

Union Of India vs Sureka International on 14 July, 2022

In the Court of Shri Sanjiv Jain,
District Judge (Commercial Court-03), Patiala House Courts
New Delhi

OMP Number. 100/2020

Union of India
Ordnance Services; MGO Branch,
CP Cell, Integrated HQRs of Army (MoD)
Sena Bhawan, New Delhi ... Petitioner/objector

versus

Sureka International
2A/226, Azad Nagar,
Kanpur, UP ... Respondent/claimant

Date of institution	:	04.11.2020
Date of reserving judgment	:	01.07.2022
Date of decision	:	14.07.2022

JUDGME NT

1. This petition under Section 34 of the Arbitration and Conciliation Act, 1996 (Act) challenges the award dated 13.05.2020 passed by the Ld. Arbitrator Sh. B.S Chumbak whereby petitioners were directed to pay a sum of Rs. 29,55,775/- with compound interest @ 12% (quarterly rest) w.e.f. 28.08.2015 till its realization, Rs. 1,00,000/- towards additional cost of litigation and Rs. 1,88,887/- towards arbitrator's fee with compound interest.

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2. The facts leading to this petition are that on 11.11.2014, respondent, a partnership firm, a small scale unit, registered with NSIC got a supply order from the Director General, CP Cell, Sena Bhawan under the Ministry of Defence for fabricating and supplying 1,75,939 nos. of shirts men's cotton Cellular 1973 pattern (modified) Khaki @ 168/- each for a total value of Rs. 2,95,57,752/-. In terms of Clause 6 Part I of the supply order, respondent was required to submit 2 Nos. of shirts as advance sample to the Controller, CQA (T & C), Kanpur within 45 days from the date of issue of supply order for test and approval before commencing the bulk manufacturing of the shirts. In terms of Clause 1 (a) Part IV of the Supply order, it was also required to furnish a performance bank guarantee for a sum equivalent to 10% of the value of the supply order within 30 days.

The respondent submitted two number of shirts as advance sample to the inspecting authority on 18.12.2014 but it could not furnish the performance bank guarantee within 30 days. It requested the

petitioner vide letter dated 22.12.2014 to extend the date or deduct the amount from its first bill. The petitioner instead vide letter dated 23.12.2014 issued a show cause notice directing the respondent to furnish the guarantee by 31.12.2014 failing which, the supply order will be cancelled at risk and cost of the respondent without any further notice and the amount is also likely to be deducted from bills of other supply OMP Comm No. 100/2020 UOI Vs. Surekha International Page No.2 of 47 orders (if any) placed on its firm at the time of cancellation. In the meanwhile, inspecting authority approved the sample. The respondent also furnished the guarantee on 16.05.2015 vide FDR No. 586870 for Rs. 29,55,775/- drawn on Allahabad Bank, Kanpur, UP.

3. In terms of the supply order, petitioner was required to re-fix the delivery period but the petitioner, instead vide letter dated 23.06.2015 with its copy to the Director General of Supplies and Disposals and NSIC, alleged that the respondent has submitted a forged bank guarantee. NSIC on receipt of the letter, also sought clarification on this issue vide letter dated 03.07.2015 which the respondent responded vide letter dated 09.07.2015 explaining that the alleged forged bank guarantee was never submitted by it. It was submitted that all the bank guarantees which are submitted by them are forwarded with the forwarding letter signed by company's Managing Director and none else. It would like to verify the signatures on the alleged bank guarantee forwarding letter. It also enclosed certified copy of the Partnership Deed, Sales Tax Registration Certificate, registration of commercial tax as well as the lease deed in the name of the respondent bearing the signatures of the Managing Director. It was also stated that due to temporary absence of its Managing Partner during the period, it could not counter/furnish timely contradiction to its letter dated 09.03.2015 regarding alleged submission of bank guarantee. It OMP Comm No. 100/2020 UOI Vs. Surekha International Page No.3 of 47 also requested the petitioner to provide the copy of forged bank guarantee so that it could investigate on its own end but the petitioner did not respond and forfeited the FDR.

4. Feeling aggrieved by the action of the petitioner in forfeiting Rs. 29,55,775/- which it had deposited in lieu of PBG through FDR, it filed a writ petition in the Hon'ble High Court of Allahabad, UP, which was disposed of vide order dated 04.08.2015 with the observations that the findings of facts can only be recorded after oral and documentary evidence adduced by the parties which is possible in a civil suit. The petitioner (respondent herein) may file a suit before the appropriate forum for redressal of its grievances which it has raised in the writ petition. However, in view of the arbitration clause, the petitioner (respondent herein) can always approach before the respondents (petitioners herein) for settlement. The respondent then filed a Civil Suit no. 2336/2015 before the Civil Judge, Kanpur but it, on the advice of the counsel, withdrew it with liberty to get the matter settled through arbitration. In the Civil Suit, it had filed an affidavit that it has discussed the subject matter with the counsel of Union of India who advised him to solve the disputes through arbitration to which, it has agreed which also has a reference in the order of the Civil Judge dated 31.05.2018. The respondent before initiating the arbitration had also requested the petitioner vide letter dated 03.10.2015 to withdraw the cancellation letter and re-fix the delivery period.

OMP Comm No. 100/2020 UOI Vs. Surekha International Page No.4 of 47 It thereafter, in terms of Clause 3 of Part III of the Supply order, sent a legal notice dated 19.05.2017 to the petitioner either

to refund the amount or refer the dispute to arbitration. It was followed by a reminder dated 08.07.2015 but the petitioner neither refunded the amount nor referred the matter to arbitration. The respondent then filed a petition under Section 11 of the Act for appointment of an arbitrator which was allowed by the Hon'ble Delhi High Court vide order dated 20.03.2015. Sh. B.S Chumbak was appointed as the Sole Arbitrator. He entered upon reference on 23.05.2019 and called upon the parties to file their statements. The respondent filed statement of claim for refund of the amount of FDR with interest alleging that it never backed out from its contractual commitments, it had submitted the advance samples to the petitioner as per the contract which were duly approved by the inspecting authority and that the petitioner was contractually bound to re-fix the delivery period. It also clarified in its letter dated 25.06.2015 that it never submitted any forged bank guarantee as alleged but the petitioner without any notice and without granting any opportunity of hearing, debarred it for one year from participation in any tender in future vide letter dated 29.07.2015. It also cancelled the supply order alleging fraud on its part in terms of para 1 (a) of Part IV of the supply order read with Part 6.12.1 (b) and 10.10.1 (b) of DPM-2009. It was stated that it had deposited the guarantee in the form of FDR thus fulfilled its contractual obligation. Since advance samples were OMP Comm No. 100/2020 UOI Vs. Surekha International Page No.5 of 47 already approved, submission of bank guarantee no longer remained the essence of the contract. There were no circumstances justifying for invoking Clause 1 (a) of Part IV of the contract. It was stated that the petitioner should have waited for the outcome of the investigation qua the alleged forged PBG and its action for banning it or cancelling the contract was premature and premeditated. It was also stated that in terms of Section 15 and 16 of MSME Act, petitioner is liable to pay compound interest on the amount illegally forfeited.

