AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

Judgment reserved on 15-03-2023

Judgment delivered on 03-05-2023

ARBA No.5 of 2017

{Arising out of order dated 2-1-2017 passed by the Judge, Commercial Court (District Level), Naya Raipur, in MJC No.33/16}

1. Bharat Aluminium Co. Ltd., a Company incorporated under the provisions of Companies Act, 1956, having its Registered Office at Core VI, Scope Office Complex, 7, Lodhi Road, New Delhi carrying its Business From P.O. BALCO Nagar, Korba, Chhattisgarh

---- Appellant

Versus

1. Shri Ramesh Kumar Jain S/o Late Hiralal Jain, Aged About 57 Years Contractor, residing at Pulgaon Naka, Durg and carrying on Business in the name and style of R.K.Transport Company, Pulgaon Naka Durg, Chhattisgarh

---- Respondent

For Appellant	Mr. Abhishek Sinha, Sr. Advocate with Mr. P.K. Bhaduri and Mr. S.S. Marhas, Advocates
For Respondent	Mr. B.P. Sharma, Advocate with Mr. M.L. Saket, Mr. Nikhil Parakh, Mr. Jatin Joshi & Mr. Raza Ali, Advocates

Hon'ble Mr. Goutam Bhaduri, J. &
Hon'ble Mr. N.K. Chandravanshi, J.

CAV Judgment

Per **Goutam Bhaduri, J.**

1. This appeal is against the order dated 02.01.2017 passed by the Commercial Court, Raipur, whereby the appeal filed by appellant herein against the award dated 15.07.2012 passed by Sole Arbitrator was affirmed by the Commercial Court. The Arbitrator has awarded a sum of Rs.3,71,80,584/- with interest in favour of respondent.

2. Brief facts of the case are that the appellant Bharat Aluminium Company Ltd offered a Notice Inviting Tender (NIT) for mining and transportation of 3,70,000 MTs of Bauxite from Mainpat Mines to its Alumina Plant at Korba (Chhattisgarh). Respondent Ramesh Kumar Jain Proprietor of R.K. Transport Company submitted its tender quoting @ Rs.697/- per Metric Ton which was the lowest bidding and as such on 11.12.1999 the agreement was entered between BALCO-Appellant and the Claimant/respondent governing contract. Thereafter, in terms of contract, by letter dated 20.01.2000, work was awarded for mining and transportation of 2,22,000 MTs of Bauxite from Mainpat Mines to Alumina Plant of Balco at Korba amounting to Rs.14,07,92,400/- at the rate of Rs.634.20 per MT and the entire work was to be completed within a stipulated period of 18 months. The period of agreement was 18 months, which was to expire by May, 2001 but subsequently it was extended uptill September, 2001. The variable factor price of diesel was included in the contract taking into basis of average distance of 220 Kms from Mainpat Mines to Alumina Plant of BALCO at Korba (C.G). By letter dated 05.01.2002, the appellant Company requested the respondent to continue the work and it was stated that the rate would be decided in due course of time. The respondent continued the work and further extracted and transported the total 1,95,000 MTs of Bauxite during the period 16.06.2001 to 31.03.2002. Since the negotiations to the extent of payment could not be settled, the Contractor raised the dispute regarding payment

of contract work as also for the extra work done by him as per Clause 9.2.3 of the general terms of the Contract. The application having been filed before the High Court under Section 11(6) of The Arbitration and Conciliation Act, 1996, the High Court by its order dated 12.04.2007 passed in MCC No.192/2006 referred the dispute to the Sole Arbitrator for adjudication.

3. The appellant filed its reply and denied the claim statement and raised different defence on the basis of which, 13 issues were framed by the Sole Arbitrator and after evidence eventually the award was passed on 15.07.2012. The award was challenged before the Commercial Court, Raipur. The said appeal was dismissed by an Order dated 02.01.2017 by the Commercial Court u/s 34 of the Arbitration Act, 1996.

4. At para 75, the Arbitrator allowed the claims to the following extent :

As against the claim made by the complaint in	Amount awarded by the Tribunal	
Claim for extra work of 195000 MT during the period June 2001 to 31st March 2002	Rs.31,85,000/-	(Including interest upto the date of filing of the statement of claim i.e., August, 2007)
Claim for restriction on carrying capacity of Trucks/Tippers which resulted extra cost of transportation was awarded.	Rs.1,23,06,058/-	(Including interest upto the date of filing of the statement of Claim i.e., August, 2007)

Claim for idle man power and machinery during strike at BALCO was awarded	Rs.71,36,568/-	(Including interest upto the date of filing of the statement of Claim i.e., August, 2007)
Delayed payment	Rs.8,30,157/-	(interest only)
Total	**Rs.2,34,57,783/-**	

On all these amounts interest was levied till August 2007. Thus the total claim awarded to the claimant comes to the total of the above figures including the principal amount till the filing of claim as Rs. 2,34,57,783/-. It was further ordered that the Claimant shall also be entitled to interest on this amount of Rs.2,34,57,783/- from 1st September, 2007 to 15th July, 2012 (i.e., 4 years, 10 months and 15 days) at the rate of 12% per annum. This accumulated interest comes to Rs.1,37,22,801/-. **Thus the total award comes to (Rs. 2,34,57,783 + 1,37,22,801/-) Rs.3,71,80,584/- (Three Crores Seventy One Lacs Eighty Thousand, Five hundred and Eighty Four).**

5. Being aggrieved by such award passed by the learned Sole Arbitrator, the appellant filed M.J.C.No.33/2016 before the Commercial Court and it also came to be dismissed by order dated 02.01.2017. Hence this appeal.

6. (A) Mr. Abhishek Sinha, learned senior counsel assisted by Mr. P.K. Bhaduri & Mr. S.S. Marhas, Advocates, appearing on behalf of appellant Company would submit that the arbitral award can be set aside u/s 34(2)(b) of the Act on the following grounds :

(i) if the Court finds that it is in conflict with the Public Policy of India and the instant award is in conflict with Public Policy;

(ii) if it is against the principles of natural justice; and

(iii) if it is against the most basic notions of morality or justice in which patent illegality exists and unilateral addition of terms to a Contract or rewriting the terms of a Contract would be against the most basic notions of morality of justice. Learned counsel submits that in the instant case, the contract was re-written, by the Arbitrator therefore, the award is patently illegal on the face of it.

