Oil & Natural Gas Corpn.Ltd vs Western Geco International Ltd on 4 September, 2014

Equivalent citations: AIR 2015 SUPREME COURT 363, 2014 AIR SCW 5727, (2014) 143 ALLINDCAS 237 (SC), 2014 (6) AIR BOM R 470, (2015) 1 CAL HN 99, (2015) 2 MAD LJ 108, 2014 (9) SCC 263, (2014) 4 ARBILR 102, (2014) 10 SCALE 328, (2014) 2 CLR 866 (SC), (2014) 107 ALL LR 333, (2014) 6 ALL WC 5898

Author: T.S. Thakur

Bench: Adarsh Kumar Goel, C. Nagappan, T.S. Thakur

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
CIVIL APPEAL NO.3415 OF 2007

Oil & Natural Gas Corporation Ltd. …Appellant

Versus

Western Geco international Ltd. …Respondent

J U D G M E N T

T.S. THAKUR, J.

1. This appeal arises out of an order dated 10th February, 2006 passed by a Division Bench of the High Court of Judicature at Bombay whereby OSA No.24 of 2006 filed by the appellant-Corporation has been partly allowed and the order passed by a single bench of the High Court in Arbitration Petition No.203 of 2005 affirmed with the modification that award of pendente lite and future interest by the Arbitral Tribunal shall stand deleted.

2. The appellant-Corporation is engaged in the business of drilling and exploration of oil and natural gases. In November, 1999, the appellant invited offers for technical upgradation of Seismic Survey Vessel, M.V. Sagar Sandhani (hereinafter referred to as the "Vessel") with a view to modernising the same. According to the tender conditions, one of the main items of equipment required for upgradation of the Vessel was "Streamers" fitted with hydrophones. The specifications, however, did not stipulate the national origin of such hydrophones.

3. In response to the tender notice respondent-M/s Western Geco International Ltd., submitted a bid offering to supply Nessie 4 streamers equipped with "Geopoint" Hydrophones of U.S. origin. The

appellant's case is that the term relating to supply of such Geopoint Hydrophones formed a material part of the offer made by the respondent-company in whose favour the appellant-Corporation eventually awarded a contract in terms of its letter dated 10th October, 2000 duly accepted by the respondent on 25th October, 2000. The Vessel was resultantly handed over to the respondent on 10th April, 2001 for carrying on the proposed modernisation and upgradation work. A formal contract was in due course executed between the parties on 18th June, 2001.

4. It is common ground that "Geopoint" Hydrophones of U.S. origin were in terms of the contract fitted in the vessel and test trials of the same conducted. Even so the vessel could not be delivered back to the appellant on 9th July, 2001, the due date for that purpose, because of some problem which the respondent encountered in obtaining licence from the U.S. authorities for sale of such hydrophones. The appellant-Corporation asserts that the respondent had for the first time made an application to the U.S. authorities for issuance of a licence as late as on 1st August, 2001 i.e. nearly a month after the due date for delivery of the vessel back to the Corporation. No formal rejection of the request for a license was according to the Corporation communicated to it as the matter appeared to be under some kind of negotiations between the respondent and the authorities in U.S.

5. The respondent's case per contra is that it continued its efforts to obtain a licence only to be informed by its sources in the US that the latter was likely to impose certain onerous conditions one of which could be that US made hydrophones can be used only on loan basis that too for a short duration of 24 months only. Respondent's further case is that its source in US had informed it that the US authorities were not likely to grant a licence to sell hydrophones to India. Be that as it may while the matter was pending with the Defence Department, a massive terrorist attack on 11th September, 2001 shook America. The respondent's hope of getting a licence for sale of US made hydrophones receded further with this unexpected development. The respondent accordingly informed the appellant- Corporation about the new development and pleading force majeure the respondent informed the appellant-Corporation of the former's inability to equip the vessel with U.S. made hydrophones. The appellant-Corporation refuted the invocation of force Majeure by its letter dated 20th September, 2001 and informed the respondent that since the field season was starting shortly any further delay in the delivery of the vessel would adversely affect its operation. The respondent on its part started looking for and offering alternatives to the U.S. made hydrophones and argued with the appellant-Corporation that since origin of the hydrophones was not indicated in the bid documents it was testing replacement by M-2 US Geo Spectrum Hydrophones made in Canada at its Norway facilities to check their suitability which exercise the respondent hoped to complete by 27th September, 2001. The respondent informed the appellant-Corporation that if the Corporation accepted the replacement, those hydrophones could be substituted for the US hydrophones within a short time.