5. The petitioner in response to the claim petition, referred the terms and conditions contained in part III and part IV of the supply order and alleged that the respondent did not deposit the PBG within the time stipulated. It was stated that only on receipt of letters dated 10.12.2014 and 23.12.2014, respondent submitted the PBG dated 03.03.2015 which on scrutiny was found forged and fake by the Bank Manager vide his letter dated 26.03.2015. In the meantime, respondent furnished FDR of Allahabad Bank, Kanpur on 16.05.2015. It was stated that a complaint was lodged at the police station Sansad Marg on 12.06.2015 and a letter dated 23.06.2015 was also sent to DGQA, New Delhi to debar the respondent from further participating in the tender process and for cancelling the supply order which was cancelled vide letter dated 30.06.2015. NSIC also de-listed the respondent vide its letter dated 28.09.2015 for one year. It was alleged that the respondent breached the terms OMP Comm No. 100/2020 UOI Vs. Surekha International Page No.6 of 47 and conditions of the supply order.

6. In rejoinder, it was submitted by the respondent that in a similar case of mattresses 'Kapok', there were allegations of submission of fake and forged PBG and the petitioner later on had accepted the FDR. It though cancelled the contract but released the FDR on the ground that it had no case to forfeit FDR.

7. The arbitrator on the pleadings, framed the following issues.

- i. Whether Performance Bank Guarantee issued by Oriental Bank of Commerce, 914, The Mall, Kanpur dated 03.03.2015 was forged, if so, its effect? OPR.
- ii. Whether the claimant (respondent herein) is entitled for refund of the sum of Rs. 29,55,775/- deposited by him towards Performance Bank Guarantee pursuant to the terms and conditions mentioned in the contract executed between the claimant and the respondent (petitioner herein)? OPD.
- iii. Whether the respondent no.2 is entitled to forfeit a sum of Rs. 29,55,775/- deposited by the claimant as Performance Bank Guarantee through the FDR dated 16.05.2015 vide receipt no. 586870 issued by Allahabad Bank, (70), 15/287, Civil Lines, Post Box No. 2, Kanpur, Uttar Pradesh? OPR.
- iv. Whether the claimant has breached the terms and OMP Comm No. 100/2020 UOI Vs. Surekha International Page No.7 of 47 conditions of the contract, if so, its effect? OPR.
- v. Whether the claimant is entitled to claim cost of proceedings and interest on the security amount deposited by the claimant firm as Performance Bank Guarantee through the FDR? OPC.
- vi. Whether the respondent has rightly cancelled the contract executed between the claimant and the respondent? OPR.
- vii. Relief.

8. Respondent examined Sh. Ashok Sureka as CW-1. Petitioner examined Lt. Col. Rajender Singh, CP Cell as RW-1.

The arbitrator after hearing the parties, gave issue wise findings holding that the allegations of criminal wrong or statutory violation would not detract the jurisdiction of the arbitral tribunal to resolve a dispute arising out of a contractual relationship on the basis of jurisdiction conferred by the arbitration clause provided in the supply order. He rejected the contention of the petitioner that the issue involved in the matter is incapable of settlement through arbitration (issue no.1).

On issue no. 2, 3 and 4, he held that the respondent is entitled for the refund.

On issue no.6, he held that the act of the petitioner to cancel the supply order/contract on the face of it appears to be premeditated, arbitrary, unlawful and not tenable in law. The OMP Comm No. 100/2020 UOI Vs. Surekha International Page No.8 of 47 petitioner failed to prove that it rightly cancelled the contract.

On issue no.5, he discussed Section 31 (7) and 31 (A) of the Act and Section 15 and 16 of MSME Act, 2006 and held that the respondent being SSI Unit was unnecessarily put to litigation. It has not violated any terms and conditions of the supply order rather, it was the petitioner who illegally cancelled the contract on the non existing grounds and forfeited the amount of FDR.

9. The petitioner challenged the award alleging that the subject stores i.e. men's cotton shirts were required for the troops/soldiers of the Indian Army i.e. Defence Forces for whom timely action was the topmost priority. Any illegality/cancellation not only affects the ordinance department including soldiers/troops but also affects the entire nation as the security of the Nation depends on them. It is stated that the dispute in respect to forged and fabricated bank guarantee could only be decided by recording oral/documentary evidence which was possible only in a civil suit and the arbitrator had no jurisdiction to decide the said dispute which was also held by the Hon'ble High Court of Allahabad, which order was not challenged by any of the parties. It is stated that the respondent had filed the civil suit before the Civil Judge, Kanpur but it withdrew the suit and took recourse to the arbitration, which is against the settled law and the directions contained in the writ petition. This question was also raised by the petitioner before OMP Comm No. 100/2020 UOI Vs. Surekha International Page No.9 of 47 the arbitrator that such like disputes cannot be referred to arbitration referring the cases, A. Ayyasamy v/s A. Paramasivam and Others (2016) 10 SCC 386, Bharat Rasiklal v/s Gautam Rasiklal, (2012) 2 SCC 144, Radhakrishnan v/s Maestro Engineers, 2010 1 SCC 72, Abdul Qadir v/s Madhav Prabhakar, AIR 1962 SC 406 and Oomor Sait HG v/s Asiam Sait, 2001 (3) CTC 269, but the arbitrator wrongly held that the allegation of criminal wrong or statutory violation would not detract the jurisdiction of the arbitral tribunal to resolve a dispute arising out of a contractual relationship on the basis of jurisdiction conferred by the arbitration clause provided in the supply order.

