Efs Facilities Services (India) ... vs Indeen Bio Power Limited on 7 July, 2023

Author: Najmi Waziri

Bench: Najmi Waziri

$~
* IN THE HIGH COURT OF DELHI AT NEW DELHI
Pronounced
+ FAO(OS) (COMM) 14/2021, CM APPL. 15614/2021 & CM APPL. 42606/2021
INDEEN BIO POWER LTD
Through: Mr. Hiroo Adva
Dahiya, Ms. Ad
Mr. Karan
Advocates.
versus

EFS FACILITIES SERVICES INDIA PVT LTD
..... Responde
Through: Mr. Dayan Krishnan, Senior
Advocate with Mr. Vasanth
Rajasekaran, Mr. Sukrit Se
Saurabh Babulkar and Mr.
Harshvardhan Korada, Advoc
+ FAO(OS) (COMM) 111/2021
INDEEN BIO POWER LTD
Through: Mr. Hiroo Adva
Dahiya, Ms. Ad
Mr. Karan
Advocates.
versus

EFS FACILITIES SERVICES INDIA PVT LTD

Through: Mr. Dayan Kris
Advocate with
Rajasekaran, M
Saurabh Babulk
Harshvardhan K
+ FAO(OS) (COMM) 56/2021

Signature Not Verified
Digitally Signed By:KAMLESH KUMAR
Signing Date:08.07.2023 19:37:55

FAO(OS) (COMM) 14/2021, and connected matters

EFS FACILITIES SERVICES (INDIA) LIMITED ... Appell

Through: Mr. Dayan Krishnan, Senior
Advocate with Mr. Vasanth
Rajasekaran, Mr. Sukrit Se
Saurabh Babulkar and Mr.
Harshvardhan Korada, Advoc

versus

INDEEN BIO POWER LIMITED
Through: Mr. Hiroo Adva
Dahiya, Ms. Ad
Mr. Karan
Advocates.

CORAM:
HON'BLE MR. JUSTICE NAJMI WAZIRI
HON'BLE MR. JUSTICE VIKAS MAHAJAN

NAJMI WAZIRI, J

1. In FAO(OS) (COMM) 14/2021 and FAO(OS) (COMM) 111/20
Indeen Bio Power Limited („Indeen) has impugned un
13(1) of the Commercial Courts Act, 2015 („CCA) read with
of the Arbitration and Conciliation Act, 1996 („the Act)
learned Single Judge dated 04.01.2021 passed in O.M.P. (CO
440 of 2020, allowing the respondent s petition under sect
Act which set aside the Arbitral Award dated 20.05.2020.

2. Mr. Hiroo Advani, the learned Advocate for Indeen s
the impugned order has erred inasmuch as i) it has re-appr
evidence led before the learned Arbitrator; and ii) the de
preparation of the Final Business Plan ('FBP') was occasio
because of M/s EFS Facilities Services (India) Pvt. Ltd. (

Signature Not Verified
Digitally Signed By:KAMLESH
KUMAR
Signing Date:08.07.2023
19:37:55

known as Dalkia India Private Limited ('DIPL')). A Projec
Agreement ('PDA') was entered into between DIPL and Indeen
02.05.2010 for setting up an 8 MW Master Residue Biomass P
Chandli, Tehsil Devli, District Tonk, Rajasthan. A Synchro
Coordination Agreement ('SCA') was signed between DIPL and
on 08.09.2011. It along with some other documents such as
Contract Agreement, a Service Contract Agreement and a Wor
Contract Agreement, all undated, became the subject of int

3. The controversy revolves around the aforenoted five
Dispute arose between the parties regarding the project, w
referred to Arbitration. A claim was brought forward by In
Arbitral Award dated 20.05.2020, Indeen has been awarded t
following reliefs:-

"Claim 1 - Loss of revenue in power generation - IN
11.37 crores
Claim 2 - Costs for Price Escalation- INR 4,33,57,1

along with pendente lite interest @ 8% per annum an
pendente lite interest @9% per annum."

