***IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Date of decision: 16th January, 2015**

\+ **O.M.P. No.1640/2014**

M/S NATIONAL HIGHWAYS AUTHORITY OF INDIA **….. Petitioner**

Through: Mr. Sudhir Nandrajog, Sr. Adv. with Ms. Tanu Priya Gupta, Adv.

Versus

M/S ORIENTAL STRUCTURAL ENGINEERS PVT. LTD. **….. Respondent**

Through: None.

CORAM:-
HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. This petition, under Section 34 of the Arbitration and Conciliation Act, 1996, seeks setting aside of the unanimous arbitral Award dated 22nd August, 2014, of the Arbitral Tribunal comprising of a nominee of the petitioner and the nominee of the respondent and a presiding Arbitrator of the choice of the nominees of the two parties, to the extent the same allows the Claims No.2 to 6 of the respondent against the petitioner (claim No.1 of the respondent against the petitioner was disallowed).

2. The petition came up before the Court first on 22nd December, 2014 when after hearing extensively the senior counsel for the petitioner, orders were reserved.

3. The arbitral award emanates from the claims of the respondent against the petitioner under the contract dated 29th September, 2005 for a price of Rs.115,24,02,683/- between the parties for construction by the respondent of New Four Lane Jhansi Bypass on National Highway 25 in the State of Uttar Pradesh for the petitioner, with the stipulated date of start as 21st November, 2005 and the stipulated date of completion as 20th May, 2008. The works were however completed only on 31st August, 2010.

4. The petitioner seeks setting aside of the arbitral award to the extent:-

(i) It allows the Claim No.2 of the respondent in the sum of Rs.89,66,783/- with interest for wrongful certification of Bills of Quantity for construction of reinforced earth, precast concrete facia panel, RCC crash barrier etc. for the period till 31st August, 2010 and holds the respondent entitled to further sums on similar basis for period subsequent

to 31st August, 2010 and till final account in respect of wrong quantification;

(ii) It allows Claim No.3 of the respondent in the sum of Rs.30,65,779/-towards delay till 31st August, 2010 in payments of the admitted amounts;

(iii) It allows Claim No.4 of the respondent in the sum of Rs.3,21,64,657/- for non-payment of price adjustment upto 31st August, 2010 and in a sum of Rs.60,87,471/- towards interest thereon till 31st August, 2010 and further finds the respondent entitled to payment of correct quantification of price adjustment in subsequent IPCs till final account, together with interest thereon;

(iv) It allows Claim No.5 of the respondent in the sum of Rs.16,09,647/- towards additional cost due to increase in royalty on various minerals for the quantities executed till February, 2010 with interest @ 10% compounded monthly from 9th March, 2010 till the completion of the work and simple interest @ 10% per annum including on compound interest

aforesaid, from 1st September, 2010 till the date of actual payment;

(v) It allows Claim No.6 of the respondent in the sum of Rs.2,68,69,295/- on account of price escalation till 31st August, 2010 and in a sum of Rs.48,29,367/- towards interest @ 10% per annum thereon compounded monthly and simple interest @ 10% per annum from 1st September, 2010 till the date of actual payment;

5. The petitioner seeks setting aside of the said arbitral award on the grounds of:-

(a) The Arbitral Tribunal having wrongly read the Contract between the parties to conclude that certain works required to be carried out were not part of the Contract when in fact as per the Contract they were not to be measured separately and were to be deemed to be incidental to the work under the Contract.

(b) Allowing of certain claims of the respondent by the Arbitral Tribunal amounting to the respondent being paid twice for the same work.

(c) The delays in payment of the admitted amounts by the petitioner to the respondent being on account of the respondent failing to comply with the obligations it was required to comply with before receiving payment and the petitioner being thus not liable to pay interest and the Arbitral Tribunal having wrongly concluded that the petitioner had delayed the payment.

(d) The Arbitral Tribunal having not considered that the respondent had not sought any clarification to the addendum / corrigendum of the pre-bid meeting, thereby impliedly accepting the addendum and having started making representation only after major work were executed.

(e) The Arbitral Tribunal having not considered that if the respondent intended to claim any additional payment pursuant to any clause in the Contract, the respondent under the contract was required to within 28 days from the date of dispute notify the engineer with a copy marked to the petitioner, of his such intention and the respondent had not done so and was thus not entitled to the claim.

(f) The Arbitral Tribunal having awarded price adjustment at a rate contrary to the Contract between the parties and the clarifications, addendum and corrigendum issued by the petitioner;

(g) The respondent being not entitled to any additional costs due to increase in royalty on various minerals owing to its failure to notify the engineer in this regard within the time prescribed and the Arbitral Tribunal having not considered the said aspect.

(h) The Arbitral Tribunal having wrongly interpreted the contractual provision regarding additional cost; contractually, the respondent was entitled thereto only if the additional cost was on account of change in legislation; the additional cost claimed by the respondent and allowed by the Arbitral Tribunal was not on account of change in legislation. The Arbitral Tribunal having misinterpreted the contract between the parties;

(i) The Arbitral Tribunal having overlooked other contractual provisions and facts.

(j) The rate of interest @ 10% granted by the Arbitral Tribunal being excessive.