10. It is stated that above finding is patently illegal being not only against the order of Hon'ble High Court of Allahabad in the writ petition but also against the settled law of the land. The arbitrator failed to explain how the act of the respondent amounts to the mere allegation of fraud. It is stated that the petitioner had brought sufficient evidences qua the respondent having been committed the criminal act of furnishing forged, fabricated and frivolous bank guarantee which is not only a crime against the government including the soldiers/troops but also against the bank whose name was used in the guarantee. It is stated that because of the criminal act, respondent was banned for a period of one year from participating in the future tender enquiries. It is stated that the contract cannot be OMP Comm No. 100/2020 UOI Vs. Surekha International Page No.10 of 47 performed/concluded on the basis of forged and fabricated guarantee. When the bank guarantee clause was agreed by the parties, then in the case of breach, whether or not actual loss or damage was proved, the party was liable to pay the amount of the bank guarantee. It is stated that Section 74 of the Indian Contract Act, 1872 is applicable in the present case. The purpose of furnishing bank guarantee is that the bank on behalf of the party undertakes/guarantees that in case, the goods are not supplied as per the contract, the bank shall cover up the losses upto the maximum limit as provided in the guarantee. It is stated that the contract was required to be executed in its letter & spirit. It is stated that the fixed deposit was rightly forfeited by the petitioner as per the contract.

11. It is stated that the loss to the petitioner cannot be quantified and calculated in terms of the money. The petitioner had no other option but to forfeit the bank guarantee in the form of FDR to compensate to some extent. In a contract where bank guarantee clause was agreed as pre-estimated loss to cover/compensate the actual losses, the petitioner is not required to prove the loss. Reference is made of the case, ONGC v/s Saw Pipes Ltd, CA No. 7419 of 2001, Ministry of Defence, Government of India v/s Cenrex Sp. Z.O.O and Ors, OMP NO. 408/2007, decided on 08.12.2015,

Tamil Nadu Telecommunications v/s BSNL, OMP (Comm)- 430/2016 decided on 11.11.2016. It is stated that in view of above OMP Comm No. 100/2020 UOI Vs. Surekha International Page No.11 of 47 proposition of law, the respondent is not entitled to refund the sum deposited by it towards the performance bank guarantee pursuant to the terms and conditions contained in the supply order.

12. It is stated that the arbitrator instead making the parties clear about his fee increased his fee gradually though he was supposed to charge as per law. Reference is made of the case Chandok Machineries v/s SN Sunderson and Co, decided on 28.08.2018 in OMP (Comm) No. 321/2017.

13. Notice of the petition was given to the respondent. It filed the reply denying the averments made in the petition.

14. I have heard ld. Counsel Sh. Ashish Kumar Sharma for the petitioner and Sh. Raghav Parwatiyar, ld. Counsel for the respondent.

15. Ld. Counsel for the petitioner reiterated what has been stated in the petition. He contended that the arbitrator could not have decided the forgery issue which was raised in the matter. The respondent had submitted a forged and fabricated bank guarantee. On suspect, petitioner got the bank guarantee verified from the bank which was found forged. It immediately wrote to the respondent and lodged the police complaint. It cancelled the contract because the stores related to the supply OMP Comm No. 100/2020 UOI Vs. Surekha International Page No.12 of 47 for the soldiers/troops. Ld. Counsel contended that in the writ petition, it was clearly held that the dispute could only be decided by leading oral/documentary evidences in a civil suit. The respondent had filed a civil suit but later, it withdrew the suit and invoked the arbitration. Ld. Counsel stated that the bank guarantee was rightly forfeited following the terms and conditions contained in the supply order.

16. Ld. Counsel contended that there is a patent illegality in the impugned award which needs be set aside. Reference is made of the cases (supra) to contend that the complaint was lodged at the police station Sansad Marg on 12.06.2015. After filing the complaint, several reminders/requests were made to the police but petitioner did not get any response from there. Requests were also sent to the Higher Authorities. Matter was also followed up with NSIC who de-listed the respondent for a period of one year w.e.f. 28.09.2015. Ld. Counsel stated that later, the same material was purchased by placing a supply order to another firm namely SR Enterprises under risk and purchase.

17. Ld. Counsel for the respondent per contra argued that the samples were submitted to the petitioner within time as per Clause 6 part II of the supply order which samples were approved by the Inspecting Authorities. It had furnished the bank guarantee in the form of FDR of the like amount which OMP Comm No. 100/2020 UOI Vs. Surekha International Page No.13 of 47 was duly accepted by the petitioner on 16.05.2015 but the petitioner failed to re-fix delivery proved as per Clause 3 part II of the supply order though it was duty bound. Ld. Counsel stated that the petitioner failed to prove before the arbitrator that furnishing of PBG was the essence of contract or the respondent had submitted the alleged forged PBG. Ld. Counsel stated that except filing a police complaint, the petitioner did not pursue any action against the respondent with regard to alleged

forged PBG. Ld. Counsel stated that the objection is primarily based on the ground that arbitration was not maintainable since there were allegations of forgery against the respondent. Ld. Counsel contended that this ground was dealt/looked into by the Hon'ble High Court at the time of appointing the arbitrator and therefore, the petitioner cannot be allowed to re-agitate this issue on the principle of estoppel, waiver and acquiescence. Ld. Counsel stated that the petitioner never objected the respondent from withdrawing the civil suit which was filed prior to the commencement of the arbitral proceedings nor challenged the order of Hon'ble High Court in the Arb. Petition no. 696/17.