4. The reason for the learned Arbitrator to award loss power generation to the tune of 11.37 crores was based on Business Plan („RBP), which was a part of the Project Dev Agreement („PDA) but not part of SCA. EFS contended that be no reason for granting the award because RPB was not in „Entire Agreement Clause of SCA dated 08.09.2011. No find rendered by the learned Arbitrator on this ground. The lea had come to the finding that the exception in Clause 11.4 apply. EFS had argued before the learned Single Judge that

Signature Not Verified
Digitally Signed By:KAMLESH KUMAR
Signing Date:08.07.2023 19:37:55

prejudice had been caused to it by referring to a documen not a part of the „Entire Agreement Clause .

5. On being impugned under S.34 of the Act, the award and set it aside, with liberty to Indeen to re-agitate its Arbitral Tribunal and in case it is so re-agitated, the Ar would reconsider the claims of Indeen, in accordance with in view the observations made in the impugned order.

6. EFS says that reference was made by the learned Arb RBP, but the said document could not be relied upon becaus represented the 'Entire Agreement.' Indeen says that RBP a not lent any weight to the claim. The claim was not posite there are only individual pieces of evidence, the said doc merely referred to; there was no cross-examination of the of the claimants who deposed apropos quantification of cla never Indeen s case that either the RBP or the FBP was par Therefore, the argument of 'Entire Agreement' has no appli facts of this case.

7. The impugned judgment has referred to the dicta of Singapore in CRW Joint Operation v. PT Perushaan Gas Nagar (Persero) TBK, (2011) SGCA 33, which has held as under:-

"The significance of the issues that were not dealt to be considered in relation to the award as a whol example, it is not difficult to envisage a situatio the issues that were overlooked were of such import that, if they had been dealt with, the whole balanc award would have been altered and its effect would been different."

Signature Not Verified
Digitally Signed By:KAMLESH KUMAR
Signing Date:08.07.2023

FAO(OS) (COMM) 14/2021, and connected matters

19:37:55

8. Indeen says that albeit the learned Single Judge h
said principle but apropos whether prejudice has resulted
aggrieved by the failure to decide the issue, it is silent
opinion if prejudice has actually been caused to EFS. The
Joint Operation (supra) is whether the whole balance of th
have been altered and its effect would have been different
undealt issues been dealt with. Nevertheless, the impugned
gone ahead and quashed the award and findings of facts. It
under:-

> – If these issues have been addressed by the learne
> Arbitral Tribunal, the very reliability of the Refe
> Business Plan, as evidenced in favour of Indeen, ma
> possibly have become questionable."

9. The court is of the view that this argument is unte
the aforesaid observation sees the tilt of balance of equi
Indeen, on the basis of the referred RBP and FBP. Therefor
questionable to refer to them before determining whether t
documents could be referred to or were part of the „Entire
Clause . Indeen says that apropos the adjudication on its
escalation of price, the learned Arbitrator has based his
material on record and the formula used for quantification
public domain. It is on this basis that he came to the con
was 10% escalation. Relying upon the dicta in ITD Cement v
OMP No.27/2010 and Dwarkadas v. State of MP (1999 (1) SCR
Indeen submits that once there is sufficient material on r
Arbitrator can use some guess work to arrive at the quantu

Signature Not Verified
Digitally Signed By:KAMLESH
KUMAR
Signing Date:08.07.2023
19:37:55

awarded and the usage of any formula for determining quan
damages is an accepted proposition (Mcdermott Internationa
Standard and Co. (2006) 11 SCC 181).

10. Indeen submits that i) the substantive evidence led
learned Arbitrator included two documents i.e. RBP and FBP
effect, detailed the final expenses incurred by the partie
contemplated as per the project, ii) when these two docume
as admissible documents in evidence, the same was neither
was any cross-examination held; the reason why the learned
has accepted the said two documents as credible evidence i
the fact that they were prepared with the consent of DIPL,
there could have been no dispute about the same.