(k) The issue with respect to additional cost due to increase in royalty on various minerals involved the issue of subsequent legislation and which is pending consideration before the Supreme Court; and,

The petitioner thus contends that the award is contrary to public policy and law of the land, within the meaning of ***Oil and National Gas Corporation Ltd. Vs. SAW Pipes Ltd.*** (2003) 5 SCC 705.

6. The senior counsel for the petitioner during the hearing fairly informed that the award, insofar as allowing the Claim No.5 of the respondent towards additional cost due to increase in royalty on various minerals, is in accordance with the judgments of the Single Judge and the Division Bench of this Court but the issue is pending consideration before the Supreme Court. The senior counsel also agrees that the challenge to the award is on the grounds either of the Arbitral Tribunal having wrongly interpreted the contract between the parties or having not considered the defence of the petitioner to the claims of the respondent which have been allowed. With regard to award on Claim No.3 allowing interest on delayed payments, it is argued that the respondent had failed to furnish the clarification sought from it and so the engineer had no option but to assess

the payment due on best judgment and payment was made accordingly and thus the petitioner could not be held liable for any interest for delay. It was argued that under the Contract the engineer was entitled to seek such clarifications and the engineer having done so and the respondent having not submitted the clarifications, no delay in payment could be attributed to the petitioner. On enquiry, as to whether the payment ultimately made to the respondent was as demanded by the respondent, it was informed that there was a difference of 5% between what the respondent had demanded and what was paid to the respondent. It was yet further contended that though the respondent in the pre-bid meeting had given a discount of 7.5% on each item and though in accordance therewith the petitioner was entitled to discount of 7.5% on payment even if found due on increased work also but the Arbitral Tribunal while allowing the claim of the respondent for price escalation has not given the said discount of 7.5%. With respect to the award on Claim No.4, it is argued that the Arbitral Tribunal did not consider that the respondent was required to raise the said dispute within 28 days and had raised the same just one month prior to the closure of the award.

7. I had during the hearing enquired from the senior counsel for the petitioner as to under which of the grounds stipulated in Section 34 of the

Arbitration Act for setting aside of the award, do the aforesaid grounds urged, fit. Attention of the senior counsel was invited to the fact that Section 34(2) provides "an arbitral award may be set aside by the Court only if" the grounds mentioned thereunder were satisfied. It was enquired whether not the use by the legislature of the word "only" is indicative of, the arbitral award being not liable to be set aside on any ground other than those specified. Such language, even under the 1940 Act, was in ***State of U.P. Vs. Allied Constructions*** (2003) 7 SCC 396 held to be restrictive in operation.

8. The senior counsel responded that the arbitration being an adjudicatory mechanism, the award, if adjudicates contrary to law or contrary to the facts, has to be held to be in conflict with the public policy of India. Reference of course is made to ***Saw Pipes Ltd.*** (supra).

9. Attention of the senior counsel for the petitioner has however been invited to the judgment of the Division Bench of this Court of which the undersigned was a member in ***Delhi Development Authority Vs. Bhardwaj Brothers*** MANU/DE/1753/2014 and in which the earlier judgment of the same Division Bench in ***State Trading Corporation of India Ltd. Vs. M/s.***

Toepfer International Asia Pte Ltd. MANU/DE/1480/2014 was quoted as laying down as under:

> *"5. The challenge in this appeal is on the ground that the learned Single Judge ignored that the interpretation of the contract between the parties given by the Arbitral Tribunal is contrary to the express terms and conditions thereof and the Arbitral Tribunal has given a meaning to the terms and conditions which is not contemplated in the contract. The senior counsel for the appellant thus wants us to read the contract between the parties, particularly the clauses relating to demurrage, and then to judge whether the interpretation thereof by the Arbitral Tribunal is correct or not.*
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> *6. In our view, the interpretation in Saw Pipes Ltd. supra (**ONGC Ltd. Vs. Saw Pipes Ltd.** (2003) 5 SCC 705) of the ground in Section 34 of the Act for setting aside of the arbitral award, for the reason of the same being in conflict with the public policy of India, would not permit setting aside, in the aforesaid facts. A Section 34 proceeding, which in essence is the remedy of annulment, cannot be used by one party to convert the same into a remedy of appeal. In our view, mere erroneous/wrong finding of fact by the Arbitral Tribunal or even an erroneous interpretation of documents /evidence, is non-interferable under Section 34 and if such interference is done by the Court, the same will set at naught the whole purpose of amendment of the Arbitration Act.*
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> *7. Arbitration is intended to be a faster and less expensive alternative to the courts. If this is one's motivation and expectation, then the finality of the arbitral award is very important. The remedy provided in Section 34 against an arbitral award is in no*

sense an appeal. The legislative intent in Section 34 was to make the result of the annulment procedure prescribed therein potentially different from that in an appeal. In appeal, the decision under review not only may be confirmed, but may also be modified. In annulment, on the other hand, the decision under review may either be invalidated in whole or in part or be left to stand if the plea for annulment is rejected. Annulment operates to negate a decision, in whole or in part, thereby depriving the portion negated of legal force and returning the parties, as to that portion, to their original litigating positions. Annulment can void, while appeal can modify. Section 34 is found to provide for annulment only on the grounds affecting legitimacy of the process of decision as distinct from substantive correctness of the contents of the decision. A remedy of appeal focuses upon both legitimacy of the process of decision and the substantive correctness of the decision. Annulment, in the case of arbitration focuses not on the correctness of decision but rather more narrowly considers whether, regardless of errors in application of law or determination of facts, the decision resulted from a legitimate process.