(B) He would further submit that the award is based on no evidence and the Arbitrator went beyond terms of contract and awarded higher rate of transportation charges otherwise than in contract, as such, the Arbitrator has exceeded the jurisdiction in exercise of discretion to award a new rate of contract was out of his power. He placed reliance on ***Ssangyong Engineering and Construction Company Limited v National Highways Authority of India (NHAI)***[1]**.** Referring to terms of contract, he would submit that only diesel rate variation contract was allowed with average one way of 220 Kms distance and another contract was taken into consideration which was not part of the agreement. He would submit that carrying capacity of the truck was awarded with respect to 12 MTs whereas the motor vehicles for which the weight was registered, it was restricted by the State and on mere assumption it

1 (2019) 15 SCC 131

was held that the claimant was allowed to carry 10.2 MTs by the appellant but no evidence was produced as to what was the carrying capacity of the vehicle and to what extent. He would submit that basic elementary evidence and factual evidence though was not on record, yet the Arbitrator came to a finding that 36% reduction was caused in carrying capacity. He submits that the award for carrying less capacity was against the contract clause as the contract clause does not say that for less loading the appellant Company would be liable but contractual payment was on the basis of actual loading. Referring to evidence, he submits that without prejudice even if it is admitted that the appellant was not allowed to carry more than 11 MTs, the Appellant Company cannot be held responsible and as such the BALCO did not place any restriction over 10.2 MTs carrying capacity.

(C) He would further submit that the award for idle labor (manpower) and machinery was wrong for the reason that the mining was being carried out at Mainpat mine which is at a distance of 220 Kms from BALCO and if the gates of the Factory were closed for mining operations, the labour cannot be made to sit idle at far remote place. He further submits that for the period of additional work from **16.06.2001 to 13.01.2002**, the Arbitrator solely of his own fixed a fresh rate of payment of freight without there being any agreement to this effect.

(D) He would submit that the award is made only on the basis of calculation without there being any evidence of actual damages caused. So though no loss is proved but the award has been passed. Therefore, the finding arrived at by the Arbitrator is based on no evidence. He submits that the award is made on the basis of guess work. He would further submits that the rule of contract variant was applied meaning thereby there was no contract and if there was no contract, no arbitration agreement exists and consequently, the issue would not be arbitral.

(E) Learned counsel for the appellant would further submit that with respect to idle manpower and machinery, only on the basis of Tabular Format Application, the compensation has been awarded and only on the basis of guess work, the award is passed. He contends that the arbitrator has misconducted himself by going into other aspects beyond the terms of contract and by adopting hyper technical approach, misinterpretation of contract is made.

(F) It is further submitted that the Arbitrator does not have jurisdiction to award claims under section 70 of the Contract Act and grant of interest on delayed payments in running bills was out of stipulation of the contract.

(G) It is further submitted that the learned arbitrator usurped the jurisdiction and wrongly misinterpreted the limitation and the onus to prove limitation has wrongly been shifted to the appellant. He

further submitted that the learned Commercial Court has completely failed to look into those aspects.

(H) While interpreting the rate of contract with the M.P. State Mining, Article 14 was applied and when specific contract exists by wrong application of Article 14 work could not have been made. He further submits that the rate of contract cannot be interfered in absence of evidence and on irrelevant considerations, when it ignores the vital issues.

(I) With respect to the period of additional work from 16.06.2001 to 31.03.2002, the Arbitrator fixed the fresh rate and under what authority and facts and figures, fresh rate was fixed is not clear especially when no rate was fixed and it was to be decided only by consultations. He further submits that when no rate is fixed, how the new rate can be fixed by the Arbitrator as he was bound by the Contract and the compensation cannot be awarded like an windfall.

(J) He submits that the Commercial Court has failed to take into consideration these vital issues and mechanically has affirmed the award passed by the Tribunal by misapplication of facts and interpretation. Therefore, both the orders of the Arbitrator and Commercial Court are liable to be set aside.

7. (A) *Per contra*, Mr. B.P. Sharma, learned counsel assisted by Mr. M.L. Saket, Mr. Nikhil Parakh & Mr. Raza Ali, Advocates,

appearing for the respondent referred to order dated 12.04.2007 passed in MCC No. 192/2006 and would submit that this fact was noted that there were two contracts, one is of 01.12.1999 and another is of 01.04.2002 and while appointing the Arbitrator, both claimant and appellant advocated that there were two contracts and on such submission the Arbitrator was appointed. Referring to documents filed in M.C.C., it is stated that 2,22,000 MTs of material was already transported from Mainpat mines to the appellant Plant and the BALCO/Appellant asked the respondent to further continue the work of mining and transportation. Referring to the reply, he would submit that as per admission, they were required to settle the rate for mining and transportation but did not do it but the respondent additionally was directed by A. Hussain, Engineer in Charge to carry out the further contract. Therefore, at the instance of Engineer in Charge, the work of mining and transportation was continued. Referring to the minutes of meeting, it is contended that according to the appellant, there were two contracts and these facts were clearly established during the hearing before the High Court while the Arbitrator was appointed and the question of limitation was not raised there. Therefore, the appellant could not raise the ground of limitation again. He would submit that it being the case the claim as a whole was to be adjudicated and consequently claim was entertained in right perspective by the Arbitrator.

(B) Referring to the report of Law Commission, learned counsel would submit that the report has resulted in amendment in the Arbitration Act, 1996, therefore, the arbitration is shown how to be dealt with and the claim in its entirety is required to be dealt with. It is further contended that the interference to what extent can be allowed is also reflected in object to frame legislation. Learned counsel would further submit that the Evidence Act is not applicable as per Section 1, therefore, the Commercial Court while dealing with the issue has appreciated the findings arrived at by the Arbitrator and the extent of judicial intervention was avoided. He would further submit that re-appreciation of evidence is not permissible, therefore, the Commercial Court was right in dismissing the appeal filed before it.

(C) Learned counsel would submit that a scheme has been evolved to challenge an award in Indian law and it has been extensively dealt in the Book “Enforcing Arbitral Award in India” which has resulted into amendment in the Arbitration and Conciliation Act, 1996 and incorporating provisions under Section 34 of the Act in place of earlier provisions for the reason of interference of the Court on the other grounds, minimal interference is called for under Section 34 read with Section 37(1) (b) of the Arbitration and Conciliation Act, 1996.

(D) Learned counsel would submit that by re-appreciation of evidence it cannot be said to be a patent illegality as specifically it

has to be shown that the award is against the fundamental policy of Indian law and the most basic notions of morality or justice. He would further submit that while considering the appeal, the Court should not act as an appellate forum and no interference in the arbitral award can be made. Only the scope of scrutiny was to be determined as to whether the Commercial Court has acted under the provisions of Section 34 of the Act, 1996 or not.

(E) He would submit that re-appreciation of evidence is not possible, this Court in supervisory jurisdiction cannot substitute its own finding even if some other finding could have been arrived at by the arbitrator. He would further submit that the interference can be made only if the reasons are so outrageous in their defiance of logic and shocks conscience of the Court, otherwise the arbitral award will not be opened to challenge and the court cannot interfere with the conclusion of the arbitrator with respect to the framing of contract.

(F) He further submits that the patent illegality should be an illegality which goes to the root of the matter and even if error of law is committed by the arbitrator, the Tribunal would not fall within patent illegality and erroneous application of law cannot be construed as patent illegality.