11. Indeen says that the delay occasioned was quantifie
reference to the IMF Inflation Index, 2012. What is to be
preceding argument is that fundamentally, the Award has ta

of documents forming part of the PDA and awarded benefits
However, the agreement between the parties was limited to
„Contract Agreements as defined in clause 1.2 of the SCA
08.09.2011. The said term is defined as under:

> "Contract Agreements" shall mean Works Contract
> Agreement, Service Contract Agreement and Supply
> Contract Agreement proposed to be executed between
> Indeen and Dalkia in a mutually agreed form.

12. It is evident that PDA is not a part of the aforeme
definition. Therefore, any award seeking to go beyond what
agreed by the parties to be the basic/foundational documen

Signature Not Verified
Digitally Signed By:KAMLESH
KUMAR
Signing Date:08.07.2023
19:37:55

be referred to, apropos their relationship, would be a pa
and an incurable anomaly.

13. Mr. Dayan Krishnan, the learned Senior Advocate for
that the arbitral award had erred inasmuch as it travelled
Contract Agreements and this error was rightly set aside i
order. The agreement limits the documents which could be r
between the parties in terms of clause 13.4 which reads as

> –Entire Agreement: Contract Agreements along with
> this Agreement constitutes the entire agreement bet
> the Parties and sets out a full statement of the
> contractual rights and liabilities of Indeen and Da

14. He further contends that the imperative to limit th
proceedings to the „Entire Agreement Clause was raised be
learned Arbitrator but it did not find any adjudication. T
noticed in the impugned order of the learned Single Judge
one of the reasons for setting aside the Arbitral Award. T
matter is settled that the relationship of the parties is
terms of the agreement. Insofar as the agreement restricts
documents to become a final agreement, nothing more is to
into. In effect, all additional documents or prior documen
have been subsumed in the final agreement, which in this c
Synchronization and Co-ordination Agreement. Reliance is p
the dicta of the Supreme Court in Thyssen Krupp Materials
Steel Authority of India 2017 SCC OnLine Del 7997, has hel

> –71. With respect to the second lot, admittedly,
> modification or amendment to the agreement was

Signature Not Verified
Digitally Signed By:KAMLESH

KUMAR
Signing Date:08.07.2023
19:37:55

parties. The learned arbitrator found that Cl
agreement had been waived by conduct of the pa
any event, it would not have any impact on the
concluded contract between the parties in rela
second lot. He relied on the negotiations betw
and exchange of letters to find that there was
concluded contract between the parties in rela
second lot. Such kind of clauses in commercial
known as –entire agreement clauses, the inten
to preclude parties from adducing evidence of
contract or agreement between the parties gove
issue. The English law in relation to such kin
been aptly laid down in the case of Inntrepren
v East Crown Ltd, [2000] 2 Lloyd's Rep. 611:

> –The purpose of an entire agreement clause
> preclude a party to a written agreement fr
> threshing through the undergrowth and find
> the course of negotiations some (chance) r
> statement (often long forgotten or difficu
> or explain) on which to found a claim such
> present to the existence of a collateral w
> The entire agreement clause obviates the o
> for any such search and the peril to the c
> parties posed by the need which may arise
> absence to conduct such a search. For such
> constitutes a binding agreement between th
> that the full contractual terms are to be
> document containing the clause and not els
> and that accordingly any promises or assur
> made in the course of the negotiations (wh
> absence of such a clause might have effect
> collateral warranty) shall have no contrac
> save insofar as they are reflected and giv
> that document.
>
> Entire agreement clauses come in different
> the leading case of Deepak v. ICI [1998] 2

Signature Not Verified
Digitally Signed By:KAMLESH
KUMAR
Signing Date:08.07.2023
19:37:55

FAO(OS) (COMM) 14/2021, and connected matters

Rep 140, 138, affirmed [1999] 1 Lloyds R
clause read as follows:
–10.16 Entirety of Agreement
This contract comprises the entire agreem

> between the PARTIES ... and there are not
> agreements, understandings, promises or
> conditions, oral or written, express or i
> concerning the subject matter which are n
> merged into this CONTRACT and superseded
> thereby ...