8. In the case of arbitration, the parties through their agreement create an entirely different situation because regardless of how complex or simple a dispute resolution mechanism they create, they almost always agree that the resultant award will be final and binding upon them. In other words, regardless of whether there are errors of application of law or ascertainment of fact, the parties agree that the award will be regarded as substantively correct. Yet, although the content of the award is thus final, parties may still challenge the legitimacy of the decision-making process leading to the award. In essence, parties are always free to argue that they are

not bound by a given "award" because what was labeled an award is the result of an illegitimate process of decision.

9. This is the core of the notion of annulment in arbitration. In a sense, annulment is all that doctrinally survives the parties agreement to regard the award as final and binding. Given the agreement of the parties, annulment requires a challenge to the legitimacy of the process of decision, rather than the substantive correctness of the award.

10. Joseph Raz in his paper "The Politics of the Rule of Law" has opined that the function of the rule of law is to facilitate the integration of a particular piece of legislation with the underlying doctrines of the legal system; the authority of the courts to harness legislation to legal doctrine arises neither from their superior wisdom nor from any superior law of which they are the custodians; it arises out of the need to bring legislation in line with doctrine. The courts ensure coherence of purpose of law, ensuring that its different parts do not fight each other. The learned author has further observed that a law which is incoherent in purpose serves none of its inconsistent purposes very well. Purposes conflict if due to contingencies of life serving one will in some cases retard the other. The second basis for the authority of the courts to integrate legislation with doctrine is the need to mix the fruits of long established traditions with the urgencies of short term exigencies. In ensuring the coherence of law, the courts are expected to ensure the effectiveness of the democratic rule. In giving weight to the preservation of long established doctrines i.e., the traditions, they protect the long term interest of the people from being swamped by the short term. We have taken the liberty

to quote from the aforesaid paper since the courts are being repeatedly called upon to adjudicate on the various provisions of the re-enacted arbitration law. From the various pronouncements in the last about 18 years since re-enactment, it appears that the danger of interpreting the new Act in a manner doing away with the whole object/purpose of re-enactment is imminent. The courts continue to be inundated till date, in spite of repeal of the old Act 18 years ago, with cases thereunder also, particularly of challenge to the arbitral award. Provisions of the old and the new Act relating to inference with the arbitral award are vastly different. However, when the courts, in the same day are wrestling with a matter concerning arbitral award under the old Act and with that under the new Act, the chances of culling out the huge difference between the two are minimal. It is not to be forgotten that the courts deal with and rule on disputes where monies and properties of real persons are at stake. The courts do not decide in abstract. Thus, when in one case the courts interfere with the arbitral award for the reason of the same not rendering to the litigant what the courts would have granted to him, the courts find it difficult in the very next case, though under the new Act, to apply different parameters.

11. Arbitration under the 1940 Act could not achieve the savings in time and money for which it was enacted and had merely become a first step in lengthy litigation. Reference in this regard can be made to para 35 of ***Bharat Aluminium Company Vs. Kaiser Aluminium Technical Services Inc.*** *(2012) 9 SCC 552. It was to get over the said malady that the law was sought to be overhauled. While under the old Act, the award was unenforceable till made rule of the court and for which it had to pass various tests as laid down therein and general power/authority was vested in the court to modify the*

award, all this was removed in the new Act. The new Act not only made the award executable as a decree after the time for preferring objection with respect thereto had expired and without requiring it to be necessarily made rule of the court but also did away with condonation of delay in filing the said objections. The reason/purpose being expediency. The grounds on which the objections could be filed are also such which if made out, the only consequence thereof could be setting aside of the award. It is for this reason that under new Act there is no power to the court to modify the award or to remit the award etc. as under the old Act. A perusal of the various grounds enunciated in Section 34 will show that the same are procedural in nature i.e., concerning legitimacy of the process of decision. While doing so, the ground, of the award being in conflict with Public Policy of India, was also incorporated. However the juxtaposition of Section 34(2)(b)(ii) shows that the reference to 'Public Policy' is also in relation to fraud or corruption in the making of the award. The new Act was being understood so [see ***Konkan Railway Corporation Ltd. Vs. Mehul Construction Co.*** *(2000) 7 SCC 201 (para 4 and which has not been set aside in* ***S.B.P. & Co. Vs. Patel Engineering Ltd.*** *(2005) 8 SCC 618)] till the Supreme Court in* ***Saw Pipes Ltd.*** *(supra) held that the phrase "Public Policy of India" is required to be given wider meaning and if the award on the face of it is patently in violation of statutory provisions, it cannot be said to be in public interest and such award/judgment/decision is likely to adversely affect the administration of justice. In para 37 of the judgment it was held that award could be set aside if it is contrary to fundamental policy of Indian Law or the interest of India or justice or morality or if it is patently illegal. A rider was however put that illegality must go to*

the root of the matter and if the illegality is of trivial nature it cannot be held that the award is against the public policy. Yet another test laid down is of the award being so unfair and unreasonable that it shakes the conscience of the court.