18. Ld. Counsel contended that submission of forged PBG by the respondent was merely an allegation which had no substance. The respondent had denied having submitted the alleged forged PBG. Further, petitioner has failed to prove that respondent had submitted the alleged forged PBG. Ld. Counsel stated that the OMP Comm No. 100/2020 UOI Vs. Surekha International Page No.14 of 47 dispute between the parties is of civil nature. The allegation of fraud imputed by the petitioner does not make the contract void ab initio. Ld. Counsel referred the case of Vidya Drolia and Ors v/s Durga Trading Corporation, C.A No. 2402 of 2019, decided on 14.12.2020 to contend that the allegation can be made a subject matter of arbitration when it relates to a civil dispute subject to a caveat that the fraud which vitiates and invalidates the arbitration clause is an aspect relating to non-arbitrability. Ld. Counsel contended that neither DPM 2009 7.7.1 nor part 4 of the supply order gives right to the petitioner to cancel the contract at the risk and expense of the respondent. In the supply order, it was nowhere provided that due to non filing of PBG within the stipulated period/extended period, the petitioner would forfeit the amount of the bank guarantee. Ld. Counsel stated that the liquidated damage clause provides the circumstances under which PBG could be encashed and in the clause, there is nothing to take the bond outside the usual commercial understanding. It is provided in the article that if there is failure to deliver any installment of goods within the date specified, the amount of PBG can be encashed/adjusted towards the losses suffered by the petitioner. Since in the instant case, date of delivery was not re-fixed after the approval of the samples so the factum of supplying the goods within the stipulated period never arose and therefore, claim of damage/right of forfeiting the FDR never arose in favour of the petitioner. Ld. Counsel referred sub clause of part III of the OMP Comm No. 100/2020 UOI Vs. Surekha International Page No.15 of 47 Supply order which provided that in the event of seller's failure to submit the bond/guarantee/document as specified in the supply order, the buyer may at its discretion withhold any payment until the completion of supply order or can deduct from the seller as agreed a liquidated damage at 0.15% of the supply order price for the delayed/undelivered store for every week of delay or part of a week subject to a maximum value of the liquidated damage being not more than 10% of the value of the delayed stores. Ld. Counsel stated that sub clause 9 of Part III only provides for the reasons for termination of the supply order and in no terms, for not furnishing the PBG, the supply order could be cancelled/terminated. Ld. Counsel stated that vide letter dated 09.03.2015, petitioner had extended the period for furnishing the PBG. Ld. Counsel stated that purpose of PBG as mentioned in the supply order was to supply the goods as per the contract. Ld. Counsel stated that after the approval of samples, the respondent had furnished the amount of PBG in the form of FDR which was duly accepted by the petitioner. It was therefore the duty of the petitioner to re-fix the delivery period which it failed to do. Ld. Counsel stated that it is not the case that the respondent failed to furnish the PBG within the specified time.

19. Ld. Counsel stated that in the letter dated 09.03.2015, petitioner never informed the respondent that the PBG was forged. It had merely said that PBG is not in accordance with OMP Comm No. 100/2020 UOI Vs. Surekha International Page No.16 of 47 the format and it suffers from discrepancy. It was inter alia stated that the bond is not as per the format, it does not bear any number of issuing bank, it indicates two figures but the correct figure is Rs. 29,55,775/- etc. The respondent vide letter dated 18.03.2015 submitted that it is ready to deposit the FDR of the amount. Ld. Counsel stated that allegation of submission of forged PBG is a mere allegation and has no serious implications in the inter se relationship between the parties. Further, acceptance of FDR of the like amount by the petitioner would operate as estoppel against the petitioner. Ld. Counsel stated that the respondent never committed the breach and was entitled for the refund of the security amount. Ld. Counsel stated that acceptance of FDR, extension of time for submission of PBG and provision of penalty on failure to submit PBG would negate the contention that submission of PBG on or before 23.12.2014 was the essence of the contract. Reference is made of the case, Hind Constructions v/s State of Maharashtra, 1979 AIR 720 SC, to contend that whether time is the essence of contract is a question of intention of the parties, to be gathered from the contract and the provision for imposition of penalty and extension of time would militate such an inference.

20. Ld. Counsel stated that there is no infirmity/illegality in the impugned award.

21. I have given my thoughtful consideration to the rival OMP Comm No. 100/2020 UOI Vs. Surekha International Page No.17 of 47 contentions, perused the award, documents placed with the award and the case laws (supra) referred by the parties.

Findings / adjudication:

22. The impugned award was passed on 13.05.2020. This petition under Section 34 of the Act has been filed on 28.11.2020.

23. Section 34 (3) of the Act provides a limitation period of three months for filing objections against an arbitral award. Proviso to Section 34 (3) of the Act provides an extended period of 30 days for filing the application and the court has the discretion to condone the delay, provided sufficient cause is shown by the party which prevented it from approaching the court in the limitation period of three months. In the case of DDA v/s Durga Construction, (2013) SCC Online Del 4451, it was held that although the courts have the jurisdiction to condone the delay, the approach in exercising such jurisdiction cannot be liberal and the conduct of the applicant will have to be tested on the anvil of whether the applicant acted with due diligence and dispatch. The applicant would have to show that the delay was on account of reasons beyond the control of applicant and could not be avoided despite all possible efforts by the applicant.

24. The proviso to Section 34 (3) of the Act is similar to that of Section 5 of the Limitation Act. It also relates to extension of period of limitation. In the instant case, there is delay of about OMP Comm No. 100/2020 UOI Vs. Surekha International Page No.18 of 47 four months in filing the petition but the Supreme Court in suo moto petition vide Writ Petition No. 03/2020 has extended the limitation keeping in view the situation arisen out of Covid-19 Pandemic in India, which is also

applicable in the arbitral proceedings,

25. In view of the directions issued by the Supreme Court, I am of the view that this petition is maintainable.

26. Section 34 of the Arbitration and Conciliation Act reads as:

"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 OMP Comm No. 100/2020 UOI Vs. Surekha International Page No.19 of 47 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- I For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India only if the making of the award was induced or affected by fraud or corruption or was in violation of Section 75 or Section 81."

ii) It is in contravention with the fundamental policy of Indian law;

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

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

[2 (A) An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the court, if the court finds that the award is vitiated by patent illegality appearing on the face of the award: Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by reappraisal of evidence.

27. Normally, the general principles are that the decision of the Arbitrator unless there is an error apparent on the face of the award which makes it unsustainable, is not to be set aside even if the court as a court of law would come to a different conclusion on the same facts. The court cannot reappraise the evidence and it is not open to the court to sit in appeal over the OMP Comm No. 100/2020 UOI Vs. Surekha International Page No.20 of 47 conclusion of the arbitrator. It is not open to the court to set aside a finding of fact arrived at by the arbitrator and only grounds on which the award can be cancelled are those mentioned in the Arbitration Act. Where the arbitrator assigns cogent grounds and sufficient reasons and no error of law or misconduct is cited, the award will not call for interference by the court in the exercise of the power vested in it.

