ 700 091. The appellant OMDC is engaged in mining of iron ore in different mines in Orissa.

3. On or about 18th September, 2007, the appellant OMDC issued a Tender Notice No. OMDC/49/2007 whereby sealed tenders were invited in prescribed format, from reputed

parties having earth moving equipment, with minimum three years of experience in raising of minerals of the description specified, for the job of raising and transporting of iron ore at North Iron Section, Bhadrasai Mines, Roida near Barbil, District Keonjhar (Orissa).

4. The respondent, Balbir Sharma, hereinafter referred to as the Respondent Contractor, successfully participated in the tender. The appellant, OMDC awarded to the respondent, Contractor the contract for the work of excavation and raising of sized iron ore over mining lease area of 254.952 hectares at Bhadrasahi Mines, Roida and for transporting the same to the crusher plant at Thakursni.

5. A work Order No. OMD/T-5/3548 dated 5.11.2007 was issued by the Deputy General Manager of the appellant OMDC, directing the respondent Contractor to execute the contract job during the period from 1st November, 2007 to 31st October, 2008.

6. After the work order was issued, the respondent Contractor had to set up the infrastructure for the contract job by employing men, constructing structures, acquiring and/or installing plant and machinery etc., which involved heavy expenditure.

7. According to the respondent Contractor, for transportation of minerals, permits are required under the mining laws. Even though the contract was for the period from 1st November, 2007 to 31st October, 2008, necessary permit for removal of mineral ores was issued by the Director of Mining, Joda District, Keonjhar, Orissa as late as on 29th February, 2008. The permit being Permit No. 16759 dated 29th February, 2008 allowed removal of ores from 28th February, 2008 to 27th March, 2008 only.

8. The respondent Contractor contends that the permit was not issued in time. The permit was issued almost six months after the contract period commenced. In any case, the permit was only for a period of one month from 28th February, 2008 to 27th March, 2008. The lethargical manner in which the appellant OMDC and/or its Officers and/or the concerned authorities proceeded, was an impediment to the progress of work.

9. The respondent Contractor claims that he had brought in about 450 labourers, who had to sit idle and had to be paid idle wages. This had an adverse financial impact on the respondent Contractor.

10. According to the respondent Contractor, there were also various other constraints. The labourers were insisting on higher rate of wages even though they were sitting idle.

11. By his letters dated 27th February, 2007, 19th December, 2007, 21st December, 2007, 29th December, 2007 etc., the respondent Contractor drew the attention of the appellant to the fact that 450 labourers were sitting idle but were demanding payment.

12. The respondent Contractor also contended that no work of removal of minerals had been done for about 8 months or so before the respondent Contractor took up the

contract job, as a result whereof there was huge accumulation. In terms of the contract, the respondent Contractor was not required to remove the accumulated minerals. Moreover, there was also flooding of the mines from 16th June, 2008 onwards.

13. It is the case of the respondent Contractor that the respondent Contractor was wrongfully induced by the appellant OMDC to accept the contract by suppression of the material fact that the appellant OMDC had no right to operate the Bhadrasai mines in Roida.

14. On the directions of the State Government, the appellant OMDC terminated the contract of the respondent Contractor by a letter dated 19th July, 2008. No penalty was however imposed by the appellant, OMDC on the respondent Contractor.

15. It appears that the lease of the appellant, OMDC in respect of the Bhadrasai Mines, was due to expire on 14th August, 1996. The appellant OMDC applied for renewal of the lease on 14th July, 1995. However, the lease was not renewed and ultimately the Government of Orissa cancelled the lease on 16th November, 2006.

16. It appears that on the prayer of the appellant, OMDC, the revisional authority passed an order dated 28th March, 2007 staying the order dated 16th November, 2006 whereby the lease had been cancelled. The order of the revisional authority was later vacated after which the appellant, OMDC filed an application in the High Court of Orissa under Article 226 of the Constitution of India being Writ Petition No. 12704 of 2007 challenging the decision of the authority concerned to cancel the lease.

17. Interim orders were passed by the High Court of Orissa in the said writ petition, restraining the respondent authorities from preventing the appellant OMDC from carrying out mining activities. The writ petition was ultimately dismissed by an Order dated 16th May, 2008. The appellant OMDC filed a Special Leave Petition in the Supreme Court being SLP (Civil) 18195 of 2008. The Supreme Court stayed the operation of the Order dated 16th May, 2008 of the High Court dismissing the writ petition.