12. The courts have thereafter been inundated with challenges to the award. The objections to the award are drafted like appeals to the courts; grounds are urged to show each and every finding of the arbitrator to be either contrary to the record or to the law and thus pleaded to be against the Public Policy of India. As aforesaid, the courts are vested with a difficult task of simultaneously dealing with such objections under two diverse provisions and which has led to the courts in some instances dealing with awards under the new Act on the parameters under the old Act.

13. The result is that the goal of re-enactment has been missed.

14. The re-enactment was not only to achieve savings in time and prevent arbitration from merely becoming the first step in lengthy litigation but also in consonance with the international treaties and commitments of this country thereto. Since the enactment of the 1940 Act, the international barriers had disappeared and the volume of international trade had grown phenomenally. The new Act was modeled on the model law of international commercial arbitration of the United Nations Commission on International Trade Law (UNICTRAL). It was enacted to make it more responsive to contemporary requirements. The process of economic liberalization had brought huge foreign investment in India. Such foreign investment was hesitant, owing to there being no effective mode of settlement of domestic and international disputes. It was with such lofty ideals and with a view to attract foreign investment

that the re-enactment was done. If the courts are to, notwithstanding such re-enactment, deal with the arbitration matters as under the old Act it would be a breach of the commitment made under the treaties on international trade.

15. Applying the aforesaid test, we are afraid, the arguments of the senior counsel for the appellant are beyond the scope of Section 34.

16. The senior counsel for the respondent has in this regard rightly argued that the scope of appeal under Section 37 is even more restricted. It has been so held by the Division Benches of this Court in ***Thyssen Krupp Werkstoffe Vs. Steel Authority of India*** *MANU/DE/1853/2011 and* ***Shree Vinayak Cement Clearing Agency Vs. Cement Corporation of India*** *147 (2007) DLT 385. It is also the contention of the senior counsel for the respondent that the argument made by the appellant before the learned Single Judge and being made before this Court, that the particular clause in the contract is a contract of indemnification, was not even raised before the Arbitral Tribunal and did not form the ground in the OMP filed under Section 34 of the Act and was raised for the first time in the arguments.*

17. The Supreme Court in ***Rashtriya Ispat Nigam Ltd. Vs. Dewan Chand Ram Saran*** *(2012) 5 SCC 306 refused to set aside an arbitral award, under the 1996 Act on the ground that the view taken by the Arbitral Tribunal was against the terms of the contract and held that it could not be said that the Arbitral Tribunal had travelled outside its jurisdiction and the Court could not substitute its view in place of the interpretation accepted by the Arbitral Tribunal. It was reiterated that the Arbitral Tribunal is legitimately entitled to take the view which it holds to be correct one after considering the*

material before it and after interpreting the provisions of the Agreement and if the Arbitral Tribunal does so, its decision has to be accepted as final and binding. Reliance in this regard was placed on ***Sumitomo Heavy Industries Ltd. Vs. ONGC Ltd.*** *(2010) 11 SCC 296 and on* ***Kwality MFG. Corporation Vs. Central Warehousing Corporation*** *(2009) 5 SCC 142. Similarly, in* ***P.R. Shah, Shares & Stock Broker (P) Ltd. V. B.H.H. Securities (P) Ltd.*** *(2012) 1 SCC 594 it was held that a Court does not sit in appeal over the award of an Arbitral Tribunal by reassessing or reappreciating evidence and an award can be challenged only under the grounds mentioned in Section 34(2) and in the absence of any such ground it is not possible to reexamine the facts to find out whether a different decision can be arrived at. A Division Bench of this Court also recently in* ***National Highways Authority of India Vs. M/s. Lanco Infratech Ltd.*** *MANU/DE/0609/2014 held that an interpretation placed on the contract is a matter within the jurisdiction of the Arbitral Tribunal and even if an error exists, this is an error of fact within jurisdiction, which cannot be reappreciated by the Court under Section 34 of the Act. The Supreme Court in* ***Steel Authority of India Ltd. Vs. Gupta Brother Steel Tubes Ltd.*** *(2009) 10 SCC 63 even while dealing with a challenge to an arbitral award under the 1940 Act reiterated that an error by the Arbitrator relatable to interpretation of contract is an error within his jurisdiction and is not an error on the face of the award and is not amenable to correction by the Courts. It was further held that the legal position is no more res integra that the Arbitrator having been made the final Arbiter of resolution of dispute between the parties, the award is not open to challenge on the ground that Arbitrator has reached at a wrong conclusion.*

18. If we were to start analyzing the contract between the parties and interpreting the terms and conditions thereof and which will necessarily have to be in the light of the contemporaneous conduct of the parties, it will be nothing else than sitting in appeal over the arbitral award and which is not permissible."

and it was further held:

(I) That a Division Bench of this Court in ***New Delhi Apartment Group Housing Society Vs. Jyoti Swaroop Mittal*** MANU/DE/9107/2007 has held that Saw Pipes Ltd. cannot be read as permitting a Court exercising powers under Section 34 to sit in appeal over the findings of fact recorded by the Arbitral Tribunal or on interpretation placed by the Arbitral Tribunal of the provisions of the Agreement.