28. In the case of Associate Builders v/s Delhi Development Au-

thority, (2015) 3 SCC 49, it was held that interference with an arbitral award is permissible only when the findings of the arbitrator are arbitrary, capricious or perverse or when conscience of the Court is shocked or when illegality is not trivial but goes to the root of the matter. The arbitrator is ultimately a master of the quantity and quality of evidence while drawing the arbitral award. Patent illegality must go to the root of the matter and cannot be of trivial nature.

29. In Ssangyong Engineering & Construction Co. Ltd. vs. National Highways Authority of India Ltd. 2019 SCC OnLine SC 677, the Supreme Court has held that under Section 34 of the Act, a decision which is perverse while no longer being a ground for challenge under public policy of India but would certainly amount to a patent illegality appearing on the face of the award. A finding based on the documents taken behind the OMP Comm No. 100/2020 UOI Vs. Surekha International Page No.21 of 47 back of the parties by the arbitrator would also qualify as a decision based on no evidence inasmuch as such decision is not based on evidence led by the parties and therefore would also have to be characterized as perverse.

30. It is not in dispute that the respondent, a small scale unit registered with NSIC got a supply order from the petitioner for fabricating/supplying of 175939 no. of shirts for a total value of Rs, 2,95,57,752/-. In terms of Clause 6 Part 1 of the Supply order, it had submitted two shirts as advance sample to the Controller CQA (TNC), Kanpur within 45 days from the date of issue of supply order for test. The inspecting authority approved the sample and the petitioner had to re-fix the delivery period.

31. As per Clause 1 (a) Part IV of the Supply order, the respondent was required to furnish a performance guarantee by way of bank guarantee/FDR to conduct the business for a sum equal to 10% of the supply order i.e. Rs. 29,55,775/- value within 30 days of signing the supply order which would be valid upto 60 days beyond the date of warranty. In the instant case, the respondent had requested the petitioner vide letter dated 22.12.2014 to extend the date for furnishing the bank guarantee which it could not furnish within the time specified or to deduct the amount of the bank guarantee from its bill but the petitioner, issued a show cause notice dated 23.12.2014 to the respondent OMP Comm No. 100/2020 UOI Vs. Surekha International Page No.22 of 47 directing it to furnish the guarantee by 31.12.2014 failing which, supply order will be cancelled at risk and cost of the respondent without any further notice and the amount would be deducted from the bills of other supply orders placed on its firm at the time of cancellation. From the show cause notice, it is clear that the petitioner had extended the time for furnishing the performance guarantee upto 31.12.2014.

32. According to the petitioner, the respondent had submitted a forged and fabricated bank guarantee which was also confirmed by the Bank Manager. The version of the respondent was that it never submitted the alleged forged bank guarantee. It had requested the petitioner to provide the copy of the forged bank guarantee so that, it could investigate at its end but the petitioner did not respond to its request. It instead, cancelled the supply order alleging fraud on the part of the respondent and informed the Director General of Supplies and NISC. Record reveals that NISC had sought clarification from the respondent on this issue which it promptly responded reiterating what it had explained to the petitioner. The petitioner then debarred the respondent for one year from participating in any of its tender in future vide letter dated 29.07.2015. It also lodged criminal complaint at the police station, Sansad Marg with regard to submission of alleged forged bank guarantee.

33. In the instant case, the respondent on 16.05.2015, had OMP Comm No. 100/2020 UOI Vs. Surekha International Page No.23 of 47 submitted an FDR for a sum of Rs. 29,55,775/- which was also accepted by the petitioner which it, encashed after the cancellation of the supply order on the ground of alleged fraud. The respondent had challenged the action of the petitioner by filing a Writ Petition before the Hon'ble High Court of Allahabad which writ was disposed of vide order dated 04.08.2015 with the observations that the findings of facts can only be recorded after oral and documentary evidence adduced by the parties which is possible in a Civil Suit. However, in view of the arbitration clause, respondent can always approach before the petitioner for settlement. The respondent then filed a Civil Suit before the Civil Judge, Kanpur but it withdrew the suit finding that the supply order consisted of an arbitration clause for resolution of dispute between the parties. It had filed an affidavit before the Civil Court that it had discussed the subject matter with the counsel

of Union of India who advised him to solve the disputes through arbitration to which, it agreed. The respondent in terms of Clause 3 Part III of the Supply order then sent a legal notice dated 19.05.2017 to the petitioner either to refund the amount forfeited or refer the dispute to arbitration but the petitioner did not take any action. The respondent then got the arbitrator appointed from the Hon'ble High Court of Delhi vide order dated 20.03.2015 by filing a petition under Section 11 of the Act.

34. On issue no. 1, the petitioner in the objections filed under OMP Comm No. 100/2020 UOI Vs. Surekha International Page No.24 of 47 Section 34 of the Act, has contended that the dispute in regard to forged/fabricated bank guarantee could only be decided in a civil suit and the arbitrator had no jurisdiction to decide the dispute referring the order of Hon'ble High Court of Allahabad but the arbitrator wrongly held that the allegation of criminal wrong/statutory violation would not detract the jurisdiction of the arbitral tribunal to resolve a dispute arising out of a contractual relationship on the basis of the jurisdiction conferred by the arbitration clause.

35. I may mention that this issue was also raised by the petitioner in the petition under Section 11 of the Act for appointment of the arbitrator. Hon'ble High Court in its order dated 20.03.2019 referring the orders of Ld. Civil Judge dated 23.04.2018, 28.04.2018 and 28.05.2018 held that a perusal of these orders shows that the petitioner (respondent herein) withdrew the suit action. The withdrawal application was supported by an affidavit in which the petitioner indicated that having confabulated with the counsel for the UOI, the petitioner came to the conclusion that the best cause of action would be to withdraw the suit and proceed to take action under the arbitration agreement. It was also observed in para 24 of the order that the writ court had indicated to the petitioner that he should either take recourse to a suit or an arbitral process. The court had also considered the contention of the counsel for the respondent (petitioner herein) that while in the suit, reliefs were OMP Comm No. 100/2020 UOI Vs. Surekha International Page No.25 of 47 sought with regard to the cancellation of letter dated 30.06.2015 but at this juncture, the respondent seeks refund of its security deposit and it does not seek a direction that a status quo ante be maintained. It was held that given the circumstances, he allows the petition and appoints an arbitrator as there is no dispute as to the existence of the arbitration agreement.