6. The appellant-Corporation was, however, in no mood to accept a substitute for the contracted hydrophones. It was on the contrary keen to have US made hydrophones fitted on the vessel. The Corporation, therefore, required the respondent to continue its efforts to secure a licence from the US Government in which direction the appellant-Corporation on its own moved the concerned Ministry in Government of India to secure a licence. Further information and details in respect of the proposed Canadian hydrophones was all the same called for by the Corporation from the

respondent. Since, however, the efforts to secure a licence from US Government were making no progress, the respondent sought approval of the appellant-Corporation to remove the US hydrophones from the vessel and transfer them to their repair facility in Singapore to facilitate replacement by the Canadian made hydrophones. The respondent also wrote a detailed letter dated 10th October, 2001 to the appellant-Corporation informing the latter that the US government was not likely to grant a licence and that it had withdrawn the application made for that purpose to prevent a denial. What is important is that by letter dated 16th October, 2001 the respondent clearly stated that it was not in a position to deliver the vessel with streamers containing the Geopoint Hydrophones of US make. This letter was followed by letter dated 21st October, 2001 addressed to the appellant-Corporation with a request to permit removal of US hydrophones and replacement of Canadian hydrophones which had been extensively tested 1999 in connection with supply of Seismic Survey Vessel delivered to NOIC for the Iran project. Further information required by the appellant-Corporation was also supplied by the respondent by its letter dated 24th October, 2001 with a request to the Corporation to approve the proposed replacement. The respondent also agreed to give additional warranty of one year for the replaced hydrophones. By another letter dated 13th November, 2001 the respondent assured the appellant-Corporation that if the latter agreed to the replacement proposal there would be no financial implications and the additional cost involved in fixing the Canadian hydrophones would also be borne by the respondent.

7. It was only on 23rd March, 2002 that the respondent conditionally agreed to the proposed replacement of the US made hydrophones by those made in Canada. One of the conditions imposed for the replacement by the appellant-Corporation was the right to recover liquidated damages as per Clause 16 and for excess engagement of vessel as per Clause 14 of the subject contract. The replacement accordingly took place and the Vessel eventually delivered back to the Corporation with Canadian hydrophones on 6th May, 2002. On 24th May, 2002, a formal amendment to the contract was also effected to record the substitution of the US hydrophones by those made in Canada.

8. With the upgradation and modernisation work completed as per the amended contract, the respondent raised invoices for payment due to it but realised that the appellant-Corporation had deducted from its dues a sum of US $ 5,114,300.98 towards excess engagement charges in terms of Clause 14 of the contract. By another letter dated 20th August, 2002, the appellant- Corporation further deducted a sum of US $ 410,641.20 based on a change in tax law applicable at 4.8% followed by a deduction of a sum of US $ 80,530.10 based on correction for price charges inclusive of income tax at 4.8%. These deductions gave rise to disputes which were referred for adjudication to an arbitral tribunal comprising three former Chief Justices of India before whom the respondent claimed a sum of US $ 7,327,610.68 towards principal dues plus US $1,205,564.13 by way of interest for the period from 20th August, 2003 to 15th November, 2003 totalling US $ 8,533,174,81 with interest pendent lite at 12% p.a. from the date of the filing of the claim till the award at the same rate.

9. The appellant-Corporation stoutly contested the claim made against it and alleged that hydrophones being an important component, the respondent had not only offered to fit US made hydrophones in the streamer section of the Vessel but actually fitted the same. The appellant's case was that the claimant having contracted to supply US made hydrophones was legally obliged to

handover the Vessel duly filled with such hydrophones within the stipulated period of 90 days which expired on 9th July, 2001. The appellant's further case was that the requirement of a licence was first mentioned by the respondent when letter dated July 9, 2001 was delivered to the appellant's representative on board the vessel at Singapore in an attempt to explain the respondent's failure to hand over the vessel on the due date. The appellant-Corporation asserted that the respondent had not even applied for a licence till then and had simply asked for an extension of time. It was only when the appellant-Corporation asked the respondent to specify on a realistic basis, the period for which extension was being demanded that the respondent had by letter dated 26th July, 2001 stated that according to their understanding the licence will be issued towards the first week of September, 2001. Since time was the essence of the contract between the parties, the respondent's failure to return the vessel duly upgraded within 9 months from the date of Letter of Acceptance or 90 days from the delivery of the vessel i.e. on or before 9th July, 2001 was a clear breach of its contractual obligation rendering the respondent liable to payment of liquidated damages and for excess engagement of the vessel, argued the appellant-Corporation.