18. Disputes and differences arose between the appellant OMDC and the respondent Contractor over payments claimed by the respondent Contractor from the appellant OMDC. The respondent Contractor invoked the arbitration clause after which Sri Murari Mohan Ghosh a retired officer of West Bengal Higher Judicial Service was appointed Arbitrator.

19. The respondent Contractor filed its statement of claim before the learned Arbitral Tribunal, inter alia claiming ï¿½

Schedule

Claim	Particulars of the Claim	Amount
Claim No. 1	Unpaid value of the work done, which were partly recorded	Rs. 16,82,990/-
Claim No. 2	Claim for Hire charges for machineries deployed in the work	Rs. 549,12,000/-
Claim No. 3	Claim for reimbursement of the amount paid towards terminal benefits @ 12% on the basis of submitted bills.	Rs. 23,73,786/-
Claim No. 4	Claim on account of Compensation for loss of profit @ 10% on the balance left out work.	Rs. 2,06,40,000/-
Claim No. 5	Claim on account of Profit of 15% on ex-mines sale.	Rs. 68,39,842/-
Claim No. 6	Claim on account of Construction of road from Roida to Thakurani.	Rs. 20,00,000/-
Claim No. 7	Claim on account of Refund of Security deposit and Earnest Money.	Rs. 19,89,037/-
Claim No. 8	Claim on account of Cost incurred in raising 28,000 M.T. Iron-ore but not lifted from mines.	Rs. 37,80,000/-
Claim No. 9	Claim on account of expenses of stacking of 28,000 M.T. Iron-ores.	Rs. 28,00,000/-
Claim No. 10	Claim on account of additional expenses incurred in removal of over burden of 3,33,500 M3.	Rs. 2,14,27,820/-
Claim No. 11	Claim for illegal deduction of amount in bills alleging quality and quantity	Rs. 3,57,030/-

Claim No. 12	Claim on account of idle wages paid to labours, staff etc.	Rs. 71,83,960/-
Claim No. 13	Claim for interest @ 18% p.a. from 01.11.2008 till the date of actual payment.	

20. In Paragraph Nos. 6 and 7 of the Statement of Claim, the respondent Contractor inter alia contended that the appellant OMDC had induced the respondent Contractor to enter into the contract wrongfully, as a result of which the respondent suffered financial losses. The appellant OMDC had no right to operate the mines.

21. Paragraph 8 of the statement of claim is extracted herein below for convenience:-

"8. It is further pertinent to state that the Respondent by its letter dated 19.7.2008 accosted the claimant for not executing the job, forgetting the fact that the Respondent had no right to work and/or get worked upon the mining lease hold area, lease for which was not subsisting in favour of the Respondent. However in the said letter, the Respondent admitted that the work in the mining area in question was directed to be stopped by the State Govt. in view of the order of the Honï¿½ble Orissa High Court, which admission on the part of the Respondent also substantiates the contention of the claimant that the Respondent had entered into the Contract with the claimant in respect of the mining area over which they had no right under the law. The said letter dated 19.7.2008 of the Respondent was appropriately replied by the claimant by his letter dated 12.9.2008 which was however not repelled."

22. Appellant OMDC filed its counter statement disputing the claims of the respondent Contractor. The appellant OMDC also raised a counter-claim, claiming Rs.48,15,90,732.19 from the respondent Contractor. The averments in Paragraph No. 6, 7 and 8 of the Statement of Claim were dealt with in Paragraphs 16 and 17 of the Counter Statement, set out herein below :

"16. With reference to paragraph nos. 6 and 7 of the said statement of claim the respondent denies and disputes each and every allegations made therein save and except what are matters of record. The contract work has been awarded after receipt of the stay order from the Central Tribunal on the operation of the impugned rejection order dated 16.11.2006 passed by the State Government till disposal of the revisional application. The respondent will rely upon the said stay order at the time of hearing as respondentï¿½s Exhibit.

The Steel and Mines Department, Government of Orissa also accordingly acted on it and allowed mining operation over the area. Subsequently as per the judgment passed on

16.5.2008 by the Honï¿½ble High Court of Orissa in respect of above mining lease area and as directed by the Deputy Director of Mines, Government of Orissa vide Memo No.51661 dated 15.7.2008 mining operation over the said 254.962 hectors of mining lease area was stopped till further order. Thus there was no illegality in operating the mine during the period from 1.11.2007 to 17.5.2008. Copy of the relevant orders will be referred to and relied upon at the time of hearing as respondentï¿½s Exhibit.