36. A perusal of the arbitral record shows that the respondent had filed a statement of claim, the petitioner had filed the statement of defence to which, the respondent had filed the rejoinder. The arbitrator on the pleadings of the parties, framed the issues. The parties tendered their evidence by calling their witnesses and exhibiting the documents. The arbitrator had also given opportunities to the parties to cross examine the witnesses as evident from the proceedings/order dated 16.11.2019. In this case, the arbitrator had conducted the proceedings like a Civil Court. He after hearing the parties, passed the award recording the contentions of the parties referring the case laws. I failed to understand what more was to be done by the Civil Court which was not done by the arbitrator in the present case. The dispute was only to the extent of refund of the FDR amount which was forfeited by the petitioner after cancelling the supply order. It is well settled legal position that all disputes arising out of an agreement shall be referred to the arbitrator and when the dispute is referable to the arbitrator, the parties cannot be compelled to take recourse of civil proceedings.

37. It is to note that in this case, the petitioner had lodged a complaint at the police station, Sansad Marg in regard to the forged bank guarantee. Surprisingly, it did not seriously follow up the complaint nor tried to find out who prepared the forged bank guarantee or at whose instance, it was prepared. It assumes importance because the respondent, on getting notice, had denied having submitted any forged bank guarantee with the petitioner. It had also asked the petitioner to provide its copy so that it could investigate on its own end but the petitioner did not respond.

38. In the impugned award, the Arbitrator had referred the case of A. Ayyasamy v/s A. Paramasivam and ors (supra) where it was held that mere allegation of fraud simplicitor may not be a ground to nullify the effect of arbitration agreement between the parties. It is only in those cases where the court while dealing with Section 8 of the Act finds that there are very serious allegations of fraud which make a virtual case of criminal offence or where the allegations of fraud are so complicated that it becomes absolutely essential that such complex issues be decided only by the Civil Court on appreciation of voluminous evidence that needs to be produced.

The arbitrator taking recourse of the case (supra), has held that where there is simple allegation of fraud touching the internal affairs of the parties and it has no implication in the OMP Comm No. 100/2020 UOI Vs. Surekha International Page No.27 of 47 public domain, the arbitration clause need not be avoided and parties can be relegated to arbitration. The arbitrator referred Section 16 of the Act and Section 8 of the Indian Contract Act, 1872, in para 59 of the award has held that the letter dated 09.03.2015 exhibited as Ex. RW-1/G finds mention that the bank guarantee bond in question is not as per the format as provided in 1 (a) Part 1 of the Supply order r/w DPM-15, it does not bear the number of issuing bank and it indicates two figures i.e. Rs. 29,35,775/- and Rs. 29,55,775/-. He held that this clearly indicates that the bank guarantee bond on the face of it was not in accordance with the terms and conditions of the supply order. Further, respondent was given time to deposit the amount of PBG as per the format by 20.03.2015 stating that extra time period taken for submission of PBG after due date i.e. 10.12.2014 will be deducted while re-fixing of BPC. He observed that FDR for the said amount was subsequently accepted by the petitioner in lieu of the PBG, thus the said action of the petitioner would amount to acceptance of the performance of the reciprocal condition of the supply order as provided under Section 8 of the Indian Contract Act. He observed that on the one hand, the petitioner vide letter dated 10.08.2015 Ex.CW-1/C13 has admitted that the case of furnishing fake PBG is under investigation and action will be taken on the outcome but on the other hand, it already took the action by cancelling the supply order vide letter dated 30.06.2015 Ex.RW-1/M which on the face of it, appears to be OMP Comm No. 100/2020 UOI Vs. Surekha International Page No.28 of 47 arbitrary and unlawful taken without providing an opportunity of being heard. He observed that the petitioner failed to bring on record any further action taken by the investigating authority pursuant to the filing of complaint regarding the alleged forged bank guarantee to the P.S Sansad Marg Ex.RW-1/L. In para 59

(ix), he observed:

" In case the respondents are satisfied that claimant firm furnished a forged PBG or that not furnished the PBG within the time agreed between the both parties, it will be entitled to initiate such action as is contemplated under the agreement like cancelling the contract or deduct the amount of PBG from the amount of first consignment to be supplied by the claimant firm. If in that process any dispute arose between the claimant and respondent the same shall have to be referred to the arbitration as contemplated under clause 3 part III of Supply Order dated 11.11.2014."

39. He held that considering the law laid down by the Hon'ble Supreme Court on the subject, Section 5, 16 and 34 of the Act coupled with the fact that opportunity of hearing was not granted to the respondent before cancelling the contract/debarring it from participating in future tender enquiries as held in the case *Erusion Equipment and Chemical Ltd v/s State of Bengal*, (1975) 1 SCC 70, it is a fit case to be tried and adjudicated by the arbitral tribunal.

40. I do not find any reason to interfere in said observations. It cannot be said that it suffer from patent illegality or the arbitrator went beyond the contract. He has correctly interpreted the terms of the contract and the law and rightly held that the OMP Comm No. 100/2020 UOI Vs. Surekha International Page No.29 of 47 allegation of criminal wrong doing or of statutory violation would not detract the jurisdiction of the arbitral tribunal to resolve a dispute arising out of contractual relationship on the basis of jurisdiction conferred by the arbitration clause provided in the supply order.

41. In this case, the arbitrator has conducted the proceedings like a Civil Court giving due opportunities to the parties to file documents, lead evidences on the documents/pleadings and thereafter, he decided the issues on merits. This issue was also dealt in detail by the Hon'ble Delhi High Court in the petition under Section 11 of the Act at the time of appointment of the arbitrator. It was held in the case of *Vidya Drolia and ors v/s Durga Trading Corporation* (supra) that allegations of fraud can be made a subject matter of arbitration when they relate to a civil dispute subject to the caveat that the fraud which would vitiate or invalidate the arbitration clause, is an aspect relating to non-arbitrability. In this case, the dispute which has been raised by the petitioner relates to a civil dispute and in view of the judgment in the case of *Vidya Drolia* (supra), the allegation of fraud as raised by the petitioner can be made a subject matter of arbitration which the arbitrator has rightly allowed while deciding issue no.1.