(G) He further submits that the entire reading of the award and the documents would show that the finding is arrived after appreciation of evidence both oral and documentary, therefore,

re-appreciation of evidence cannot be done by this Court. It is further submitted that this Court being an appellate Court in exercise of jurisdiction under section 37 of the Act, 1996 can exercise the jurisdiction for the limited purpose. It is stated that the issue of limitation as has been raised in the grounds was never raised before the arbitrator. It is stated when the appellant went into arbitral proceeding without any objection and subsequently has raised after the loss the same cannot be sustained. It is stated that neither it has been pleaded nor any facts were placed and the order of reference dated 12.04.2007 by the High Court would be binding on the tribunal and the plea of limitation having not been raised, the claim would be deemed to be barred.

(H) He would submit that the respondent concluded the contract of mining and supply of bauxite 2,22,000 MTs and subsequently was assigned the work of mining and transportation of 1,95,000 MTs of bauxite which would show that respondent was equipped with sufficient means and, therefore, this issue was decided on the basis of pleadings of the parties. It is further submitted that the sole arbitrator has held that no route map was prescribed in the contract except the fact that average one way distance from Mainpat mines to Korba Alumina Plant is 220 Kms by shortest route, however, from documents and pleadings, it was revealed that there were 3 routes available for transportation i.e., **(i)** via Darima; **(ii)** via Karabel Ambikapur and **(iii)** via Pathalgaon Hathi) , out of which Pathalgaon Hathi route was totally out of

order whereas Darima route was closed by District Magistrate, therefore, though the Kansabel-Ambikapur route was not in good condition, the claimant was constrained to ply his vehicles by taking a long distance via Kansabel-Ambikapur. Hence, for all these reasons, it must have increased the distance by 20 Kms. Therefore, grant of claim for extra long run on appreciation of evidence is not required to be interfered with.

(I) Learned counsel would further submit that the sole arbitrator applied the principle of *quantum of meruit* to grant claim as the respondent was the lowest bidder and the issue has not been contested by the appellant before the Arbitrator. Learned counsel would also submit that 15th running accounts bill from February 2001 was kept pending by the appellant Company for 90 days, it was settled between the parties, after lapse of considerable time the interest was awarded and since there was delay in payment of bill, as the respondent is entitled to claim interest as agreed up.

(J) With respect to closure of factory, counsel would submit that the man-power was kept idle for 57 days from 03.03.2001 to 08.05.2001 due to strike called by workers and the main gates were closed and since there being no clause of *force majeure* in the contract agreement, because of fault of the appellant, supply of bauxite could not be continued. He would submit that since factual re-appreciation of facts and evidence is not permissible, the

Commercial Court has rightly held in favour of the respondent and dismissed the appeal.

8. We have heard learned counsel appearing for the parties at length, perused the pleadings and the evidence available on record.

9. The Arbitrator was appointed pursuant to an order passed by this Court in the matter of ***Ramesh Kumar Jain v M/s Bharat Aluminium Company Ltd.***[2] wherein the arbitration clause was invoked. An agreement dated 6-12-1999 was entered into between the parties initially for a period of 18 months, which was subsequently extended till 31-3-2002. The agreement was predominantly for the work of mining and transportation of Bauxite from Mainpat Mines to Aluminium Plant, BALCO, Korba. According to the respondent, full and final payment was not made despite several applications. By letter dated 22-8-2005 annexed as Annexure – A/2 to MCC, a request was made to appoint an Arbitrator as per clause 9 of the agreement. The prayer for appointment of Arbitrator was rejected by the appellant, therefore, in an arbitration proceeding the High Court by an order dated 12-4-2007 appointed the Arbitrator. The document Annexure – A/2 refers to a further agreement dated 11-12-1999. The letter dated 5-1-2002 (Annexure - C/36) written by the appellant purports that mining and transportation of 1,11,000 MT Bauxite from Mainpat Mines and it further purports that the quantity against the above referred order was completed on 5-1-2002, but the

2 MCC No.192 of 2006 (decided on 12-4-2007)

respondent/claimant was advised to continue further delivery of Bauxite from Mainpat Mines and it was stated that the rate and terms and conditions will be decided in course of time after consultation.

10. The facts would show that the said rate for mining and transportation was never settled. These facts are revealed from minutes of the meeting held on 27-2-2006, which was for the finanlisation of outstanding dues in connection with mining and transportation of Bauxite. It refers to an agreement dated 1-4-2002 and the letter of BALCO dated 5-1-2002 and claimant was further directed to continue the work i.e. after completion of original contract. The minutes of the meeting refers to earlier agreement dated 11-12-1999 and the subsequent agreement dated 1-4-2002, therefore, it apparently appears that the contract between the parties subsisted and was alive. When dispute arrived at between the parties to settle it as per original terms of agreement an MCC was filed before the High Court. The letters *inter se* were made part of the MCC whereby the respondent was asked to continue the job after conclusion of the original agreement. While the Arbitrator was appointed no issue of limitation was raised and for the first time before the Arbitrator the issue was raised.

11. The Supreme Court in the matter of ***National Insurance Company Limited v Boghara Polyfab Private Limited***[3] has laid down the scheme for appointment of Arbitrator. In the said decision, the

3 (2009) 1 SCC 267

Supreme Court held that when a contract contains an arbitration clause and any dispute in respect of the said contract is referred to arbitration without the intervention of the Court, the Arbitral Tribunal can decide the following questions affecting its jurisdiction :

(a) whether there is an arbitration agreement;

(b) whether the arbitration agreement is valid;

(c) whether the contract in which the arbitration clause is found is null and void and if so whether the invalidity extends to the Arbitration clause also

In the case at hand, no such grounds were raised before the Arbitrator at the time of proceeding.

12. In ***National Insurance Company Limited*** (supra) at paras 22 & 23 the Supreme Court has laid down that the Chief Justice or his designate may choose to decide whether the claim is a dead (long-barred) claim or a live claim and whether the parties have concluded the contract/transaction by recording satisfaction of their mutual rights and obligation or by receiving the final payment without objection. The Supreme Court further held that if such points are raised, the Court may decide the same or in alternative may leave those issues open with the Arbitral Tribunal to decide the same. It further says that Chief Justice or his Designate chooses to examine the issue and decides it, the Arbitral Tribunal cannot re-examine the same issue.