Rix J and the Court of Appeal held in that c particular focusing on the words –promises or conditions) that this language was apt to ex liability for a collateral warranty. In Alman v. Associated Newspapers Group Ltd 20 June 19 (cited by Rix J at p.168), Browne-Wilkinson J the same conclusion where the clause provided written contract –constituted the entire agre understanding between the parties with respec matters therein referred to focusing on the –understanding . In neither case was it neces decide whether the clause would have been suf it had been worded merely to state that the a containing it comprised or constituted the en agreement between the parties. That is the qu raised in this case, where the formula of wor the clause is abbreviated to an acknowledgeme parties that the Agreement constitutes the en agreement between them. In my judgment that f is sufficient, for it constitutes an agreemen contractual terms to which the parties agree themselves are to be found in the Agreement a nowhere else and that what might otherwise co a side agreement or collateral warranty shall legal effect.

72. While there is hardly any case law or jurispr Indian courts on such concepts, this court is of

Signature Not Verified
Digitally Signed By:KAMLESH KUMAR
Signing Date:08.07.2023 19:37:55

that the above ruling in the context of English apply with equal force to the Indian context. The insertion of such a clause is the parties resolv either of them from raising any claim based on a contract, entered into by the parties during nego after conclusion of the contract. The very purpos stipulation would be defeated in case parties wer raise a claim based on a collateral agreement, en between them during negotiations. In the present Clause 9 of the agreement between the parties is nature; it would necessarily preclude the parties

any claims based on collateral agreements that ar
encompassed within the present contract or are no
stated as being amendments to the main agreement.
being the case, we are of the view that the learn
fell into error by not giving Clause 9 its full i
Indeed by finding that the parties through their
impliedly waived Clause 9, the arbitrator in effe
the very purpose of inserting Clause 9- that to p
parties from raising such claims based on collate
agreements entered into between the parties, not
encompassed by the contract nor specifically stat
amendments to the agreement. Therefore, we set as
arbitrator's award in relation to the second lot
find that there was no concluded contract entered
between the parties in relation to the second lot

15. Furthermore, section 28 of the Arbitration and Conc
Act,1996 makes it incumbent upon the Arbitrator to take in
terms of contract and trade usages. It reads as under: -

.. —28. Rules applicable to substance of dispu
Where the place of arbitration is situate in I
(a) in an arbitration other than an internatio
commercial arbitration, the arbitral tribunal
decide the dispute submitted to arbitration in
accordance with the substantive law for the ti

Signature Not Verified
Digitally Signed By:KAMLESH
KUMAR
Signing Date:08.07.2023
19:37:55

being in force in India;
(b) in international commercial arbitration,--
(i) the arbitral tribunal shall decide the dis
accordance with the rules of law designated by
parties as applicable to the substance of the
(ii) any designation by the parties of the law
system of a given country shall be construed,
otherwise expressed, as directly referring to
substantive law of that country and not to its
of laws rules;
(iii) failing any designation of the law under
(a) by the parties, the arbitral tribunal shal
rules of law it considers to be appropriate gi
the circumstances surrounding the dispute.
(2) The arbitral tribunal shall decide ex aequ
or as amiable compositeur only if the parties
expressly authorised it to do so.
[(3) While deciding and making an award, the
arbitral tribunal shall, in all cases, take in
the terms of the contract and trade usages app
to the transaction.]