(II) That the parties having agreed to be bound by the arbitral award and by declaring it to be final, also agree to be bound by the wrong interpretation or an erroneous application of law by the Arbitral Tribunal and once the parties have so agreed, they cannot apply for setting aside of the arbitral award on the said ground. Reliance in this regard was placed on ***Tarapore and Co. Vs. Cochin Shipyard Ltd., Cochin*** (1984) 2 SCC 680, ***U.P.***

Hotels Vs. U.P. State Electricity Board (1989) 1 SCC 359 and ***N. Chellappan Vs. Secretary, Kerala State Electricity Board*** (1975) 1 SCC 289, though all under the Arbitration Act, 1940; and,

(III) *"11. We are further of the view that the scope of judicial review of an arbitral award is akin to review under Article 226 of the Constitution of India of the decisions of bodies, where it is a settled principle of law (See* ***State of U.P. Vs. Maharaja Dharmander Prasad Singh*** *(1989) 2 SCC 505 and* ***State of U.P. Vs. Johri Mal*** *(2004) 4 SCC 714) that the judicial review is of the decision making process and not of the decision on merits and cannot be converted into an appeal. This is quite evident from the various Clauses of Section 34 (2)(a) which prescribe the grounds of challenge on the lines of violation of the principles of natural justice in making of the award or invalidity of the arbitral agreement and non-arbitrability of the disputes arbitrated and of the composition of the Arbitral Tribunal or arbitral procedure being not in accordance with the agreement between the parties. Section 34(2)(b) adds the ground of the arbitral award being in conflict with the public policy of India. None of the said grounds are the grounds of challenge on the merits of the award. The ground of challenge of the award being in conflict with the public policy of India is explained as the award being induced or affected by fraud or corruption or being in violation of Section 75 or Section 81. Thus the grounds of challenge are akin to the grounds of judicial review under Article 226 and not to grounds of appeal or revision. We are reminded of the merits legality distinction in judicial review as culled*

out by Lord Hailsham in ***The North Wales Vs. Evans*** *(1982) 1 WLR 1155 by observing "the purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment, reaches on a matter which it is authorized by law to decide for itself a conclusion which is correct in the eyes of the Court". Lord Brightman in the same judgment held that judicial review, as the words imply, is not an appeal from a decision, but a review of the manner in which the decision was made and it would be an error to think that the Court sits in judgment not only on the correctness of the decision making process but also on the correctness of the decision itself. It was clarified that only when the issue raised in judicial review is whether a decision is vitiated the judicial review of the decision making process includes examination, as a matter of law, of the relevance of the factors. In our opinion the same is an apt test also for judicial review of the arbitral awards and just like a mere wrong decision without anything more is not enough to attract the power of judicial review, the supervisory jurisdiction conferred on the Court under the Arbitration Act is limited to see that the Arbitral Tribunal functions within the limits of its authority and that the arbitral award does not occasion miscarriage of justice. The Supreme Court in* ***Mc. Dermott International Inc. Vs. Burn Standard Co. Ltd.*** *(2006) 11 SCC 181 commenting on the radical changes brought about by the re-enactment of the arbitration law observed that the role of the Courts under the new law is only supervisory, permitting intervention in few circumstances only, like, in case of fraud or bias by the arbitrators, violation of natural justice etc. and the Court cannot correct the errors of arbitrators and can only quash the award leaving the parties free to begin arbitration again.*

12. Of the finality of arbitral awards, there is no doubt under our arbitration law. The Supreme Court as far back as in ***Union of India Vs. A.L. Rallia Ram*** *AIR 1963 SC 1685 held that:-*

> *"An award being a decision of an arbitrator whether a lawyer or a layman chosen by the parties, and entrusted with power to decide a dispute submitted to him is ordinarily not liable to be challenged on the ground that it is erroneous. In order to make arbitration effective and the awards enforceable, machinery is devised for lending the assistance of the ordinary Courts. The Courts are also entrusted with power to modify or correct the award on the ground of imperfect form or clerical errors, or decision on questions not referred, which are severable from those referred……..The Court may also set aside an award on the ground of corruption or misconduct of the arbitrator, or that a party has been guilty of fraudulent concealment or wilful deception. But the Court cannot interfere with the award if otherwise proper on the ground that the decision appears to it to be erroneous. The award of the arbitrator is ordinarily final and conclusive, unless a contrary intention is disclosed by the agreement. The award is the decision of a domestic tribunal chosen by the parties, and the civil courts which are entrusted with the power to facilitate arbitration and to effectuate the awards, cannot exercise appellate powers over the decision. Wrong or right the decision is binding, if it be reached fairly after giving adequate opportunity to the parties to place their grievances in the manner provided in the arbitration agreement."*

of course the said judgment being under the Arbitration Act, 1940 proceeds to hold that an award is bad on the ground of error of law on the face of it. However the legislature while re-enacting the arbitration law has removed the ground of challenge of error of law on the face of the award. In ***Mc. Dermott International Inc.*** *supra also it was held that the parties to the Arbitration Agreement make a conscious decision to exclude the Courts jurisdiction as they prefer the expediency and finality offered by arbitration. I am bound to respect the said change brought about by the legislature and cannot dogmatically review the awards on the grounds of challenge which have been intentionally taken away by the legislature.*