13. For brevity paras 22 & 23 of the decision of the Supreme Court rendered in the matter of ***National Insurance Company Limited*** (supra) are quoted below :

> 22. Where the intervention of the court is sought for appointment of an Arbitral Tribunal under Section 11, the duty of the Chief Justice or his designate is defined in SBP & Co. This Court identified and segregated the preliminary issues that may arise for consideration in an application under Section 11 of the Act into three categories, that is, (i) issues which the Chief Justice or his designate is bound to decide; (ii) issues which he can also decide, that is, issues which he may choose to decide; and (iii) issues which should be left to the Arbitral Tribunal to decide.
>
> 22.1 The issues (first category) which the Chief Justice/his designate will have to decide are:
>
> (a) Whether the party making the application has approached the appropriate High Court.
>
> (b) Whether there is an arbitration agreement and whether the party who has applied under Section 11 of the Act, is a party to such an agreement.
>
> 22.2 The issues (second category) which the Chief Justice / his designate may choose to decide (or leave them to the decision of the Arbitral Tribunal) are:
>
> (a) Whether the claim is dead (long-barred) claim or a live claim.
>
> (b) Whether the parties have concluded the contract/transaction by recording satisfaction of their mutual rights and obligation or by receiving the final payment without objection.
>
> 22.3 The issues (third category) which the Chief Justice / his designate should leave exclusively to the Arbitral Tribunal are :
>
> (i) Whether a claim made falls within the arbitration clause (as for example, a matter which is reserved for final decision of a

> departmental authority and excepted or excluded from arbitration).
>
> (ii) Merits or any claim involved in the arbitration.
>
> 23. It is clear from the scheme of the Act as explained by this Court in SBP & Co., that in regard to issues falling under the second category, if raised in any application under section 11 of the Act, the Chief Justice/his designate may decide them, if necessary by taking evidence. Alternatively, he may leave those issues open with a direction to the Arbitral Tribunal to decide the same. If the Chief Justice of his Designate chooses to examine the issue and decides it, the Arbitral Tribunal cannot re-examine the same issue. The Chief Justice/his designate will, in choosing whether he will decide such issue or leave it to the Arbitral Tribunal, be guided by the object of the Act (that is expediting the arbitration process with minimum judicial intervention). Where allegations of forgery/fabrication are made in regard to the document recording discharge of contract by full and final settlement, it would be appropriate if the Chief Justice/his designate decides the issue.

14. Therefore, the conclusion by application of the said principle in the instant case it shows that while the appointment of Arbitrator was decided the issue of limitation was not raised by the appellant with respect to the claim whereas the letters attached by the respondent while seeking appointment of Arbitrator contains reference of two agreements i.e. 11-12-1999 and 1-4-2002. So this Court while appointing the Arbitrator was conscious of the nature of claim *qua* its validity. Therefore, the submission of the appellant that the claim was barred by time cannot be reconsidered and this Court having held the claim to be a live claim, Arbitrator was appointed.

15. The Arbitrator thereafter conducted the proceedings and has awarded the following claim :

> (a) claim for extra work of 1,95,000 MT during the period of June, 2001 to March, 2002 wherein the rate was fixed and additionally Rs.10/- PMT was awarded;
>
> (b) Likewise claim for restriction in carrying capacity of the trucks/tippers resulting in extra cost of transportation Rs.1,23,06,058/-;
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> (c) claim for idle machinery Rs.71,36,568/-; and
>
> (d) claim for interest on delayed payment of 15th RA Bill of Rs.8,30,157/-.

16. Since the appellate power u/s 37 of the Act, 1996 would be controlled and would be within the purview of limitation provided u/s 34 of the Act, 1996 to challenge the arbitral award, it would be relevant to refer the provisions of Section 34 of the Act, 1996 which is reproduced herein below:

> 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 1 – For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if, -

(i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81, or

(ii) it is in contravention with the fundamental policy of India law or;

(iii) it is in conflict with the most basic notions of morality or justice.

Explanation 2.-- For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian Law shall not entail a review on the merits of the dispute.]

(2A) An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the Court, if the Court finds that the award is vitiated by patent illegality appearing on the face of award:

Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by reappreciation of evidence.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal:

Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.

(4) On receipt of an application under sub-section(1), the Court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal

> will eliminate the grounds for setting aside the arbiral award.
>
> (5) An application under this section shall be filed by a party only after issuing a prior notice to the other party and such application shall be accompanied by an affidavit by the applicant endorsing compliance with the said requirement.
>
> (6) An application under his section shall be disposed of expeditiously and in any event, within a period of one year from the date on which the notice referred to in sub-section (5) is served upon the other party."

17. The Supreme Court in the matter of ***State of Chhattisgarh and Another v Sal Udyog Private Limited***[4], at para 15 has reiterated the observations made in ***Ssangyong Engineering & Construction Company Limited*** (supra), which spelt out the contours of the limited scope of judicial interference in reviewing the Arbiral Awards under the Act. Para 15 is relevant and quoted below :

> 15. In Ssangyong Engineering and Construction Company Limited v. National Highways Authority of India (NHAI), speaking for the Bench, Justice R.F. Nariman has spelt out the contours of the limited scope of judicial interference in reviewing the Arbitral Awards under the 1996 Act and observed thus :
>
> > "34. What is clear, therefore, is that the expression "public policy of India", whether contained in Section 34 or in Section 48, would now mean the "fundamental policy of Indian Law" as explained in paras 18 and 27 of Associate Builders[Associate Builders v. DDA (2015) 3 SCC 49 : (2015)2 SCC (Civ) 204] i.e., the fundamental policy of Indian law would be relegated to "Renusagar" understanding of his expression. This would necessarily mean that Western Geco [ONGC v. Western Geco International Ltd., (2014) 9 SCC 263 :(2014) 5 SCC (Civ) 12) expansion

4 (2022) 2 SCC 275

has been done away with. In short, Western Geco [ONGC v. Western Geco International Ltd., (2014) 9 SCC 263 :(2014) 5 SCC (Civ) 12], as explained in paras 28 and 29 of Associate Builders [Associate Builders v. DDA,(2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204, would no longer obtain, as under the guise of interfering with an award on the ground hat the arbitrator has not adopted a judicial approach, the Court's intervention would be on the merits of the award, which cannot be permitted post amendment. However, insofar as principles of natural justice are concerned, as contained in Sections 18 and (34(2)(a)(iii) of the 1996 Act, these continue to be grounds of challenge of an award, as is contained in para 30 of Associate Builders.

35. It is important to notice that the ground for interference insofar as it concerns “interest of India” has since been deleted, and therefore, no longer obtains. Equality, the ground for interference on the basis that the award is in conflict with justice or morality is now to be understood as a conflict with the “most basic notions of morality or justice”. This again would be in line with paras 36 to 39 of Associate Builders [Associate Builders v. DDA(2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204], as it is only such Arbitral Awards that shock the conscience of the court that can be set aside on this ground.

36. Thus, it is clear that public policy of India is now constricted to mean **firstly**, that a domestic award is contrary to the fundamental policy of Indian law, as understood in paras 18 and 27 of Associate Builders [Associate Builders v. DDA (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204], or secondly, that such award is against basic notions of justice or morality as understood in paras 36 to 39 of Associate Builders [Associate Builders v. DDA (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204], Explanation 2 to Section 34(2)(b)(ii) and Explanation 2 to Section 48(2)(b)(ii) was added by the Amendment Act only so that Western Geco

[ONGC v. Western Geco International Ltd., (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12], as understood in Associate Builders [Associate Builders v. DDA (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204, and paras 28 and 29 in particular,is now done away with.