10. The Corporation also disputed the invocation of force majeure clause in the fact situation of the case especially when securing of a licence for the equipment was not a part of the contract between the parties, it being the sole responsibility of the respondent to determine the type and make of hydrophones. The terrorist attack on the twin towers was, according to the appellant-Corporation a post-contractual period issue as the date of the delivery of the vessel under the contract had since long expired by the time the attack took place. It was also contended that the delay in the completion of the contract was entirely attributable to the respondent who when called upon by the appellant-Corporation to submit the performance report of the M-2 hydrophones used in Seismic Survey Vessel PEJWAK suggested that the appellant-Corporation should obtain the same directly from NIOC forcing the appellant-Corporation to send a representative to Oslo to verify the parameters of the M-2 hydrophones at their own expense. It was asserted that once the respondent informed the appellant-Corporation that the US department of Commerce had finally rejected the licence, the appellant-Corporation was left with no alternative except to agree to the replacement of the US made hydrophones by Canadian M-2 hydrophones resulting in the delivery of the vessel back to the Corporation on 6th May, 2002 after considerable delay.

11. On the pleadings of the parties the Arbitral Tribunal framed the following issues for determination:

> Was the national origin of hydrophones used in the Nessie-4 streamers, a material term of the contact between the parties?
>
> Was the respondent justified in refusing to allow substitution of the Canadian M-2 hydrophones for the US Geopoint hydrophones?
>
> Was the claimant's declaration of force majeure justified under the terms of the contract?
>
> Whether there was any delay in the performance of the contact?

If the answer to point No.4 is in the affirmative, who is responsible for such delay?

If the answer to point No.4 is in the affirmative, whether the Claimant is entitled to damages?

Whether the respondent was entitled to adjust the sum of US $ 491,000 out of the sum payable, in whole or in part, as alleged in para 30 of the statement?

Is respondent entitled to both Liquidated Damages and Excess Engagement charges for the same periods of time under the provisions of the Contract?

12. In the award which the Tribunal made and published Issue No. 1 was answered in the negative holding that since the choice of the hydrophones was left to the bidders subject to the equipment meeting the specifications prescribed for the purpose and since the stipulations did not indicate the make or the country of origin of the hydrophones, the national origin of such hydrophones was not a material term of the contract between the parties.

13. Issue No. 2 was, however, answered by the Tribunal in the affirmative, who took the view that once the respondent had made the choice and contracted to supply hydrophones made in the U.S. the appellant- Corporation was entitled to insist on the supply of the contracted equipment. The arbitrators further held that once the respondent had informed the appellant that the option of U.S. made hydrophones was closed, the later was not justified in insisting that the request for a license with the U.S. authorities should be pursued further. The arbitral tribunal decided Issue No.3 against the respondent holding that none of the events mentioned in the contract had taken place and since the parties to the contract did not belong to U.S., the force majeure clause could not have been validly invoked by the respondent.

14. Dealing with the question of delay in the performance of the contract and its consequences covered by Issue Nos. 4 to 8, the Arbitrators held that the respondent-claimant had completed the performance of the contractual obligations within the stipulated time frame and would have but for the U.S. licence requirement delivered the vessel to the appellant on July 9, 2001 in which event there would have been no necessity to invoke the force majeure clause or to seek extension of time or to offer the Canadian hydrophones. Even so the fact remained that the respondent had not delivered the vessel back to the appellant-Corporation on time. The Tribunal then examined whether the respondent was responsible for the entire delay between July 9, 2001 and 6th May 2002 when the vessel was actually returned. The Tribunal rejected the contention on behalf of the respondent that extension of time for completing the contracted works had the effect of waiving the rights vested in the appellant under clause 14 and 16 of the contract. The Tribunal held that waiver ought to be express or the fact situation must be necessary implication manifest an intention to waive. Mere extension of time did not signify waiver of the rights flowing from clause 15 and 16 of the contract, observed the Arbitral Tribunal. Having said so the Tribunal held that since the respondent had informally intimated to the appellant Corporation as early as on October 24, 2001 that it did not desire to pursue the request for a licence with the U.S. authorities any further and since by a letter dated 25th October 2001 the final particulars in regard to the Canadian