13. It cannot also be lost sight of that non-conferring of finality on the arbitral awards not only affects the speed and expense of arbitration but also has a more subtle consequences of, extensive judicial review changing the nature of the arbitral process to an even greater extent. If arbitration becomes simply another level of decision making, subject to judicial review on merits, arbitrators may begin to decide cases and write opinions in such a way as to insulate their awards against judicial reversal producing opinions that parrot the appropriate statutory standards in conclusory terms, but suffer from a lack of reasoned analysis. Such a shift from the arbitral model, in which decision makers are free to focus solely on the case before them rather than on the case as it might appear to an Appellate Court, to the administrative model, in which decision makers are often concerned primarily with building a record for review, in my opinion would substantially undercut the ability of arbitrators to successfully resolve disputes. The Courts therefore have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is

particular language in the written instrument which will support the claim. The agreement is to submit all grievances to arbitration, not merely those which the Court will deem meritorious. The Courts if start undertaking to determine the merits of the grievance, would be usurping the function which under that Arbitration Act, 1996 is entrusted to the Arbitration Tribunal. This plenary review by the Courts of the merits would make meaningless the provisions that the arbitral award is final, for in reality it would almost never be final. I though may admit that sieving out the genuine challenges from those which are effectively appeals on merits is not easy.

14. Arbitration will not survive, much less flourish, if this core precept is not followed through by the Courts. The integrity and efficacy of arbitration as a parallel dispute resolution system will be subverted if the Courts appear unable or unwilling to restrain themselves from entering into the merits of every arbitral decision that comes before it. The power to intervene must and should only be exercised charily, within the framework of the Arbitration Act. Minimal curial intervention is underpinned by need to recognise the autonomy of the arbitral process by encouraging finality, so that its advantage as an efficient alternative dispute resolution process is not undermined. The parties having opted for arbitration, must be taken to have acknowledged and accepted the attendant risks of having only a very limited right of recourse to the Courts. It would be neither appropriate nor consonant for the Court to lend assistance to a dissatisfied party by exercising appellate function over arbitral awards, save to the extent statutorily permitted."

10. I have enquired from the senior counsel for the petitioner whether not at least this Court would be bound by the judgment aforesaid of the Division Bench and as per which the grounds urged by the petitioner for setting aside of the Arbitral Award are not within the ambit of Section 34(2) of the Arbitration Act.

11. The senior counsel for the petitioner has not shown any judgment to the contrary.

12. I may add, an indication of what the legislature, while re-enacting the arbitration law, meant by including the ground, of the arbitral award being in conflict with public policy of India, for setting aside of arbitral awards can be had from the Explanation to Section 34(2) which declares 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. Sections 75 as well as 81 are contained in Part III titled 'Conciliation'. Section 75 requires the parties and the conciliator to keep confidential all matters relating to conciliation proceedings and the settlement agreement. Section 81 provides that the parties shall not rely on

or introduce as evidence in arbitral or judicial proceedings, views expressed or suggestions made by the other party in respect of a possible settlement of the dispute, the admissions made by the other party in course of the conciliation proceedings, the proposals made by the conciliator, the fact that the other party had indicated his willingness to accept a proposal for settlement made by the conciliator. Thus, if the arbitral award is based on what had transpired in the conciliation proceedings which ultimately failed and not on adjudication by the Arbitral Tribunal, it would be deemed to be in conflict with the public policy of India. Though the explanation to Section 34(2) containing the ground of the arbitral award being in conflict with the public policy of India is prefaced with "without prejudice to the generality of Section 34(2)(b)(ii)" but the declaration therein of the award being in conflict with the public policy of India if the making of the award was induced by fraud or corruption or was in violation of Sections 75 or 81, in my humble view is suggestive of the expression "the public policy of India" being required to be read as meaning grounds *ejusdem generis* with the grounds of fraud or corruption or the award being based on material exchanged in conciliation which ultimately failed. In my view, the same cannot be read as referring to public policy of India qua adjudication of

disputes in Courts, where error of law or fact is a ground for interference by higher Court. If the intent was to make the award liable to be set aside if contrary to the substantive law applicable to the decision thereof the legislature would have provided so. Even under the 1940 Act, neither the error of law nor of fact in the arbitral award was a ground for setting aside thereof. The preamble to the re-enacted Act states the purpose of the re-enactment to make our domestic law relating to arbitration in consonance with the United Nations Commission on International Trade Law (UNCITRAL) Model Law and the grounds of interference with the arbitral award under the same were/are much narrower than the grounds of interference under the 1940 Act. If the words "in conflict with the public policy of India" are to be read as permitting interference with the arbitral award whenever the same is found to be contrary to the substantive law applicable to the merits of the dispute, the same in my view would be in violation of the preamble to the re-enacted law.