37. **Insofar as domestic awards made in India are concerned, an additional ground is now available under sub-section (2-A), added by the Amendment Act, 2015, to Section 34. Here, there must be patent illegality appearing on the face of the award,which refers to such illegality as goes to the root of the matter but which does not amount to mere erroneous application of the law. In short, what is not subsumed within "the fundamental policy of Indian law", namely,the contravention of a statute not linked to public policy or public interest, cannot be brought in by the back-door when it comes to setting aside an award on the ground of patent illegality.**

38. Secondly, it is also made clear that re-appreciation of evidence, which is what an appellate court is permitted to do, cannot be permitted under the ground of patent illegality appearing on the face of the award.

39. To elucidate, para 42.1 of Associate Builders [Associate Builders v. DDA (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204], namely a mere contravention of the substantive law of India, by itself, is no longer a ground available to set aside anArbitral award. Para 42.2 of Associate Builders[Associate Builders v. DDA (2015) 3 SCC 49 : (2015)2 SCC (Civ) 204], however, would remain, for if an arbitrator gives no reasons for an award and contravenes Section 31(3) of the 1996 Act, that would certainly amount to a patent illegality on the face of the award.

40. The change made in Section 28(3) by the Amendment Act really follows what is stated in paras 42.3 to 45 in Associate Builders [Associate Builders v. DDA (2015)

> 3 SCC 49 : (2015) 2 SCC (Civ) 204],namely, that the construction of the terms of a contract is primarily for an arbitrator to decide, unless the arbitrator construes the contract in a manner that no fair-minded or reasonable person would; in short, that the arbitrator's view is not even a possible view to take. Also, if the arbitrator wanders outside the contract and deals with matters not allotted to him, he commits an error of jurisdiction. This ground of challenge will now fall within the new ground added under Section 34 (2-A).
>
> 41. What is important to note is that a decision which is perverse, as understood in paras 31and 32 of Associate Builders [Associate Builders v. DDA (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204], while no longer being a ground for challenge under "public policy of India", would certainly amount to a patent illegality appearing on the face of the award. **Thus, a finding based on no evidence at all or an award which ignores vital evidence in arriving at is decision would be perverse and liable to be set aside on the ground of patent illegality.** Additionally, a finding based on documents taken behind the back of the parties by the arbitrator would also qualify as a decision based on no evidence inasmuch as such decision is not based on evidence led by the parties,and therefore, would also have to be characterized as perverse."
>
> (emphasis added)

18. Further referring to the facets of the 'patent illegality, the Supreme Court in ***Delhi Airport Metro Express Pvt. Ltd.v. Delhi Metro Rail Corporation Ltd.***[5]**,** held that the Scope has been narrowed down but in case of "patent illegality" interference in the arbitral award would be permissible. At para 26, the Court has observed as under :

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> "26. Patent illegality should be illegality which goes to the root of the matter. In other words, every error of law committed by the Arbiral Tribunal would not fall within the expression 'patent illegality' Likewise, erroneous application of law cannot be categorized as patent illegality. In addition,contravention of law not linked to public policy or public interest is beyond the scope of the expression' patent illegality'. What is prohibited is for courts tore-appreciate evidence to conclude that the award suffers from patent illegality appearing on the face of the award, as courts do not sit in appeal against the arbitral award. The permissible grounds for interference with a domestic award under Section 34 (2-A) on the ground of patent illegality is when the arbitrator takes a view which is not even a possible one, or interprets a clause in the contract in such a manner which no fair-minded or reasonable person would, or if the arbitrator commits an error of jurisdiction by wandering outside the contract and dealing with matters not allotted to them. An arbitral award stating no reasons for its findings would make itself susceptible to challenge on this account. The conclusions of the arbitrator which are based on no evidence or have been arrived at by ignoring vital evidence are perverse and can be set aside on the ground of patent illegality. Also, consideration of documents which are not supplied to the other party is a facet of perversity falling within the expression' patent illegality'.

In the light of aforesaid principles, the justification or interference in award shall be examined in the instant case.

19. The claim for extra work of 1,95,000 MT beyond contract period Rs.78,00,000/- + interest Rs.70,20,000/- total Rs,1,48,20,000/- was raised. As against this, an amount of Rs.31,85,000/- was awarded.

20. The respondent in his statement of claim stated that pursuant to the NIT for mining and transportation of 10.50 lac MT of Bauxite the rate quoted by it was Rs.697/- PMT and even after completion of

the stipulated quantity under the contract, the contract was not executed. The other two contractors who were awarded similar contract had left, therefore, at the request of the company the respondent continued the work and delivered 50% extra quantity from the left out areas by removal of over burden and so had a legitimate expectation that rate for the extra quantity with a removal of heavy burden would be decided and would be paid to him on the basis of tender rates already existing for tenders. The respondent claimed that it was informed that left out areas would be decided to continue in the same rate and the appellant company assured that it would be paid on ad hoc basis at the old rate till finalisation of rate for the extra quantity and on settlement of other claims. The respondent also stated that he completed the additional quantity of 1,11,000 MT as per delivery schedule and further he was asked to continue the work by letter dated 5-1-2002 on the assurance that the rate would be decided in course of time. The work continued till 31-3-2002, but the BALCO did not decide the rate. The respondent also pleaded that since the rate was not fixed, for the extra work, he was paid at the old rate of Rs.657/- PMT for such extra work whereas he should have been paid at the rate of Rs.697/- PMT and, therefore, the claim for Rs.40/- PMT as extra cost totaling Rs.78,00,000/- was incurred.

21. As against this, BALCO in its defence denied such claim. It was stated that the claim is against the terms of contract. It was further stated that the claimant continued the work at the rate which was

earlier prevailing and the work was executed and was paid same rate. BALCO further stated that the rate was impliedly agreed and the payment having been accepted, the claimant was not entitled to any further claim.

22. The learned Arbitrator at paras 55 to 58 has awarded compensation at Rs.10/- PMT on the principle of '*Quantum Meriut*'. The letter dated 5-1-2002 (Annexure – C/36) would show that no rate was fixed. According to the respondent, the company paid Rs.657/- PMT but the learned Arbitrator has recorded that it is at the rate of Rs.634/- PMT. Applying the principle of '*Quantum Meriut*', no fixation or authorisation accepted. Therefore, when the rate was not decided how the additional cost of Rs.10/- PMT extra was fixed by the Arbitrator. There is a factual dispute that the Arbitrator has observed that respondent was paid at the rate of Rs.634.20 PMT and by addition of Rs.10/-, it would come to Rs.644.20 PMT. There is no contract to this effect and no rate was fixed. When there is no contract to this issue how there can be fixation of rate by the Arbitrator. The fixation of rate by the Arbitrator, therefore, apparently appears to be without jurisdiction in absence of any agreement. The Arbitrator of his own could not have fixed the rate by rewriting the contract.