Thus the alleged excuse of the claimant is not at all maintainable since the claimant was awarded the contract within the period when there was no impediment. Hence it is denied that the respondent has no legal right over the mines in question.

In any event the claimant can not take the shield of different orders of the High Court now since the claimant had acted upon the contract and realised payment from the respondent.

17. The statements made in paragraph no.8 of the said statement of claim are denied in its material particulars. Before the letter dated 19.7.2008 the claimant had abandoned the work and asked for termination vide its letter dated 12.7.2008 and the claimant had deliberately suppressed the same before the arbitration proceeding. For suppression of such vital documents the claimant is not at all entitled to any relief what so ever s claimed in the claim petition and the claim petition is liable to be dismissed in limine with exemplary cost.

It appears from the claim petition that the claimant had claimed certain amount of Ex-Mine Sales. Such claim of the claimant is totally not maintainable. The contract was for raising and transporting of iron ore to Thakurani Railway Siding/Crusher plant."

23. The learned Arbitrator made and published his award dated 22nd March, 2012. The amounts awarded by the learned Arbitrator in respect of each of the claims as against the amount claimed by the respondent are as follows :-

Sl. No.	**Particulars**	**Claim Amount**	**Awarded Amount**
Claim No.1	Unpaid value of the work done, which were partly recorded	Rs. 16,82,990/-	Rs. 10,94,492/-

Claim No.2	Claim for Hire charges for machineries deployed in the work	Rs. 549,12,000/-	Rs. 549,12,000/-
Claim No.3	Claim for reimbursement of the amount paid towards terminal benefits @ 12% on the basis of submitted bills.	Rs. 23,73,786/-	
Claim No.4	Claim on account of Compensation for loss of profit @ 10% on the balance left out work.	Rs. 2,06,40,000/-	Rs. 2,06,40,000/-
Claim No.5	Claim on account of Profit of 15% on ex-mines sale.	Rs. 68,39,842/-	Rs. 68,39,842/-
Claim No.6	Claim on account of Construction of road from Roida to Thakurani.	Rs. 20,00,000/-	Rs. 20,00,000/-

Claim No.7	Claim on account of Refund of Security deposit and Earnest Money.	Rs. 19,89,037/-	Rs. 19,89,037/-
Claim No.8	Claim on account of Cost incurred in raising 28,000 M.T. Iron-ore but not lifted from mines.	Rs. 37,80,000/-	Rs. 37,80,000/-
Claim No.9	Claim on account of expenses of stacking of 28,000 M.T. Ironores.	Rs. 28,00,000/-	Rs. 28,00,000/-
Claim No.10	Claim on account of additional expenses incurred in removal of over burden of 3,33,500 M3.	Rs. 2,14,27,820/-	Disallowed

Claim No.11	Claim for illegal deduction of amount in bills alleging quality and quantity	Rs. 3,57,030/-	Disallowed
Claim No.12	Claim on account of idle wages paid to labours, staff etc.	Rs. 71,83,960/-	Rs. 71,83,960/-
Claim No.13	Claim for interest @ 18% p.a. from 01.11.2008 till the date of actual payment.		

24. The award is long and reasoned. The award in respect of each and every claim is based on evidence and/or calculations based on contractual provisions.

25. The learned Arbitrator, on consideration of the pleadings and submissions of the respective parties, including the admissions made by the appellant OMDC in its Counter Statement, particularly in paragraphs 16 and 17 thereof and upon scrutiny of the documents on record before the learned Arbitrator, found that under Section 4 of the Mines and Minerals (Development and Regulation) Act, 1957, no person was to carry on mining operation in any area, except under and in accordance with the terms and conditions of a mining lease. Furthermore, the Mineral Concession Rules, 1960, framed under the said Mines and Minerals (Development and Regulation) Act, 1957 prohibits a lessee from entering into any contract or arrangement or understanding by which lesseeï¿½s operation or undertakings might specifically be controlled by any person or body of persons other than the lessee.

26. The learned Tribunal found that mining lease in respect of the mine in question had been granted by Government of Orissa to M/s. BPNE Ltd. No materials were placed before the learned Arbitrator to show that appellant OMDC had mining lease over the area. The State Government had rejected the application for renewal of the mining lease on 16th November, 2006. The Orissa High Court had ultimately rejected the writ

application of the appellant OMDC, challenging the rejection.