hydrophones were duly supplied, allowing some time to the respondent to take a decision, the delay post October 21, 2001 could not be attributed to the respondent. That finding, observed the Tribunal, did not impact the amount deducted by the respondent towards liquidated damages as the capping provision limited to 10% was less than the sum payable for the delay upto October 31, 2001. As regards excess engagement charges the Arbitrators held that except for the period commencing November 1, 2001 to March 22, 2002 the appellant Corporation was justified in making deductions for the rest of the period from the claim of the respondent. The Arbitrators held that the deductions in relation to the period from November 1, 2001 to March 22, 2002 amounting to US$ 2,445,246.54 were wrongly made by the appellant-Corporation which amount the respondent was entitled to get from the appellant together with interest at the rate indicated in the award.

15. As regards deductions based on change of tax law or non payment of taxes under the Indian Law, the Tribunal held that the same were not permissible in the facts and circumstances of the case especially when the contracted work was to be executed and completed at the ship repair unit of the respondent claimant in Singapore and so was the handing over of the completed vessel to the appellant-Corporation. No part of the work having been undertaken outside Singapore no deduction could be made on account of non-payment of any tax. The Arbitrators held that since no taxes were attracted under the Indian Income Tax Act the price could not include the said tax component. The Arbitrators accordingly held that deductions made on two counts, being of US $ 410,641.20 and US $ 80,530.10 were also unjustified and unwarranted by law or contract.

16. Aggrieved by the award made by the Arbitral Tribunal, the appellant Corporation preferred a petition under Section 34 of the Arbitration and Conciliation Act, 1996 which failed and was dismissed by a Single Judge of the High Court but was allowed in part in O.S.A No. 241 of 2006 by the Division Bench of the High Court to the extent of deleting pendente lite in future interest from the award made by the Tribunal. Before the Division Bench, a three-fold submission was urged on behalf of the appellant- Corporation. Firstly, it was contended that the Tribunal had fallen in error in holding that the delay between 14th September 2001 and 21st March 2002 was not attributable to the respondent company. Secondly, it was contended that the Arbitral Tribunal was not right in holding that the deductions made by the appellant towards taxes was not legally permissible. Thirdly it was contended that the award by the Arbitral Tribunal for the pendente lite and future interest was not justified. While the Division Bench rejected the first two contentions the respondent appears to have made a statement before the High Court waiving pendente lite interest and agreeing to the modification of the award to that extent. The High Court held that the Arbitral Tribunal's findings to the effect that the delay between 16th October and 21st March 2002 is not attributable to the respondent, was based on the consideration of the material placed before the Arbitral Tribunal which called for no interference. So also deductions towards payment of taxes were, according to the High Court, rightly disallowed by the Arbitrators.

17. The present appeal assails the correctness of the Award of the Arbitral Tribunal and the orders passed by the High Court as noticed in the beginning of this order.

18. We have heard learned counsel for the parties at length who have taken us through the award made by the Arbitral Tribunal, provisions of the contract executed between the parties and the

correspondence exchanged between them. There is no denying the fact that there was delay in the return of the vessel to the Corporation after upgradation. In terms of the contractual time schedule the vessel ought to have returned to the Corporation by 9th July 2001 which was instead returned to the Corporation only on 6th May 2002 i.e. after a delay of 9 months and 28 days. Who is responsible for this delay is the essence of the dispute between the parties. According to the appellant-Corporation the delay is entirely attributable to the respondent while according to the respondent the delay is attributable to the appellant. The Arbitrators have after examining the material placed before them recorded a finding to the effect that the delay between 10th July 2001 and 31st March 2001 was entirely attributable to the respondent. That finding was not challenged by the respondent before the High Court nor is it under challenge before us. The Arbitrators have on the basis of the finding recorded by them allowed to the appellant- Corporation excess engagement charges under clause 14 besides liquidated damages under clause 16 of the Contract executed between the parties. But for the period between 1st November, 2001 and 22nd March, 2002 which comes to 4 months and 22 days the Arbitrators have found the delay to be attributable to the appellant-Corporation. Deduction made by the Corporation in regard to this period has been faulted by the arbitrators and the amount directed to be released in favour of the respondent-Company. The award deals with this period and the amount deducted for the same in the following words:

> "In the result we are of the opinion that except for the period from November 1, 2001 to March 23, 2002 for which deduction has been made from the Claimant's invoices, no exception can be taken for the rest of the deduction made from the claim of the Claimant. The deduction in relation to the period from November 1, 2001 to March 22, 2002 (4 months + 22 days) works out to a sum of US $ 2,445,246.53 which the Claimant would be entitled to from the Respondent together with interest at the rate of indicated hereafter".