23. The rate which is awarded for the extra work on the principle of '*Quantum Meriut*', would not be applicable in view of the law laid down by the Supreme Court in ***Mahanagar Telephone Nigam***

Limited v Tata Communications Limited[6]. The Supreme Court in such case has held that the compensation '*Quantum Meriut*' is awarded for work done or services rendered, when the price thereof is not fixed by a contract. Here in the instant case the rate having been accepted and work was done it could not have awarded the amount of compensation of Rs.10/- PMT on the basis of '*Quantum Meriut*'. The Supreme Court held thus at paras 4, 7 & 9 :

> 4. Having heard the learned counsel for both sides, one neat question arises before this Court, which is, whether, when parties are governed by contract, a claim in quantum meruit under Section 70 of the Indian Contract Act, 1872 ["Contract Act"] would be permissible. Section 70 of the Contract Act reads as under:
>
> > "70. Obligation of person enjoying benefit of non-gratuitous act.—Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered."
>
> This Section occurs in Chapter V of the Contract Act, which chapter is headed, "of certain relations resembling those created by contract". There are five sections that are contained in this Chapter. Each of them is posited on the fact that there is, in fact, no contractual relationship between the parties claiming under this Chapter. For example, under Section 68, if a person incapable of entering into a contract is supplied necessaries by another person, then the person who has furnished such supplies becomes entitled to be reimbursed from the property of the person so incapable of entering into the contract. Section 69 also deals with a case where a person has no contractual relationship with the other person mentioned therein, but who is interested in the payment of money which the other person is bound by law to pay, and who, therefore, pays it on behalf

6 (2019) 5 SCC 341

of such person. Such person is entitled to be reimbursed by the other person. Under Section 71, again, the finder of goods spoken of is a person who is fastened with the responsibility of a bailee as there is no contractual relationship between the finder of goods and the goods which belong to another person. Equally, under Section 72, a person to whom money has been paid or anything delivered by mistake or coercion must repay or return it, or else, such person would be unjustly enriched. Here again, there is no contractual relationship between the parties. It is in this setting that Section 70 occurs.

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7. In Alopi Parshad and Sons Ltd. v. Union of India, (1960) 2 SCR 793, this Court dealt with an arbitration award which, inter alia, awarded certain amount on the basis of quantum meruit. In setting aside the Award on the ground of error apparent on the face of the record, this Court held:

> 24…… Ghee having been supplied by the Agents under the terms of the contract, the right of the Agents was to receive remuneration under the terms of that contract. It is difficult to appreciate the argument advanced by Mr. Chatterjee that the Agents were entitled to claim remuneration at rates substantially different from the terms stipulated, on the basis of quantum meruit. Compensation quantum meruit is awarded for work done or services rendered, when the price thereof is not fixed by a contract. For work done or services rendered pursuant to the terms of a contract, compensation quantum meruit cannot be awarded where the contract provides for the consideration payable in that behalf. Quantum meruit is but reasonable compensation awarded on implication of a contract to remunerate, and an express stipulation governing the relations between the parties under a contract, cannot be displaced by assuming that the stipulation is not reasonable.

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9. Indeed, the aforesaid position in law is made clearer by Section 73 of the Contract Act. Section 73 reads as follows:

> "73. **Compensation for loss or damage caused by breach of contract.—** When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.
>
> Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.
>
> **Compensation for failure to discharge obligation resembling those created by contract.**—When an obligation resembling those created by contract has been incurred and has not been discharged, any person injured by the failure to discharge it is entitled to receive the same compensation from the party in default, as if such person had contracted to discharge it and had broken his contract.
>
> Explanation.—In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account."

This Section makes it clear that damages arising out of a breach of contract is treated separately from damages resulting from obligations resembling those created by contract. When a contract has been broken, damages are recoverable under paragraph 1 of Section 73. When, however, a claim for damages arises from obligations resembling those created by contract, this would be covered by paragraph 3 of Section 73.

24. Further in the matter of ***PSA SICAL Terminals (P) Ltd. v. Board of Trustees of V.O. Chidambranar Port Trust Tuticorin and Others***[7], the Supreme Court held that the fundamental principle of justice when is breached by a unilateral addition or alteration of a contract has been foisted upon an unwilling party, the same cannot be liable to be performed. In the said decision, the Supreme Court held that at paras 87 to 92 :

> 87. As such, as held by this Court in Ssangyong Engineering and Construction Company Limited (supra), the fundamental principle of justice has been breached, namely, that a unilateral addition or alteration of a contract has been foisted upon an unwilling party. This Court has further held that a party to the Agreement cannot be made liable to perform something for which it has not entered into a contract. In our view, rewriting a contract for the parties would be breach of fundamental principles of justice entitling a Court to interfere since such case would be one which shocks the conscience of the Court and as such, would fall in the exceptional category.
>
> 88. We may gainfully refer to the following observations of this Court in Bharat Coking Coal Ltd. v. Annapurna Construction.
>
> > "22. There lies a clear distinction between an error within the jurisdiction and error in excess of jurisdiction. Thus, the role of the 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. If he has travelled beyond the contract, he would be acting without jurisdiction, whereas if he has remained inside the parameters of the contract, his award cannot be questioned 26 (2003) 8 SCC 154 on the ground that it contains an error apparent on the face of the record."

7 2021 SCC OnLine SC 508

> 89. It has been held that the role of the 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. If he has travelled beyond the contract, he would be acting without jurisdiction.
>
> 90. It will also be apposite to refer to the following observations of this Court in the case of Md. Army Welfare Housing Organization v. Sumangal Services (P) Ltd.
>
> > "43. An Arbitral Tribunal is not a court of law. Its orders are not judicial orders. Its functions are not judicial functions. It cannot exercise its power ex debito justitiae. The jurisdiction of the arbitrator being confined to the four corners of the agreement, he can only pass such an order which may be the subject matter of reference."
>
> 91. It has been held that an Arbitral Tribunal is not a Court of law. Its orders are not judicial orders. Its functions are not judicial functions. It cannot exercise its powers ex debito 27 (2004) 9 SCC 619 justitiae. It has been held that the jurisdiction of the arbitrator being confined to the four corners of the agreement, he can only pass such an order which may be the subjectmatter of reference.
>
> 92. In that view of the matter, we are of the considered view, that the impugned Award would come under the realm of 'patent illegality' and therefore, has been rightly set aside by the High Court.

25. Applying the aforesaid principle it would show that the Arbitrator has no power to decide the rate apart from what the parties have given him under the contract. If he has travelled beyond the contract, he would be acting without jurisdiction, whereas if he had remained inside the parameters of the contract, his award cannot be questioned on the ground that it contains an error apparent on the face of the record. It further held that an Arbitral Tribunal is not a

Court of law; its orders are not judicial orders and its functions are not judicial functions. It cannot exercise its powers *ex debito justitiae*, therefore, when the award comes under the realm exceeding jurisdiction or rewritten it would be of 'patent illegality'.

26. Further perusal of the award would show that the Arbitrator has fixed the contract rate. As per the contract, the respondent was paid Rs.634.20 PMT apart from the escalation, therefore, the Arbitrator appears to have rewritten the contract and it would be a patent illegality.