27. The appellant OMDC made an application in the District Court of North 24 Parganas at Barasat under Section 34 of the 1996 Act for setting aside the said award dated 2nd March, 2012 passed by the sole Arbitrator. The grounds are in a nutshell as follows:-

(i) The arbitrator was wrong in passing the award only on the ground that the appellant OMDC was not the mining lessee in respect of the mines in question. The appellant OMDC had been in possession of and operating Roida mines since 1983 without any dispute.

(ii) The application for renewal of mining lease was made at least 12 months before the date of expiry thereof. Till the date of final disposal of the application for renewal, the lease is to be deemed to have been extended. There were also various interim orders permitting mining operations to go on.

(iii) The learned Arbitrator erred in law and facts and acted against public policy in allowing most of the claims of the respondent Contractor and in rejecting the counter claims of appellant OMDC.

(iv) The learned Arbitrator factually erred in holding that appellant OMDC did not have mining lease.

28. Mr. Somnath Bose, appearing on behalf of the appellant OMDC submitted that the contract between the respondent contractor and the appellant OMDC related to certain jobs at the Bhadrasai-Roida Iron Ore and Manganese Mines covering 254.952 hectares, held by the appellant OMDC under a mining lease granted by the State of Orissa.

29. Mr. Bose submitted that Bhadrasai-Roida Iron Ore and Manganese Mines covering about 998.70 hectares was different from Kolha Roida Iron Ore and Manganese mine covering 254.952 hectares. Mr. Bose has relied on two sketch maps to demonstrate that the two mines were different.

30. Mr. Bose argued that disputes in relation to the claims of the respondent Contractor towards outstanding bills and also for compensation and/or damages in relation to the agreement in respect of Bhadrasai-Roida Iron Ore and Manganese Mines was referred to arbitration by the sole arbitrator. The respondent Contractor had raised claims on account of extra work of removal of iron ore, payment on account of idle labour and idle machinery and vehicle charges in respect of Bhadrasai-Roida Iron Ore and Manganese Mines.

31. Mr. Bose submitted that Bhadrasai-Roida Iron Ore and Manganese Mine covering 998.70 hectors and Kolha-Roida Iron Ore and Manganese Mine covering 254.95 hectors were different mines. Cancellation of the mining lease in respect of Kolha-Roida Iron Ore and Manganese Mine had no nexus with Bhadrasai-Roida Iron Ore and Manganese Mine.

32. Mr. Bose argued that the learned Arbitrator failed to appreciate that the disability of the appellant OMDC in respect of Kolha-Roida Iron Ore and Manganese Mine was of no relevance to the claims in relation to the Bhadrasai-Roida Iron Ore and Manganese Mine. Mr. Bose argued that the ï¿½stop operationï¿½ order was in respect of Kolha Roida Iron Ore and Manganese Mines and not in respect of Bhadrasai-Roida Iron Ore and Manganese Mines.

33. It however appears that the appellant OMDC did not hold any separate mining lease in respect of Bhadrasai-Roida Iron Ore and Manganese Mines. Bhadrasai-Roida Iron Ore and Manganese Mine and Kolha Roida Iron Ore and Manganese Mines were operated under the same mining lease. According to the respondent Contractor, the mining lease in respect of Bhadrasai-Roida Iron Ore and Manganese Mines also stood cancelled when the tender in question was floated.

34. Whether the appellant OMDC held a valid mining lease in respect of Bhadrasai-Roida Iron Ore and Manganese Mines or whether the mining lease in respect of the said cancellation is a factual issue, which has been decided by the learned Arbitrator, on consideration of the pleadings and evidence before him. It is well settled that this Court considering an application under Section 34 of the 1996 Act, for setting aside an award, does not sit in appeal over factual findings arrived at by the learned arbitrator.

35. Mr. Bose argued that the learned Court failed to appreciate that the Arbitral Award dealt with disputes not contemplated by or falling within the terms of the submission to arbitration. Mr. Bose has, however, not been able to demonstrate which of the disputes do not fall within the terms of submission to arbitration. Nor has he referred to any specific provision of the agreement or provisions of law under which the claims are barred.

36. There is no doubt that an Arbitral Tribunal is required to decide a dispute in accordance with the substantive law for the time being in force, as argued by Mr. Bose. It is, however, well settled that the strict rules of evidence as contained in the Indian Evidence Act, 1872 or procedural rules as contained in the Code of Civil Procedure, 1908 do not apply to arbitratal proceedings before an Arbitral Tribunal. An Arbitral Tribunal is required to proceed fairly, and in accordance with law, giving equal opportunity of representation to all the parties.