42. Qua the findings on issue no.2, 3 and 4, it is not in dispute that after the approval of samples, the petitioner was required to OMP Comm No. 100/2020 UOI Vs. Surekha International Page No.30 of 47 re-fix the delivery period so that respondent could commence bulk manufacturing of the shirts. In this case, supply order was issued on 11.11.2014. The respondent had submitted two shirts as advance sample for inspection on 18.12.2014 i.e. within the stipulated period. The samples were approved by inspecting authority on 22.01.2015. The supply order was cancelled on 30.06.2015. The alleged forged bank guarantee was submitted on 03.03.2015 though the performance bank guarantee should have been submitted by the respondent within 30 days from the date of issue of the supply order. It had requested to extend the date of submission of PBG which was allowed. Finally, after reaffirmation of approval of the samples, the respondent furnished the PBG in the

form of FDR dated 16.05.2015 Ex.CW-1/C7.

43. Before adverting further, I would like to reproduce some of the relevant clauses of the supply order:

Para 3 Part 1 (Delivery Period): 75939 numbers to be supplied within 5 months and balance 1 lakh to be supplied within next months or earlier after approval of advance samples and bulk order clearance by this office. However, this clause will be applicable only after fulfilling the condition of para 6 of part II of the supply order. Please note that contract can be cancelled unilaterally by the buyer in case, items are not received within the contracted delivery period. Extension of contracted delivery period will be at the sole discretion of buyer with application of LD clause, denial OMP Comm No. 100/2020 UOI Vs. Surekha International Page No.31 of 47 clause and other applicable clauses. Any request for DP extension by the seller should reach the buyer minimum 40 days prior to the expiry of delivery period/extended delivery period.....The delay in number of days by seller in making such a request will be deducted from the total administrative delay taken by buyer for grant of delivery period extension while calculating liquidated damages.

Para 6 Part I (Advance Sample Clause): Two numbers shall be submitted to the controller CQA (TNC) Kanpur within 45 days from the date of issue of supply order for tests and approval. If seller fails to submit samples by the dates specified or the samples are not found acceptable by the inspecting authority, the contract will be cancelled at the risk and expenses of the seller. CQA shall submit the advance sample report within 30 days of receipt of the sample. Para 8 Part III (Liquidated Damages): In the event of the seller failure to submit the bonds, guarantees and documents, supply the stores/goods etc as specified in the supply order, the buyer may at his discretion withhold any payment until the completion of the supply order. The buyer may also deduct from the seller as agreed, liquidated damages @ 0.5% of the supply order price of the delayed/undelivered stores/services mentioned for every week of delay or part of a week subject to the maximum value of the liquidated damages being not higher than 10% of the value of delayed stores.

Para 9 Part III (Termination of Supply Order): The buyer shall have the right to terminate the supply order in part or in full (a) if the delivery of the material is delayed for causes not attributable to force majeure for more than one month OMP Comm No. 100/2020 UOI Vs. Surekha International Page No.32 of 47 after the scheduled date of delivery, b) the seller is declared bankrupt or become insolvent c) the delivery of material is delayed due to causes of force majeure for more than one month d) the buyer has noticed that the seller has utilized the services of any indian/foreign agent in getting the supply order and paid any commission to such individual/company etc e).....

Para 1 Part IV (Performance Guarantee): a) In case of indigenous seller, it is required to furnish a PBG/FDR.... for a sum equal to 10% of the supply order..... value within 30 days of signing of the supply order. It will be valid upto 60 days beyond the date of warranty and it should be on in Form DPM 15 and Clause 2 part IV.

Para 11 Part IV (Risk and Expense Clause): a) If the stores or any installment is not delivered within the time as specified, the buyer shall after granting the seller 45 days to cure the breach will be at liberty without prejudice to the right to recover liquidated damages as a remedy for breach of contract, to declare the contract as cancelled either wholly or to the extent of such default. b)....., c) in case of material breach that was not remedied within 45 days, buyer shall have the right of first refusal to the seller with liberty to purchase/procure from any source as he thinks fit of the same stores.....

44. In the impugned award, the arbitrator had considered the contentions of the respondent that after the approval of the advance samples, the petitioner was required to re-fix the delivery period to commence bulk manufacturing of the shirts OMP Comm No. 100/2020 UOI Vs. Surekha International Page No.33 of 47 which was never done and the supply order was cancelled; that by submitting the samples and depositing the requisite performance security, respondent fulfilled its part of the contractual obligations but the petitioner instead re-fixing the delivery period as provided under Clause 3 Part II of the Supply order, arbitrarily/illegally cancelled the supply order and debarred it from participating in future tender enquiries without following the procedure established by law, although in another contract relating to mattresses, dated 01.12.2014, placed on the respondent, where there were also the allegations of furnishing forged bank guarantee and thereafter, the respondent had furnished the FDR, the FDR was discharged and released to the respondent vide letter dated 24.11.2015 i.e. after the date of forfeiture of the amount of PBG in the present case; that the acceptance of PBG in the form of FDR and re-approval of samples would have the effect of waiver in view of Section 8 and 55 of the Indian Contract Act and law laid down in the case of Hind Construction Contractors v/s State of Maharashtra (supra).

The arbitrator had also considered the contentions of the petitioner who had referred Section 73 and 74 of the Indian Contract Act that the purpose of furnishing bank guarantee is that the bank on behalf of the firm undertakes that in case, the goods are not supplied within the contractual period, the bank shall cover up the losses upto the maximum limit as provided in the contract. He also considered the case laws i.e. ONGC v/s OMP Comm No. 100/2020 UOI Vs. Surekha International Page No.34 of 47 Saw Pipes Ltd (supra), Ministry of Defence v/s Cenrex SPZO.O & Ors (supra), Tamilnadu Telecommunication v/s BSNL (supra) which have also been referred in the present petition.