13. I may however notice ***Oil and Natural Gas Corporation Ltd. Vs. Western GECO International Ltd.*** (2014) 9 SCC 263 where also it was held:-

"35. What then would constitute the 'Fundamental policy of Indian Law' is the question. The decision in ***Saw Pipes Ltd.*** *(supra) does not elaborate that aspect. Even so, the expression must, in our opinion, include all such fundamental principles as providing a basis for administration of justice and enforcement of law in this country. Without meaning to exhaustively enumerate the purport of the expression "Fundamental Policy of Indian Law", we may refer to three distinct and fundamental juristic principles that must necessarily be understood as a part and parcel of the Fundamental Policy of Indian law. The first and foremost is the principle that in every determination whether by a Court or other authority that affects the rights of a citizen or leads to any civil consequences, the Court or authority concerned is bound to adopt what is in legal parlance called a 'judicial approach' in the matter. The duty to adopt a judicial approach arises from the very nature of the power exercised by the Court or the authority does not have to be separately or additionally enjoined upon the fora concerned. What must be remembered is that the importance of Judicial approach in judicial and quasi judicial determination lies in the fact so long as the Court, Tribunal or the authority exercising powers that affect the rights or obligations of the parties before them shows fidelity to judicial approach, they cannot act in an arbitrary, capricious or whimsical manner. Judicial approach ensures that the authority acts bonafide and deals with the subject in a fair, reasonable and objective manner and that its decision is not actuated by any extraneous consideration. Judicial approach in that sense acts as a check against flaws and faults that can render the decision of a Court, Tribunal or Authority vulnerable to challenge.*

36. In ***Ridge v. Baldwin*** *[1963 2 All ER 66], the House of Lords was considering the question whether a Watch Committee in exercising its authority Under Section 191 of the Municipal Corporations Act, 1882 was required to act judicially. The majority decision was that it had to act judicially and since the order of dismissal was passed without furnishing to the Appellant a specific charge, it was a nullity. Dealing with the Appellant's contention that the Watch Committee had to act judicially, Lord Reid relied upon the following observations made by Atkin L.J. in [1924] 1 KB at pp. 206, 207:*

> *Wherever anybody of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority, they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs.*

37. The view taken by Lord Reid was relied upon by a Constitution Bench of this Court in ***A.C. Co. Ltd. v. P.N. Sharma and Anr.*** *AIR 1965 SC 1595 where Gajendragadkar, C.J. speaking for the Court observed:*

> *In other words, according to Lord Reid's judgment, the necessity to follow judicial procedure and observe the principles of natural justice, flows from the nature of the decision which the watch committee had been authorised to reach Under Section 191(4). It would thus be seen that the area where the principles of natural justice have to be followed and judicial approach has to be adopted, has become wider and consequently, the horizon of writ jurisdiction has been extended in a corresponding measure.*

In dealing with questions as to whether any impugned orders could be revised Under Article 226 of our Constitution, the test prescribed by Lord Reid in this judgment may afford considerable assistance.

38. Equally important and indeed fundamental to the policy of Indian law is the principle that a Court and so also a quasi-judicial authority must, while determining the rights and obligations of parties before it, do so in accordance with the principles of natural justice. Besides the celebrated 'audi alteram partem' rule one of the facets of the principles of natural justice is that the Court/authority deciding the matter must apply its mind to the attendant facts and circumstances while taking a view one way or the other. Non-application of mind is a defect that is fatal to any adjudication. Application of mind is best demonstrated by disclosure of the mind and disclosure of mind is best done by recording reasons in support of the decision which the Court or authority is taking. The requirement that an adjudicatory authority must apply its mind is, in that view, so deeply embedded in our jurisprudence that it can be described as a fundamental policy of Indian Law.

39. No less important is the principle now recognised as a salutary juristic fundamental in administrative law that a decision which is perverse or so irrational that no reasonable person would have arrived at the same will not be sustained in a Court of law. Perversity or irrationality of decisions is tested on the touchstone of Wednesbury's principle of reasonableness. Decisions that fall short of the standards of reasonableness are open to challenge in a Court of law often in writ

jurisdiction of the Superior courts but no less in statutory processes where ever the same are available.

40. It is neither necessary nor proper for us to attempt an exhaustive enumeration of what would constitute the fundamental policy of Indian law nor is it possible to place the expression in the straitjacket of a definition. What is important in the context of the case at hand is that if on facts proved before them the arbitrators fail to draw an inference which ought to have been drawn or if they have drawn an inference which is on the face of it, untenable resulting in miscarriage of justice, the adjudication even when made by an arbitral tribunal that enjoys considerable latitude and play at the joints in making awards will be open to challenge and may be cast away or modified depending upon whether the offending part is or is not severable from the rest."