37. Mr. Bose submitted that there is no whisper in the award that parties had agreed to any procedure to be followed by the Arbitral Tribunal in conducting the proceedings. It is well settled that the Arbitral Tribunal can adopt its own procedure. The adjudication must, however be in compliance of the principles of natural justice, and the respective parties given a reasonable opportunity of hearing.

38. In Shin Satellite Public Co. Ltd. v. M/s. Jain Studios Ltd. reported in AIR 2006 SC 963 : (2006) 2 SCC 628, cited by Mr. Somnath Bose, the Supreme Court held that a Court of law would have to read the agreement as it is. The Court cannot rewrite the agreement or

create a new agreement.

39. In Polymat India P. Ltd. & Anr. v. National Insurance Co. Ltd. & Ors. reported in AIR 2005 SC 286 : (2005) 9 SCC 176, the Supreme Court held that the terms of the contract have to be construed strictly without altering the nature of the contract. The proposition of law enunciated by the Supreme Court in Shin Satellite Public Co. Ltd. (supra) and Polymat India P. Ltd. (supra) is well-settled. The judgments are however not applicable.

40. It is also true that the contract must be read as a whole, and not to be dissected. But it equally well settled that if the contract was in several parts some of which were legal and enforceable and some were unenforceable, the lawful parts would be enforced provided they were severable.

41. In Delhi Development Authority v. M/S. R.S. Sharma & Co., New Delhi, cited by Mr. Bose reported in (2008) 13 SCC 80, the Supreme Court held that an award which was contrary to substantive provisions of law or the provisions of the 1996 Act or against the terms of the respective contract or patently illegal or prejudicial to the rights of the parties was open to interference by Court under Section 34(2) of the 1996 Act. An award could be set aside if it was contrary to the fundamental policy of law or the interest of India or justice or morality. An award could also be set aside if it were so unfair or unreasonable that it shocked the conscience of the Court. It was open to the Court to consider whether the award was against the specific terms of the contract and if so interfere with it on the ground that it is patently illegal and opposed to the public policy of India. There can be no dispute with the proposition laid down by the Supreme Court in Delhi Development Authority (supra).

42. In Mcdermott International Inc v. Burn Standard Co. Ltd. & Ors. reported in (2006) 11 SCC 181, cited the Supreme Court held that under the 1996 Act, the Arbitral Tribunal was under a duty to assign reasons for its decision. In this case, the award is reasoned.

43. There can be no doubt that under the 1996 Act, the learned Arbitral Tribunal is obliged to pass a reasoned award. There can also be no doubt that a mere statement of reasons does not satisfy the requirement of Section 31(3) of the 1996 Act. The reasons must be based upon materials submitted before the Arbitral Tribunal. The Tribunal has to give its reasons upon consideration of the relevant materials, while irrelevant materials may be ignored. There is no reason to hold that the reasons given by the learned arbitrator are not on consideration of relevant materials.

44. In Oil & Natural Gas Corporation Ltd. v. Western Geco international Ltd. reported in (2014) 6 SCC 321 = AIR 2015 SC 363 cited by Mr. Bose, the Supreme Court reiterated that the phrase ï¿½Public Policyï¿½ used in Section 34 was required to be given a wider meaning. It could 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 public good or public interest has varied from

time to time. However, the award which was, on its face, patently in violation of statutory provisions, could not be said to be in public interest. Such an award was likely to be adversely affected the administration of justice. The award could thus be set aside, if it was patently illegal.

45. There can be no doubt that an award which is patently illegal can be set aside. It is too late in the day to contend to the contrary. However, the award in this case does not appear to be patently illegal. Mr. Bose has not been able to demonstrate the patent illegality in the award.

46. In Bannari Amman Sugars Ltd. v. Commercial Tax Officer reported in (2005) 1 SCC 625 cited by Mr. Bose, the Supreme Court held that where a particular mode was prescribed for doing an act and there was no impediment in adopting the mode, the deviation to act in a different manner, without disclosing any discernible principles which were reasonable, had to be labelled as arbitrary. The Supreme Court reiterated that every state action had to be informed by reason.