19. The above period of 4 months and 22 days between 1st November, 2001 and 22nd March, 2002, in our opinion, comprises four separate intervals. The first of these four intervals is the period between 1st November, 2001 and 26th November, 2001 which period was taken by the appellant-Corporation to take a final decision whether or not an application should be made to the U.S authorities for the issue of a licence. The second interval comprises time taken by the respondent-claimant to make an application between 27th November, 2001 and 7th January, 2002, both days inclusive. The application for grant of a license was filed by the respondent only on 8th January, 2002. The third interval comprises time taken by the U.S Authorities between 8th January, 2002 and 7th March, 2002 to formally decline the issue of a license for sale of US made hydrophones to India. The fourth interval comprises time taken by the respondent-claimant to convey the decision of the U.S Authorities between 8th March, 2002 and 21st March, 2002. It is common ground that while the U.S Authorities had rejected the request for grant of a license on 8th March, 2002, the said rejection was conveyed to the appellant-corporation only on 22nd March, 2002.

20. From the findings of the fact recorded by the arbitrators with which we see no reason to interfere or disagree, it is evident, that the appellant-corporation was solely responsible for the delay in taking a decision in the matter between 24th October, 2001 and 26th November, 2001. The

arbitrators have found and, in our opinion, rightly so that the respondent-claimant had by its letter dated 24th October, 2001 clearly informed the appellant that there was no use pursuing the matter with the U.S. Authorities any further. Even particulars regarding Canadian hydrophones were supplied to the appellant in terms of a letter dated 25th October, 2001. The arbitrators have held that delay in taking a decision whether or not any formal application should be made and a formal rejection obtained by the respondent was attributable only to the appellant- Corporation. There is, in our opinion, no legal flaw, infirmity or perversity in that finding which we hereby affirm. Deduction made by the appellant-Corporation for the First interval that comprises period between 1st November, 2001 and 25th November, 2001, both days inclusive, cannot, therefore, be sustained and the arbitral award to that extent cannot be faulted.

21. That brings us to the second interval comprising period between 26th November, 2001-the date when the appellant-Corporation issued instructions for making of a formal application for the grant of a license and 8th January, 2002-when such an application was actually made by the respondent-company. This period reckoned from 27th November, 2001 to 7th January, 2002 works out to 42 (Forty two) days which must be attributed to the respondent- claimant, who could and indeed ought to have acted diligently and with reasonable despatch in the matter instead of taking the same easy, and if we may say so somewhat reluctantly. We cannot help saying with utmost respect at our command for the eminence and erudition of the distinguished jurists comprising the Arbitral Tribunal that the tribunal failed to appreciate this aspect hence fell in a palpable error leading to miscarriage of justice. The test adopted by the Tribunal for holding the appellant-Corporation responsible for delay ought to have been applied to the respondent as well for its failure to take action in the right earnest instead of sitting over the matter leading to detention of the vessel for a period more than what was absolutely necessary.

22. The period between 8th January, 2002 and 8th March, 2002 comprising the third interval during which the U.S. authorities decided the application for the grant of a license has been rightly counted against the appellant-Corporation as it was at the instance of the Corporation that a formal application was made. The time spent by the U.S. authorities for disposal of the request could not in the facts and circumstances be attributed to or counted against the respondent-claimant who had advised the appellant against any such move. The arbitral Tribunal, therefore rightly held that deduction for this period was not justified.

23. That leaves us with the fourth and the last interval comprising the period between 8th March, 2002 and 22nd March, 2002 when the rejection of the application was conveyed to the appellant-Corporation. There is, in our opinion, no valid reason why this period should not be counted against the respondent, who could and indeed should have conveyed the rejection to the appellant-Corporation forthwith, instead of taking nearly two weeks to do so. To sum up; the period of 4 months and 22 days which the arbitrators have attributed to the appellant-Corporation shall have to be reduced by 42 days comprising the first interval and 14 days comprising the fourth making a total of 56 days. Resultantly, deduction made by the appellant- Corporation for 56 days referred to above deserve to be affirmed, and the award made by the arbitrators modified to that extent. It follows that the amount awarded to the respondent-Company shall on a proportionate basis, stand reduced.