14. I have considered the challenge aforesaid to the arbitral award on the anvil of the above latest adjudication also. No ground, of the Arbitral Tribunal in the instant case having not adopted a judicial approach or having acted in violation of the principles of natural justice has been urged. It is also not the case that the Arbitral Tribunal has not acted *bona fide* or not dealt with the subject in a fair, reasonable and objective manner or that the decision of the Arbitral Tribunal was actuated by any extraneous consideration. Non application of mind by the Arbitral Tribunal is also not pleaded or argued. No case of perversity or irrationality has also been made

out. The entire challenge is on the ground of the findings of the Arbitral Tribunal being factually erroneous and which is not a ground even as per the judgment (supra) of the Supreme Court. Of course, the Supreme Court in para 40 of the judgment has held that if the Arbitral Tribunal, from the facts proved before it fails, to draw an inference which ought to have been drawn or draws the inference which on the face of it is untenable, the arbitral award would be in conflict with public policy of India and the test of "fails to draw inference which ought to have been drawn or draws an inference which is untenable" is very wide but the said test is qualified with the words "resulting in miscarriage of justice". I am unable to read the judgment of the Supreme Court as opening the doors of challenge to an Arbitral Award by a detailed examination of all the facts and material before the Arbitral Tribunal and to determination of whether the inferences drawn and the consequences reached by the Arbitral Tribunal therefrom are correct or not and whether the Court agrees with the same or not. If the same were to be permitted, it would do away with the difference between the Court exercising appellate power and power of judicial review of Arbitral Award under Section 34 of the Act and would be against the several other judgments of the Supreme Court and which, in the judgment (supra) were

neither considered nor differed from. The judgment (supra) of the Supreme Court, cannot be read in isolation, forgetting all other judgments of the Supreme Court and none of which have been overruled.

15. The expression "miscarriage of justice", used by the Supreme Court in the judgment (supra) as qualifying the test laid down in para 40 thereof of the validity of the Arbitral Award, is an expression well recognized in law and generally associated with grossly unfair outcome in a judicial proceeding as when a defendant is convicted despite a lack of evidence on an essential element of a crime (per Black's Law Dictionary, Eight Edition). The Supreme Court in ***Union of India Vs. Ibrahim Uddin*** (2012) 8 SCC 148 cited with approval ***Bibhabati Devi Vs. Ramendra Narayan Roy*** AIR 1947 PC 19 holding that miscarriage of justice means such a departure from the rules which permeate all judicial procedure as to make that which happen not in the proper sense of the word 'judicial procedure' at all.

16. Thus, it is not every inference drawn or not drawn by the Arbitral Tribunal from the material before it and which the Court finds to have been wrongly drawn or not drawn, which could be held to be resulting in miscarriage of justice. Such inference / failure to interfere by the Arbitral

Tribunal, even if in the opinion of the Court wrong, would permit interference under Section 34 of the Arbitration Act only if it results in a grossly unfair outcome.

17. There is another aspect of the matter. A detailed inquiry into the correctness of the inference drawn / not drawn by the Arbitral Tribunal would require the Court not only to go through and dissect the arbitral record which is often voluminous in cases as the present but to also give an opportunity to the parties / their counsels to address on the inferences drawn / not drawn by the Arbitral Tribunal and to only thereafter form an opinion. The same would again make a proceeding under Section 34 of the Arbitration Act and hearing thereof akin to an appeal from original decrees of the Court and would be an antithesis to the very concept of judicial review of arbitral award, even if the Court at the end of such a marathon hearing were to conclude that there has been no miscarriage of justice. It is thus for the contracting party challenging the Arbitral Tribunal to, in the memorandum of challenge itself, make out a case of miscarriage of justice within the parameters aforesaid. No such case has been made out in the petition in the present case. Without any such case having been made out in

the memorandum of petition, this Court would not embark upon an exercise of requisitioning the arbitral record and giving an opportunity to the parties / their counsels to address on the correctness of the inference drawn / not drawn by the Arbitral Tribunal and on the aspect of whether there has been a miscarriage of justice.

18. Mention may also be made of another recent dicta in ***Associate Builders Vs. DDA*** MANU/SC/1076/2014 where on conspectus of plethora of cases including ***Western GECO International Ltd.*** supra, the judgment of the Single Judge of this High Court dismissing the petition under Section 34 of the Arbitration Act was restored and the judgment of the Division Bench in appeal thereagainst interfering with the award was set aside holding that the Division Bench exceeded its jurisdiction in interfering with the pure finding of facts forgetting that the arbitrator is the sole Judge of the quantity and quality of evidence before him and that the Division Bench has no business to enter into the pure question of fact to set aside the award. It was further held that the same cannot be done by any Court under jurisdiction exercised under Section 34 of the Act. The Supreme Court further held that the expression 'justice' when it comes to setting aside an award under the

public policy ground can only mean that the award shocks the conscience of the Court and that it cannot possibly include what the Court thinks is unjust on the facts of a case for which the Court then seeks to substitute its own view for the arbitrator's view and does what it considers to be 'justice'. The Supreme Court observed that the Division Bench had lost sight of the fact that it is not a first Appellate Court and cannot interfere with errors of fact. The Supreme Court held that if the arbitrators have decided the dispute with a sound head and a good heart and after hearing both sides, the Courts should not interfere with their award, even if the Court disagrees with the reasons assigned by the arbitrator.

19. It is not the case of the petitioners that the arbitrators in the present case have not decided with a sound head and a good heart.

20. I therefore do not find any case for entertaining the challenge to the Arbitral Award by way of this petition and dismiss the same.

No costs.

RAJIV SAHAI ENDLAW, J.

JANUARY 16, 2015
'gsr'