47. In Himani Alloys Ltd. v. Tata Steel Ltd. reported in (2011) 15 SCC 273 cited by Mr. Bose, the Supreme Court held that it was true that a judgment could be given on the admission contained in the Minutes of a Meeting. However, the admission should be categorical. It should be a conscious and deliberate act of the party making it, showing an intention to be bound by it. Referring to Order 12, Rule 6 of the Civil Procedure Code, the Supreme Court held that it was an enabling provision neither mandatory nor peremptory but discretionary.

48. The Supreme Court further held that the Court on examination of the facts and circumstances, had to exercise its judicial discretion, keeping in mind that a judgment on admission is a judgment without trial, which permanently denies any remedy to the defendant, by way of an appeal on merits. Therefore, unless the admission was clear unambiguous and unconditional, the discretion of the Court should not be exercised to deny the valuable right of a defendant to contest the claim.

49. In this case, the award has been made and published on contest, after giving the respondent Contractor and appellant OMDC opportunity of representation. This is not a case of admission in the minutes but of admission in pleadings. Admission in pleadings, unless rectified by amendment is binding on the party making the admission.

50. The judgment in Koduri Krishnarao v. State of Andhra Pradesh, Hyderabad reported in AIR 1962 AP 249, was rendered in the particular facts of the case. A judgment is a precedent for the issue of law that is raised and decided. The judgment in Koduri Krishnarao (supra) does not decide any proposition which is relevant in this case.

51. In Balraj Taneja & Anr v. Sunil Madan & Anr. reported in (1999) 8 SCC 396 the Supreme Court observed that on failure of defendant to file written statement the Court should not proceed to pass judgment blindly. It is only on being satisfied that there is no

fact which need be proved on account of deemed admission, that the Court could pass judgment. The Court had to write a judgment in conformity with the Order 20, Rule 1 . The judgment has no relevance to the issues involved in this case.

52. The judgment of the Supreme Court in Addagada Raghavamma and Anr v. Addagada Chenchamma and Anr. reported in AIR 1964 SC 136 was rendered in the particular facts of the case.

53. In Union Territory of Pondicherry and Ors. v. P.V. Suresh reported in (1994) 2 SCC 70, the Supreme Court held that the Court cannot alter the terms of the contract or rewrite the contract. The Court cannot also evolve formula for determining instalments payable under the contract in the absence of materials before it. The judgment was rendered in the context of proceedings under Article 226 of the Constitution of India. The proposition that the Court cannot alter the terms of the contract or rewrite the contract is well established.

54. In Makram Barsoum Estafnous and London & Leeds Business Centres Limited reported in 2011 EWCA Civ 1157, the Court of Appeal held that the general approach to the construction of documents was well settled. The Court could not rewrite contracts in the context of establishing what the parties had meant by the language they had used. To quote the Appeal Court "that case is not a licence for the Courts to rewrite contracts."

55. In Union of India v. Ibrahim Uddin reported in (2012) 8 SCC 148 the question before the Supreme Court was whether not filing rebuttal amounts to an admission and whether Section 58 of the Evidence Act is attracted. The Supreme Court held that admission was the best piece of sensitive evidence that an opposite party could rely upon. Though not conclusive, it was decisive of the matter, unless successively withdrawn or proved erroneous. Admission might in certain circumstances operate as an estoppel. The question which is needed to be considered is what weight is to be given to an admission and for that purpose it is necessary to find out whether the admission is clear, unambiguous and relevant piece of evidence. In this case the appellant OMDC has not been able to demonstrate that any admission made by the appellant OMDC was withdrawn, but still considered. Nor was the appellant OMDC able to prove that the admission was erroneous. There was no reason why admission made in the counter statement of the appellant should not have been considered to operate as an estoppel.

56. Arbitrators are Judges appointed by the parties and, therefore, an award passed by an Arbitrator/Arbitral Tribunal is not to be interfered with lightly. It is well-settled that in proceedings under Section 34 of the 1996 Act, the Court does not sit in appeal over the award.

57. It is well-settled that in proceedings under Section 34 of the 1996 Act, the Court does not sit in appeal over an award by reanalysing the evidence. In P.R. Shah, Shares & Stock Brokers (P) Ltd. v. B.H.H. Securities (P) Ltd. reported in (2012) 1 SCC 594 the

Supreme Court held:-

"21. A court does not sit in appeal over the award of an Arbitral Tribunal by reassessing or re-appreciating the evidence. An award can be challenged only under the grounds mentioned in Section 34(2) of the Act. ..... Therefore, in the absence of any ground under Section 34(2) of the Act, it is not possible to re-examine the facts to find out whether a different decision can be arrived at."