27. The Supreme Court in the matter of ***Satyanarayana Construction Company v Union of India and Others***[8], has held that it would be beyond the jurisdiction of the Arbitrator to fix the rate if additional work is carried out and it would be beyond his competence and authority. The Arbitrator would not be entitled to rewrite the contract. The Supreme Court held thus at para 11 :

> 11. Thus, as per the contract, the contractor was to be paid for cutting the earth and sectioning to profile, etc. @ Rs 110 per cubic metre. There may be some merit in the contention of Mr Tandale that the contractor was required to spend huge amount on the rock blasting work but, in our view, once the rate had been fixed in the contract for a particular work, the contractor was not entitled to claim additional amount merely because he had to spend more for carrying out such work. The whole exercise undertaken by the arbitrator in determining the rate for the work at Serial No. 3 of Schedule A was beyond his competence and

8 (2011) 15 SCC 101

> authority. It was not open to the arbitrator to rewrite the terms of the contract and award the contractor a higher rate for the work for which rate was already fixed in the contract. The arbitrator having exceeded his authority and power, the High Court cannot be said to have committed any error in upsetting the award passed by the arbitrator with regard to Claim 4.

28. The Arbitrator further has awarded Rs.10/- PMT as an additional compensation, but entire reading of the evidence and the agreement would show that no where it can be found that such Rs.10/- PMT, which has been granted by the Arbitrator was within the terms of contract. Therefore, by such additional grant fresh contract was created, where in appellant has not consented ever.

29. The Supreme Court in the case of ***Kailash Nath Associates v Delhi Development Authority and Another***[9], has held that where a sum is named in a contract as a liquidated amount payable by way of damages, the party complaining of a breach can receive as reasonable compensation such liquidated amount only if it is a genuine pre-estimate of damages fixed by both parties. Reference is made to Section 73 of the Indian Contract Act, 1872 (for short 'the Act, 1872'), which speaks that reasonable compensation will be fixed on well known principles that are applicable to the law of contract, which are to be found, *inter alia,* in Section 73 of the Act, 1872. The Supreme Court held thus in paras 43.2 to 43.6 :

> 43.2 Reasonable compensation will be fixed on well known principles that are applicable to the law of contract, which are to be found inter alia in Section 73 of the Contract Act.

9 (2015) 4 SCC 136

43.3 Since Section 74 awards reasonable compensation for damage or loss caused by a breach of contract, damage or loss caused is a sine qua non for the applicability of the Section.

43.4 The Section applies whether a person is a plaintiff or a defendant in a suit.

43.5 The sum spoken of may already be paid or be payable in future.

43.6 The expression "whether or not actual damage or loss is proved to have been caused thereby" means that where it is possible to prove actual damage or loss, such proof is not dispensed with. It is only in cases where damage or loss is difficult or impossible to prove that the liquidated amount named in the contract, if a genuine pre-estimate of damage or loss, can be awarded.

30. For the sake of convenience, Section 73 of the Act, 1872 is quoted below :

"73. **Compensation for loss or damage caused by breach of contract.**—When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.

Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

Compensation for failure to discharge obligation resembling those created by contract.—When an obligation resembling those created by contract has been incurred and has not been discharged, any person injured by the failure to discharge it is entitled to receive the same compensation from the party in default, as if such person had contracted to discharge it and had broken his contract.

> Explanation.—In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account.

31. This Court in the matter of ***State of Chhattisgarh & Another v M/s Learn Nature Consultan ts Partnership Firm***[10], held thus at paras 16, 17, 23 & 24 :

> 16. In order to ascertain the damages the Supreme Court in the matter of ***Kanchan Udyog Limited Versus United Spirits Limited {(2017) 8 SCC 237}*** has held that under Section 73 of the Contract Act, a party who suffers breach of contract is entitled to compensation for any loss or damage caused to him thereby from the party who has broken the contract. It further held that there must be causal connection between the breach of contract and the "loss sustained by the party" who suffers the breach. The common sense test of causation is whether a breach of contract is a sufficiently substantial cause of the plaintiff's loss. In regard to remoteness of damage, in para 27 of the judgment, the Court has held as under:-
>
> > 27. In Galoo Ltd. the emphasis was on the common sense approach, holding that the breach may have given the opportunity to incur the loss but did not cause the loss, in the sense in which the word "cause" is used in the law. The following passage extracted therein from *Chitty* on Contracts, 26th Edn. (1989) Vol. 2, pp. 1128-1129, Para 1785 may be usefully set out: (WLR p. 1370 A – B)
> >
> > > "....'The important issue in remoteness of damage in the law of contract is whether a particular loss was within the reasonable contemplation of the parties, but causation must also be proved: there must be a causal connection between the defendant's breach of contract and the plaintiff's loss. The courts have avoided laying down any formal tests

10 ARBA No.27 of 2019 (decided on 13-12-2022)

> for causation: they have relied on common sense to guide decisions as to whether a breach of contract is a sufficiently substantial cause of the plaintiff's loss."

17. Further the Supreme Court in **Kanchan** (supra) has reiterated the view taken in the matter of ***C. & P. Haulage v. Middleton, (1983) 3 All ER 94*** & in the matter of ***Cullinane v. British Rema Mfg. Co. Ltd. {(1954) 1 QB 292}*** and held thus in para 31:-

> "31. In C & P Haulage, which considers Cullinane also, it has been observed as follows: (C. & P. Haulage case, All ER p.99 *b-e*)
>
> > "...The law of contract compensates a plaintiff for damages resulting from the defendant's breach; it does not compensate a plaintiff for damages resulting from his making a bad bargain. Where it can be seen that the plaintiff would have incurred a loss on the contract as a whole, the expenses he has incurred are losses flowing from entering into the contract, not losses flowing from the defendant's breach. In these circumstances, the true consequence of the defendant's breach is that the plaintiff is released from his obligation to complete the contract-or in other words, he is saved from incurring further losses. If the law of contract were to move from compensating for the consequences of breach to compensating for the consequences of entering into contracts, the law would run contrary to the normal expectations of the world of commerce. The burden of risk would be shifted from the plaintiff to the defendant. The defendant would become the insurer of the plaintiff's' enterprise. Moreover, the amount of the damages would increase not in relation to the gravity or consequences of the breach but in relation to the inefficiency with which the plaintiff carried out the contract.

> The greater his expenses owing to inefficiency, the greater the damages.

23. Lord Goodard, CJ., in ***Bonham- Carter v. Hyde Park Hotel Ltd. {(1948) 64 TLR 177}*** stated:

> "Plaintiff must understand that if they bring actions for damages it is for them to prove their damage: it is not enough to write down the particulars, and, so to speak, throw them at the head of the Court saying: 'This is what I have lost; I ask you to give me these damages.' They have to prove it."

> The claim for damages would not be admissible if there is a total absence of specific particulars of the loss allegedly suffered by the plaintiff. In as suit for quantified damages based on an actionable claim, it is the obligation of the plaintiff to specify the damages with respect to the individual claims and to point out precisely the extent of damage, with reference to all material particulars and the manner in which it was caused.

> In a suit for damages caused by the defendant's breach of contract, the damages must be proved by the plaintiff. He must satisfy the Court both as to the fact of damage and as to its amount when it claims substantial damages.