16. The learned Single Judge has considered this issue under:-

> —53. I have considered the submissions of both side learned Arbitral Tribunal has itself acknowledged, correctly, the fact that the Reference Business Pla of the PDA. This is also apparent from Clause E in recitals with which the PDA commences. Mr. Dayan Krishnan has contended that Clause 13.2 of the SCA unambiguously, that the SCA, read with the Contract Agreements, constituted the —entire agreement betw parties. He has also invited my attention to the ju

Signature Not Verified
Digitally Signed By:KAMLESH KUMAR
Signing Date:08.07.2023 19:37:55

> which, in his submission, proscribe reliance on ma outside the agreement which contractually constitut —entire agreement . Whether the submission is right wrong, is not for me to opine upon, as the learned Tribunal would first have to take a view thereon. T jurisdiction of this Court, under Section 34 of the does not include the authority to act as an arbitra issues which have not been decided in the arbitral under challenge. Para 58 of the impugned Award specifically records this submission, as having bee advanced before the learned Arbitral Tribunal, thus EFS:
>
> —According to the learned counsel for the Responden alleged reference business plan was not part of the This being the position, the Reference Business pla be relied upon as SCA represents the entire agreeme between the parties. The alleged assurances given d the course of negotiation have no contractual force cannot be acted upon. He also expressed grave doubt the authenticity of the Reference Business plan rel by the Claimant.

17. EFS further contends that the basis for awarding Rs Indeen is misplaced and erroneous because it refers to a d the Inflationary Index of the International Monetary Fund document was never put to the EFS (Dalkia India Pvt. Ltd.) rationale which could be looked into. Therefore, placing r the same was unfair and has caused prejudice to the respon impugned judgment has found this unfairness in the Arbitra reason to disagree with it. The learned Single Judge has r under:-

Signature Not Verified
Digitally Signed By:KAMLESH
KUMAR

Signing Date:08.07.2023
19:37:55

— 55. Mr. Dayan Krishnan, on behalf of EFS, has questioned the correctness of the award of Rs.4,33, -, by the learned Arbitral Tribunal, towards escala three grounds; firstly, that the learned Arbitral T had found the offer is obtained by Indeen, on the b which it claimed escalation, not to inspire confide had awarded escalation on the basis of mere presump based on inflation figures of the International Mon Fund in 2012, which was impermissible, secondly, th Indeen had failed to establish having taken any ste mitigate the damage is, pursuant to the alleged rep of the contract by DIPL, and thirdly, that Indeen h abandoned the project, and could not, therefore, cl escalation.

56. Mr. Advani contends, per contra, that the learn Arbitral Tribunal did not conclusively reject the o submitted by Indeen, on the basis of which it claim escalation, and that, in any event, the learned Arb Tribunal was well within its jurisdiction to have a escalation on a reasonable basis, which is all it d Reliance was placed, for this purpose, on the judgm the Supreme Court in McDermott International Inc. v Burn Standard Co. Ltd.

xxxx
59. To my mind, such a course of action was not ope the learned Arbitral Tribunal. Even assuming Indeen entitled to escalation, awarded escalation would ha be based on materials provided by Indeen, or otherw emanating from the record, and not on any other bas This would amount to —wandering , by the learned Arbitral Tribunal, outside the covenants of the agr between the parties, the pleadings on record, and e case set up by Indeen itself. It was not open, with respect to the learned Arbitral Tribunal, to so per It is nobody's case that the material, on the basis the learned Arbitral Tribunal awarded escalation to

Signature Not Verified
Digitally Signed By:KAMLESH
KUMAR

Signing Date:08.07.2023

19:37:55

> Indeen, was ever relied upon, by Indeen itself, or
> Indeen as a basis to claim escalation. The material
> was found to be lacking in credibility, by the lear
> Arbitral Tribunal. Mr. Dayan Krishnan submitted tha
> learned Arbitral Tribunal effectively extended char
> Indeen, which it was not competent to do. I do not
> to express any opinion regarding whether Indeen was
> was not, entitled to escalation, as the award of es
> in my view, deserves to be set aside as being premi
> material outside the contract between the parties,
> was never pleaded by Indeen before the learned Sole
> Arbitrator. The judgment in McDermott International
> which Mr. Advani sought to place reliance, does not
> advance the case of Indeen to any substantial exten
> that is stated, in the said decision, is that –diff
> formulae can be applied in different circumstances
> question as to whether damages should be computed b
> taking recourse to one or the other formula, having
> to the facts and circumstances of a particular case
> eminently fall within the domain of the arbitrator
> can be no cavil with this proposition. The formula
> by the learned Arbitral Tribunal has, however, to e
> from some material on record. In case the learned A
> Tribunal seeks to decide on public knowledge, to aw
> any particular sum to the claimant, the proposal to
> has to be put to the respondent, and both sides hav
> heard on that aspect. Else, the learned Arbitral Tr
> would, additionally, be proceeding in violation of
> principles of natural justice and fair play.