24. We may at this stage deal with the contention urged on behalf of the respondent that the jurisdiction of the Court to set aside an arbitral award being limited to grounds set out in Section 34 of the Arbitration and Conciliation Act, 1996, this Court ought not to interfere with the same. It was contended that none of the grounds on which a Court is authorised to interfere with an arbitral award are present in the case at hand. Alternatively, it was contended that even if a contrary view is possible on the facts proved before the Arbitral Tribunal, the Court cannot, in the absence of any compelling reason, interfere with the view taken by the Arbitrators as if it was sitting in appeal over the award made by the Tribunal. Section 34 of the Arbitration and Conciliation Act, 1996 reads :

> "34. Application for setting aside arbitral award.—(1) Recourse to a court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3). (2) An arbitral award may be set aside by the court only if—
>
> (a) the party making the application furnishes proof that—
>
> (i) a party was under some incapacity, or
>
> (ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or
>
> (iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
>
> (iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:
>
> Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or
>
> (v) the composition of the Arbitral Tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or
>
> (b) the court finds that—
>
> (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

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

Explanation.—Without prejudice to the generality of sub-clause (ii), it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption or was in violation of Section 75 or Section 81."

25. It is true that none of the grounds enumerated under Section 34(2)(a) were set up before the High Court to assail the arbitral award. What was all the same urged before the High Court and so also before us was that the award made by the arbitrators was in conflict with the "public policy of India" a ground recognised under Section 34(2)(b)(ii) (supra). The expression "Public Policy of India" fell for interpretation before this Court in ONGC Ltd. v. Saw Pipes Ltd. (2003) 5 SCC 705 and was, after a comprehensive review of the case law on the subject, explained in para 31 of the decision in the following words:

> "31. Therefore, in our view, the phrase "public policy of India" used in Section 34 in context is required to be given a wider meaning. It can be stated that the concept of public policy connotes some matter which concerns public good and the public interest. What is for public good or in public interest or what would be injurious or harmful to the public good or public interest has varied from time to time. However, the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice. Hence, in our view in addition to narrower meaning given to the term "public policy" in Renusagar case10 it is required to be held that the award could be set aside if it is patently illegal. The result would be — award could be set aside if it is contrary to:
>
> (a) fundamental policy of Indian law; or
>
> (b) the interest of India; or
>
> (c) justice or morality, or [pic](d) in addition, if it is patently illegal.

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

26. 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. 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 any body 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."

27. The view taken by Lord Reid was relied upon by a Constitution Bench of this Court in A.C. Companies Ltd vs. 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 S.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 A. 226 of our Constitution, the test prescribed by Lord Reid in this judgment may afford considerable assistance."

28. 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.

29. 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.

30. 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.

31. Inasmuch as the arbitrators clubbed the entire period between 16th October, 2001 and 21st March, 2002 for purposes of holding the appellant- Corporation responsible for the delay, they committed an error resulting in miscarriage of justice apart from the fact that they failed to appreciate and draw inferences that logically flow from such proved facts. We have, therefore, no hesitation in rejecting the contention urged on behalf of the respondent that the arbitral award should not despite the infirmities pointed out by us be disturbed.

32. That brings us to the last submission that deduction on account of taxes not paid should have been allowed by the respondent-arbitral tribunal. The Tribunal has, in our opinion, correctly held that no part of the work was undertaken outside Singapore which was to be executed on a turnkey basis for a price that was pre-determined. The arbitrators have, in our opinion, rightly held that no taxes were payable under the Indian Income tax Act so as to entitle the Corporation to deduct any amount on that account by reason of non-payment of such taxes. The challenge to the award to that extent must fail and is, hereby, rejected.

33. In the result, we allow this appeal but only to the extent that out of the period of 4 months and 22 days which the arbitrators have attributed to the appellant-Corporation a period of 56 days comprising 42 days of the first interval and 14 days of the second referred to in the judgment shall be reduced. Resultantly, deductions made by the appellant-Corporation for the said period of 56 days shall stand affirmed and the award made by the arbitrators modified to that extent with a

proportionate reduction in the amount payable to the respondent. No costs.

.....J. (T.S. THAKUR) .....J. (C. NAGAPPAN)
.....J. (ADARSH KUMAR GOEL) New Delhi September 4, 2014