58. Sections 34(1) and (2) of the 1996 Act, provides as follows:-

"34. Application for setting aside arbitral award.-(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).

(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 matters 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 Part; 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), 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."

59. As observed by the Supreme Court in Associate Builders v. Delhi Development Authority reported in (2015) 3 SCC 49 cited by Mr. Kapur, the 1996 Act was enacted to provide for an arbitral procedure, which is fair, efficient and capable of meeting the needs of arbitration, to provide that the Arbitral Tribunal gives reasons for an arbitral award, to ensure that the Arbitral Tribunal remains within the limits of its jurisdiction and to minimise the supervisory role of Courts.

60. Section 5 of the 1996 Act provides that notwithstanding anything contained in any other law for the time being enforce, in matters governed by Part 1, no judicial authority is to intervene, except where so provided in the said part.

61. Section 34, read in conjunction with Section 5 makes it clear that an arbitral award that is governed by Part 1 of the 1996 Act, can only be set aside on grounds mentioned in Section 34(2) and (3) and not otherwise.

62. None of the grounds contained in Sub-section 2(a) of Section 34 permit the Court to adjudicate the merits of the decision rendered by an arbitral award. The merits of an award might only be looked into under certain specified circumstances, when an award is found to be in conflict with the public policy of India, as held by the Supreme Court in Associate Builders (supra).

63. In Renusagar Power Co. Ltd. v. General Electric Co. reported in 1994 Supp (1) SCC 644 the Supreme Court held that the expression ï¿½Public Policyï¿½ in the context of a foreign award, would have to be construed to mean an award contrary to (i) the fundamental policy of the Indian law; or (ii) the interest of India; or (iii) justice or morality. Such an award would have to be set aside as contrary to the public policy of India.

64. In ONGC Ltd. v. Saw Pipes Ltd. reported in (2003) 5 SCC 705 the Supreme Court held :

"The phrase "Public Policy of India" is not defined under the Act. Hence, the said term is required to be given meaning in context and also considering the purpose of the section and scheme of the Act. It has been repeatedly stated by various authorities that the expression "public policy" does not admit of precise definition and may vary from generation to generation and from time to time. Hence, the concept "public policy" is considered to be vague, susceptible to narrow or wider meaning depending upon the context in which it is used. Lacking precedent the Court has to give its meaning in the light and principles underlying the Arbitration Act, Contract Act and Constitutional provisions."

65. An award would be set aside if it was contrary to (a) the fundamental policy of Indian law; (b) the interest of India or (c) justice or morality or (d) if it was patently illegal. In ONGC Ltd. v. Saw Pipes Ltd. (supra) the Supreme Court made it clear that it was open to the Court to interfere with an award on the ground that it was patently illegal and therefore, opposed to the public policy of India.

66. An award might be set aside as patently illegal, provided the illegality goes to the root of the award. If the illegality is of a trivial nature it cannot be said that the award is against public policy. This proposition was reaffirmed by the Supreme Court in Hindustan Zinc Ltd. v. Friends Coal Carbonization reported in (2006) 4 SCC 445. In ONGC v. Saw Pipes Ltd. (supra) the Supreme Court held that an award could also be set aside, if it was so unfair and unreasonable, that it shocked the conscience of the Court.

67. In view of the judgment in ONGC Ltd. v. Saw Pipes Ltd. (supra) it has to be held that the award could be set aside if it was in contravention of the provisions of 1996 Act or any other substantive law governing the parties or was against the terms of the contract. Of course the award could be set aside on the ground of patently illegallity, subject to the condition that the illegality went to the root of the award. It is now also settled law that a decision which is perverse or so irrational that no reasonable person would have arrived at the same, would be liable to interference under Section 34 of the 1996 Act.

68. In Associate Builders v. Delhi Development Authority (supra) the Supreme Court held that it must be clearly understood that when a Court is applying ï¿½public policyï¿½ test to an arbitral award, it does not act as a Court of appeal and consequently the errors of fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to be accepted as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon, when he delivers his arbitral award. Thus, an award based on little evidence or no evidence, which does not measure up in quality to a trained legal mind would not be held to be invalid on this score. Once it is found that the arbitratorsï¿½ approach is not arbitrary or capricious then he is the last word on facts.