18. EMF contends that the evidence led by the Indeen di
confidence. Logically, the said Agreement was to be reject
claim is rejected, there would be no occasion to refer to
Index, for awarding damages.

19. There can be no dispute that reference to material
„Entire Agreement was a fundamental anomaly which would v

Signature Not Verified
Digitally Signed By:KAMLESH
KUMAR
Signing Date:08.07.2023
19:37:55

FAO(OS) (COMM) 14/2021, and connected matters

> finding of fact. If the basis for entitlement of damages
> emanates from documents which cannot be referred to then s
> conclusion is a patent illegality. Such finding would have
> under section 34 of the Act.

20. On the scope for judicial review under sections 34
Act, Indeen relies upon the dicta of the Supreme Court in
Metro Express Private Limited vs. Delhi Metro Rail Corpora
(2022) 1 SCC 131, in particular, upon the following observ

> –.....27. For a better understanding of the role a

Courts in reviewing arbitral awards while consider
applications filed under Section 34 of the 1996 Ac
would be relevant to refer to a judgment of this C
in Ssangyong Engg. & Construction
Ltd. v. NHAI [Ssangyong Engg. & Construction Co.
Ltd. v. NHAI, (2019) 15 SCC 131 : (2020) 2 SCC (Ci
213] wherein R.F. Nariman, J. has in clear terms
delineated the limited area for judicial interfere
into account the amendments brought about by the 2
Amendment Act. The relevant passages of the judgme
in Ssangyong [Ssangyong Engg. & Construction Co.
Ltd. v. NHAI, (2019) 15 SCC 131 : (2020) 2 SCC (Ci
213] are noted as under : (SCC pp. 169-71, paras 3

—34. What is clear, therefore, is that the ex
—public policy of India , whether contained i
34 or in Section 48, would now mean the —fund
policy of Indian law as explained in paras 1
of Associate Builders [Associate Builders v.
(2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] i.e
fundamental policy of Indian law would be rel
—Renusagar understanding of this expression.
would necessarily mean tha
Geco [ONGC v. Western Geco International Ltd.
(2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12] exp

Signature Not Verified
Digitally Signed By:KAMLESH
KUMAR

Signing Date:08.07.2023
19:37:55

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
: (2015) 2 SCC (Civ) 204] , would no longer o
under the guise of interfering with an award
ground that the arbitrator has not adopted a
approach, the Court's intervention would be o
merits of the award, which cannot be permitte
amendment. However, insofar as principles of
justice are concerned, as contained in Sectio
34(2)(a)(iii) of the 1996 Act, these continue
grounds of challenge of an award, as is conta
para 30 of Associate Builders [
Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 S
(Civ) 204] .
35. It is important to notice that the ground
interference insofar as it concerns —interest
has since been deleted, and therefore, no lon
obtains. Equally, the ground for interference

basis that the award is in conflict with just
morality is now to be understood as a conflic
—most basic notions of morality or justice .
would be in line with paras 36 to 39 of Assoc
Builders [Associate Builders v. DDA, (2015) 3
: (2015) 2 SCC (Civ) 204] , as it is only suc
awards that shock the conscience of the court
be set aside on this ground.
36. Thus, it is clear that public policy of I
constricted to mean firstly, that a domestic
contrary to the fundamental policy of Indian
understood in paras 18 and 27 of Associate
Builders [Associate Builders v. DDA, (2015) 3
: (2015) 2 SCC (Civ) 204] , or secondly, that
award is against basic notions of justice or
understood in paras 36 to 39 of Associate