24. In all actions accordingly on the case where the damage actually done is the gist of the action, the character of the acts themselves which produce the damage, and the circumstances under which these act are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. (See: ***Ractliffe v. Evans, {1982 (2) QB 524}***).

32. Section 73 of the Act, 1872 makes it compulsory for the plaintiff to prove that he has suffered damages and the extent to which he has suffered before a Court can award him damages for breach of contract, and if he does not give the best evidence, every

presumption should be made against him. However, this does not relieve the Court altogether of the duty of assessing the damages. The learned Arbitrator has assessed the damages only on the basis of oral statement and on the guess work, therefore, the same cannot be sustained and it would therefore fall within four corners of patent illegality.

33. The Arbitrator has further made an award for restriction in carrying capacity of trucks/tippers holding that extra cost for transportation was borne out by the respondent. The respondent claimed an amount of Rs.3,72,60,900/- inclusive of interest whereas the Arbitrator has awarded an amount of Rs.1,23,06,058/- with interest. The claimant has pleaded that he was not allowed to carry more than 11 MT. In examination in evidence in respect of Question No.45 specific statement was made that the BALCO was not responsible to reduce carrying capacity. Thus, *prima facie*, it appears that the appellant was not responsible for any reduction in weight. So the restriction on carrying capacity can not be attributed to appellant.

34. Section 79 of the Motor Vehicles Act, 1988 (for short 'the MV Act') controls the grant of goods carriage permit. The relevant part of Section 79(2)(ii) & (viii) is quoted below for ready reference :

79. Grant of goods carriage permit.—

xxx xxx xxx

> (2) The Regional Transport Authority, if it decides to grant a goods carriage permit, may grant the permit and may, subject to any rules that may be made under this Act, attach to the permit any one or more of the following conditions, namely:—
>
> xxx xxx xxx
>
> (ii) that the gross vehicle weight of any vehicle used shall not exceed a specified maximum;
>
> xxx xxx xxx
>
> (viii) that the conditions of the permit shall not be departed from, save with the approval of the Regional Transport Authority;

35. Reading of the aforesaid provision would show that the gross vehicle weight of any vehicle is controlled by the Regional Transport Authority. The respondent divided the claim in two categories e.g. (i) on the basis of longer route; and (ii) on account of restriction in carrying capacity. Perusal of the document would show that only tabular statement and oral statement were placed on record to make high light the quantum of loss.

36. In cross-examination, when a specific question (Q.No.106) was asked, reference is made to tabular statement. Perusal of tabular statement, it is difficult to understand on what rate and how the loss was calculated and proved. Simply because of production of tabular statement, it cannot be said that it is a evidence to evaluate the facts. Tabular statements of loss are self declaratory statement of claimant. The basis on which such facts and figures were arrived

at is absent. So it would on opinion of claimant and not the evidence of facts.

37. The respondent pleaded that he possessed vehicle of carrying capacity of 12 MT and because of restriction imposed by the appellant, he suffered loss, however, the same has not been established by the respondent and is silent. The carrying capacity of the vehicle as per the document produced i.e. registration certificate it has been shown as 11,850 kgs. There is no documentary evidence on record to show that any penalty was imposed by the appellant over the carrying capacity. In absence of any document which could have been placed and proved, it cannot be inferred that the respondent was restricted to carry 10.2 MT only despite the fact that the carrying capacity of the vehicle was more than 10.2 MT. So the award/ claim on the basis of alleged loss and calculation is based on no evidence and only on guess work.

38. The Supreme Court in the matter of ***Kailash Nath Associates*** (supra) and this Court in ***M/s Learn Nature Consultants Partnership Firm*** (supra) & ***Union of India & Another v M/s Eskay Build Works Pvt. Ltd.***[11] held that the Arbitrator cannot rewrite the award, therefore, that part of the finding of the Arbitrator which is without any evidence; beyond the terms of contract; and again would be a patent illegality.

11 ARBA No.78 of 2016 (decided on 16-5-2017)

39. In respect of idle machinery an amount of Rs.58,25,770/- with interest was claimed. The learned Arbitrator awarded an amount of Rs.43,69,327.50 + interest to the tune of Rs.27,67,240=75; totaling Rs.71,36,568/-. In fact, the claim has been made in two categories i.e. for idle manpower and another one is idle machinery. In total, claim of Rs.58,25,770/- was awarded. Only available evidence, apart from the pleading at paras 13, 14 and 19.4, is that due to the strike in the factory the gates of the factory were closed, therefore, they were not allowed to operate in the mines. Admittedly, the mines at Mainpat is situated at distance of about 220 kms. away from Korba. There is no evidence on record to show that how the mining process came to stand still and there is no document to show as to how much expenses incurred by the respondent during such stagnant period. Only tabular chart has been produced by the respondent. The tabular statement is not based on any copy of book entry or payment made and only is a self declaratory opinion, which can not be sustained, as it is not an evidence of facts.

40. Perusal of the award would show that the Arbitrator was in agreement with the fact that the respondent has not produced any document for loss under different heads. Reading of cross-examination from Q.Nos.102 to 300 it is manifest that when the claimant was asked about the calculation, the answer was avoided. The Arbitrator came to a finding that the claim of the respondent is limited to the extent of idle machinery and not idle manpower, thereby the claim was reduced to Rs.43,69,327.50 i.e. to the extent

of 75% of the total claim whereas the tabular statement, which is produced, on which the claimant has relied, shows that the claim was made for both idle machinery and idle manpower to the tune of Rs.58,25,770/-. Consequently, the finding of the Arbitrator that the respondent has claimed for idle machinery only is contrary and erroneous on the face of the record. Once it has been arrived that there is no evidence on record, no award can be sustained.

41. The other question which falls about claim for interest is on delayed payment. Again in the statement of claim, apart from the avements in the claim which is denied, the evidence has been produced in tabular statement alone under the head 'calculation sheet No.5'. The claim has been allowed at the rate of 18% interest on the basis of assumption under Section 70 of the Act, 1872.

42. For brevity Section 70 of the Act, 1872 is quoted below :

> **70. Obligation of person enjoying benefit of non-gratuitous act.**—Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered.

43. Perusal of Section 70 of the Act, 1872 would show that when there is no contract existed then principle of Section 70 can be made applicable. So the necessary inferences by application of Section 70 of contract is that no agreement existed. So in absence of agreement, the dispute of any like nature can not be adjudicated as

the arbitrator gets jurisdiction; when a contract to such subject exists. Therefore, the grant of award would be without jurisdiction.

44. Having thus considered all the facts and circumstances of the case and applying the well settled principles of law, we are of the view that the award dated 15-7-2012 passed by the learned Sole Arbitrator and the order dated 2-1-2017 passed by the learned Commercial Court, Raipur, cannot be sustained. Accordingly, the same are liable to be and are hereby set aside.

45. As a sequel, the instant appeal is allowed, leaving the parties to bear their own cost(s).

Sd/-

(Goutam Bhaduri)
Judge

Sd/-

(N.K. Chandravanshi)
Judge

Rao/Gowri