69. Patent illegality may render an award to be in conflict with the public policy of India. Under the explanation to Section 34(2)(b) an award may be said to be in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption.

70. In McDermott International Inc. v. Burn Standard Co. Ltd. reported in (2006) 11 SCC 181, the Supreme Court held:-

"112. It is trite that the terms of the contract can be express or implied. The conduct of the parties would also be a relevant factor in the matter of construction of a contract. The construction of the contract agreement is within the jurisdiction of the arbitrators having regard to the wide nature, scope and ambit of the arbitration agreement and they cannot be said to have misdirected themselves in passing the award by taking into consideration

the conduct of the parties. It is also trite that correspondences exchanged by the parties are required to be taken into consideration for the purpose of construction of a contract. Interpretation of a contract is a matter for the arbitrator to determine, even if it gives rise to determination of a question of law. [See Pure Helium India (P) Ltd. v. ONGC and D.D. Sharma v. Union of India]."

71. In MSK Projects (I) (JV) Ltd. v. State of Rajasthan reported in (2011) 10 SCC 573 the 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. Extrinsic evidence is admissible in such cases, because the dispute is not something which arises under or in relation to the contract or dependent on the construction of the contract or to be determined within the award. The ambiguity of the award can, in such cases, be resolved by admitting extrinsic evidence. The rationale of this rule is that the nature of the dispute is something which has to be determined outside and independent of what appears in the award. Such a jurisdictional error needs to be proved by evidence extrinsic to the award. Reference may in this context, also be made to the judgment of the Supreme Court in Gobardhan Das v. Lachhmi Ram [AIR 1954 SC 689], Thawardas Pherumal v. Union of India [AIR 1955 SC 468], Union of India v. Kishorilal Gupta & Bros. [AIR 1959 SC 1362], Alopi Parshad & Sons Ltd. v. Union of India [AIR 1960 SC 588], Jivarajbhai Ujamshi Sheth v. Chintamanrao Balaji [AIR 1965 SC 214] and Renusagar Power Co. Ltd. v. General Electric Co. (1984) 4 SCC 679 : AIR 1985 SC 1156].

72. In Indu Engineering & Textiles Ltd. v. Delhi Development Authority reported in (2001) 5 SCC 691, the Supreme Court held that the Arbitrator being a Judge appointed by the parties, the award passed by him is not to be interfered with lightly. When the view taken by the arbitrator was a possible or a plausible one, on his analysis of evidence and interpretation of contractual and/or statutory provisions and did not suffer from any manifest error, it was not open to the Court to interfere with the award.

73. Even though the judgment in Indu Engineering & Textiles Ltd. (supra) was rendered in the context of an application under Section 30 of the Arbitration Act 1940, for setting aside of an award, the same principle would apply to an application for setting aside an award, under Section 34 of the 1996 Act.

74. In Rashtriya Ispat Nigam Ltd. v. Dewan Chand Ram Saran, reported in (2012) 5 SCC 306, the Supreme Court held that when a clause in a contract was capable of two interpretations and the view taken by the arbitrator was clearly a possible if not a plausible one, it was not possible to say that the arbitrator had travelled outside his jurisdiction, or that the view taken by him was against the terms of contract. That being the position, Court could not interfere with the award and substitute its view in place of the interpretation accepted by the arbitrator.

75. In Sumitomo Heavy Industries Ltd. v. ONGC Ltd. reported in (2010) 11 SCC 296 the Supreme Court held:

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

76. As observed above, an award can only be interfered with grounds stipulated in Section 34(2) of the 1996 Act. In this case no grounds have been made out for interference with the impugned award.

77. It is well settled that the arbitral tribunal is competent to interpret the terms and conditions of a contract and the interpretation cannot be interfered with by Court in an application for setting aside only because some other interpretation might have been possible.

78. The factual finding of the learned Arbitrator based on evidence as also admission of appellant OMDC in its pleadings does not call for interference in an application under Section 34 of the 1996 Act. Appellant OMDC has not produced any evidence and/or any cogent evidence before us to show that the mining lease in respect of the mines in question was valid and enforceable on the date on which the contract was executed with the respondent.

79. The learned Court below rightly rejected the application for setting aside of the award. We find no grounds to interfere with the judgement and order under appeal. The appeal is dismissed.

80. Urgent Photostat certified copy, if applied for, be delivered to the learned counsel for the parties, upon compliance of all usual formalities.

81. Sahidullah Munshi, J.—I Agree.