Signature Not Verified
Digitally Signed By:KAMLESH
KUMAR
Signing Date:08.07.2023
19:37:55

Builders [Associate Builders v. DDA, (2015)
: (2015) 2 SCC (Civ) 204] . Explanation 2 to
34(2)(b)(ii) and Explanation 2 to Section 48(
was added by the Amendment Act only so that W
Geco [ONGC v. Western Geco International Ltd.
(2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12] , a
understood in Associate Builders [
Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 S
(Civ) 204] , and paras 28 and 29 in particula
done away with.

37. Insofar as domestic awards made in India
concerned, an additional ground is now availa
under sub-section (2-A), added by the Amendme
2015, to Section 34. Here, there must be pate
illegality appearing on the face of the award
refers to such illegality as goes to the root
but which does not amount to mere erroneous
application of the law. In short, what is not
within —the fundamental policy of Indian law
the contravention of a statute not linked to
or public interest, cannot be brought in by t
when it comes to setting aside an award on th
of patent illegality.
38. Secondly, it is also made clear that re-a
of evidence, which is what an appellate court
permitted to do, cannot be permitted under th
of patent illegality appearing on the face of

39. To elucidate, para 42.1 o

Builders [Associate Builders v. DDA, (2015) 3
: (2015) 2 SCC (Civ) 204] , namely, a mere
contravention of the substantive law of India
is no longer a ground available to set aside
award. Para 42.2 of Associate Builders [Assoc
Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 S
(Civ) 204] , however, would remain, for if an
gives no reasons for an award and contravenes

Signature Not Verified
Digitally Signed By:KAMLESH
KUMAR
Signing Date:08.07.2023
19:37:55

31(3) of the 1996 Act, that would certainly
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 i
42.3 to 45 in Associate Builder
Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 S
(Civ) 204] , namely, that the construction of
of a contract is primarily for an arbitrator
unless the arbitrator construes the contract
that no fair-minded or reasonable person woul
short, that the arbitrator's view is not even
view to take. Also, if the arbitrator wanders
contract and deals with matters not allotted
commits an error of jurisdiction. This ground
challenge will now fall within the new ground
under Section 34(2-A).
41. What is important to note is that a decis
perverse, as understood in paras 31 and 32
of Associate Builders [Associate Builders v.
(2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , w
longer being a ground for challenge under —pu
policy of India , would certainly amount to a
illegality appearing on the face of the award
finding based on no evidence at all or an awa
ignores vital evidence in arriving at its dec
be perverse and liable to be set aside on the
patent illegality. Additionally, a finding ba
documents taken behind the back of the partie
arbitrator would also qualify as a decision b
evidence inasmuch as such decision is not bas
evidence led by the parties, and therefore, w
have to be characterised as perverse.

28. This Court has in several other judgments inte
Section 34 of the 1996 Act to stress on the restra
shown by Courts while examining the validity of th
arbitral awards. The limited grounds available to

Signature Not Verified
Digitally Signed By:KAMLESH
KUMAR
Signing Date:08.07.2023
19:37:55

for annulment of arbitral awards are well known t
trained minds. However, the difficulty arises in a
the well-established principles for interference t
of each case that come up before the Courts. There
disturbing tendency of Courts setting aside arbitr
awards, after dissecting and reassessing factual a
the cases to come to a conclusion that the award n
intervention and thereafter, dubbing the award to
vitiated by either perversity or patent illegality
the other grounds available for annulment of the a
This approach would lead to corrosion of the objec
1996 Act and the endeavours made to preserve this
which is minimal judicial interference with arbitr
awards. That apart, several judicial pronouncement
Court would become a dead letter if arbitral award
aside by categorising them as perverse or patently
without appreciating the contours of the said expr
29. Patent illegality should be illegality which g
root of the matter. In other words, every error of
committed by the Arbitral Tribunal would not fall
the expression –patent illegality . Likewise, erro
application of law cannot be categorised as patent
illegality. In addition, contravention of law not
public policy or public interest is beyond the sco
expression –patent illegality . What is prohibited
Courts to reappreciate evidence to conclude that t
suffers from patent illegality appearing on the fa
award, as Courts do not sit in appeal against the
award. The permissible grounds for interference wi
domestic award under Section 34(2-A) on the ground
patent illegality is when the arbitrator takes a v
is not even a possible one, or interprets a clause
contract in such a manner which no fair-minded or
reasonable person would, or if the arbitrator comm
error of jurisdiction by wandering outside the con
dealing with matters not allotted to them. An arbi
award stating no reasons for its findings would ma
susceptible to challenge on this account. The conc

Signature Not Verified
Digitally Signed By:KAMLESH
KUMAR FAO(OS) (COMM) 14/2021, and connected matters
Signing Date:08.07.2023
19:37:55

the arbitrator which are based on no evidence or

arrived at by ignoring vital evidence are perverse
be set aside on the ground of patent illegality. A
consideration of documents which are not supplied
other party is a facet of perversity falling withi
expression –patent illegality .

30. Section 34(2)(b) refers to the other grounds o
court can set aside an arbitral award. If a disput
not capable of settlement by arbitration is the su
matter of the award or if the award is in conflict
public policy of India, the award is liable to be
Explanation (1), amended by the 2015 Amendment Act
clarified the expression –public policy of India
connotations for the purposes of reviewing arbitra
It has been made clear that an award would be in c
with public policy of India only when it is induce
affected by fraud or corruption or is in violation
75 or Section 81 of the 1996 Act, if it is in cont
with the fundamental policy of Indian law or if it
conflict with the most basic notions of morality o
31. In Ssangyong [Ssangyong Engg. & Construction C
Ltd. v. NHAI, (2019) 15 SCC 131 : (2020) 2 SCC (Ci
213] , this Court held that the meaning of the exp
–fundamental policy of Indian law would be in
accordance with the understanding of this Court
in Renusagar Power Co. Ltd. v. General Electric
Co. [Renusagar Power Co. Ltd. v. General Electric
1994 Supp (1) SCC 644] . In Renusagar [Renusagar P
Co. Ltd. v. General Electric Co., 1994 Supp (1) SC
this Court observed that violation of the Foreign
Regulation Act, 1973, a statute enacted for the –n
economic interest , and disregarding the superior
in India would be antithetical to the fundamental
Indian law. Contravention of a statute not linked
policy or public interest cannot be a ground to se
naught an arbitral award as being discordant with
fundamental policy of Indian law and neither can i

Signature Not Verified
Digitally Signed By:KAMLESH
KUMAR
Signing Date:08.07.2023
19:37:55

brought within the confines of –patent illegality
discussed above. In other words, contravention of
only if it is linked to public policy or public in
cause for setting aside the award as being at odds
fundamental policy of Indian law. If an arbitral a
shocks the conscience of the court, it can be set
being in conflict with the most basic notions of j
ground of morality in this context has been interp
this Court to encompass awards involving elements

> sexual morality, such as prostitution, or awards s
> validate agreements which are not illegal but woul
> enforced given the prevailing mores of the day. [S
> Engg. & Construction Co. Ltd. v. NHAI, (2019) 15 S
> 131 : (2020) 2 SCC (Civ) 213].....
>
> (emphasi

21. Reliance by the Arbitrator on the IMF Inflation Ind the escalation cost of 10% was without putting the said In EFS. The latter never had occasion to rebut the said Index results in violation of the principles of natural justice unfair procedure was adopted which vitiated the Award. It held by the learned Single Judge.

22. The Court finds no reason to interfere with the det and findings of the impugned judgment, the appeal, along w applications, is without merit and is accordingly dismisse

NAJMI

VIKAS MAHAJAN, J. JULY 7, 2023/sb