45. After considering the contentions, the arbitrator discussed Section 8, Section 55 of the Indian Contract Act and the case of Hind Construction Contractors (supra) and analyzed the terms and conditions as contained in the supply order which provided that liquidated damages can be claimed only in the event of the seller's failure to submit the bonds/supply of stores etc as specified in the order. He held that in the clause 8 Part III, it is mentioned that buyer may at its discretion withhold

any payment until the completion of the supply/deduct the said sum from the bill of the seller. He also referred the case of ONGC v/s Saw Pipes (supra), Ministry of Defence, Government of India v/s Sunrex S.V (supra), Section 51, 52 and 54 of the Indian Contract Act and held that there are two types of contracts, one where the actual loss can be calculated and even if there is a clause of liquidated damages, only actual loss should be granted subject to the upper limit as specified in the liquidated damages clause under Section 74 of the Indian Contract Act, second where loss is caused but cannot be quantified in view of the nature of the contract, then the court should allow the enforcement of liquidated damages under Section 74 of the Indian Contract Act. He referred the case of Tamilnadu Telecommunications v/s Bharat Sanchar Nigam OMP Comm No. 100/2020 UOI Vs. Surekha International Page No.35 of 47 Limited (supra) and Clause 3 Part II, Sub-Clause 6 of Part I, Sub Clause 2 of Part III, Clause 8 of Part III, Clause 9 of Part III, Clause 1(a) of Part IV, Clause 5 of Part IV and held that the supply order was concluded between the parties. He held that the time was not the essence for supplying the goods since as per Clause 2 of Part III, supply order shall come into effect on the date of its acknowledgment by the seller and shall remain valid until the completion of the obligations of the parties under the supply order. It was the duty of the petitioner to re-fix the date of the delivery within the stipulated period after the approval of advance sample and bulk order clearance by the office. In this case, the samples were approved on 21.01.2015 and reapproved on 13.05.2015. The petitioner was required to re-fix the delivery period which was not done. The bank guarantee by way of FDR was deposited by the respondent on 16.05.2015.

46. In the instant case, terms and conditions of the supply order nowhere specify that in case, the respondent fails to furnish the PBG within the specified time, the petitioner shall be entitled to forfeit the bank guarantee. I am of the view that the arbitrator has rightly applied the principles laid down in the case of Hind Construction Company (supra) that the cancellation of contract and forfeiting the security deposit by the petitioner would amount to committing of breach of contract. He has distinguished the case of ONGC v/s Saw Pipes Ltd (supra) OMP Comm No. 100/2020 UOI Vs. Surekha International Page No.36 of 47 observing that in the present case, despite fulfilling the terms and conditions by the respondent, the petitioner cancelled the supply order without re-fixing the date of delivery of goods. The penalty clause provides to claim liquidated damages only on the event of delayed supplies, goods not supplied within the stipulated time or the goods are not supplied in accordance with the specifications. Only in those events, PBG could be adjusted for the satisfaction of losses incurred by the petitioner. The arbitrator also distinguished the case of Ministry of Defence (supra) and held that in the present case, the respondent was not given any opportunity to supply the goods. He held that the clauses in the supply order pertaining to the imposition of penalty and extension of time were never intended by the parties to be the essence of the contract.

47. In the instant case, as evident from the record, the samples were sent within time. The petitioner in terms of Clause 3 and 6 of Part II of the Supply Order was bound to re-fix the delivery period which it did not. As per Clause 8 Part III, the performance bond was meant to secure delay in delivery and other breach of terms and conditions of the contract and the bond could be encashed only in certain circumstances. 30 days time for furnishing PBG was never intended by the parties to be the essence of contract as the supply order provided for imposition of penalty and extension of time. PBG amount deposited in the form of FDR on 16.05.2015 was accepted by OMP Comm No.

100/2020 UOI Vs. Surekha International Page No.37 of 47 the petitioner thus, it waived the condition of furnishing PBG within 30 days by virtue of Section 8 and 55 of the Indian Contract Act. The arbitrator has rightly held that the act of cancellation of contract, forfeiture of amount of FDR and debaring the respondent from taking part in further tender enquiries is malafide, arbitrary and unlawful only on the ground of alleged forged PBG allegedly furnished by the respondent though the petitioner has failed to lead any evidence that the alleged offence of forgery was committed by the respondent. The arbitrator also referred the case of Matresses i.e. File No. A/59590/DGOS/2012/Mttress Kapok/OS PIII/Proc Sec/2298 related to the same party where the amount was released in the similar case.

48. A perusal of the note at page 142 Ex.RW-1/K1 reveals that the issue raised by the Ministry in the present reference is similar as earlier examined by it in File No. A/59590/DGOS/2012/Mttress Kapok/OS PIII/Proc Sec/2298 in case of M/s sureka International, Kanpur vide Note 40/ante dated 27.05.2015 where the Ministry has advised to take similar action in the present reference against M/s Sureka International, Kanpur as suggested by them in the file (date of breach is 10.12.2014).

49. I failed to understand why the policy of pick and choose was adopted by the petitioner as in one case, the amount was released but in the present case, the amount was realized.

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50. That being the position, I do not find any infirmity/illegality in the award whereby the arbitrator has held that the petitioner failed to prove that it was entitled to forfeit the sum deposited by the respondent as PBG through FDR dated 16.05.2015 or that the respondent committed the breach of the terms and conditions of the contract rather, it has proved that it has complied with all the terms and conditions mentioned in the supply order and further, in none of the clauses of the supply order, it is mentioned that due to non filing of PBG within the stipulated period, the petitioner is competent to forfeit the amount of bank guarantee in the absence of any accounting between the parties to the commercial contract. There is nothing in the wording of liquidated damages clause to take the bond outside the usual commercial understanding as to how a performance bond operates. It is also provided in the article that if there is failure to deliver any installment of the goods by the date specified, only on those events, the amount of PBG can be encashed or adjusted towards the losses suffered by the petitioner but in this case, date of delivery is not refixed so, the factum of supplying the goods within the stipulated time never arose. He has rightly held that the respondent is entitled for the refund of the sum deposited by it by way of FDR towards BG in compliance of the terms and conditions provided in the supply order.

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51. Though Id. Counsel has contended that later, the same material was purchased by placing a supply order to another firm namely, SR Enterprises under risk and purchase but the arbitral record or the award do not find a word that the supply was taken under the risk and purchase. For the sake of arguments, even if we presume that supply was taken under risk and purchase but Id. Counsel has not disclosed whether any loss or damages was suffered by the petitioner on this count.

Therefore, no benefit can be given to the petitioner. Admittedly, the supplies were for the troops/defence persons but it is well settled law that parties are bound by the terms and conditions of the contract/supply order and the arbitrator was required to confine himself within the terms while passing the award.

52. On issue no.6, the arbitrator had considered the contention of the respondent that the supply order was cancelled invoking Clause 1 (a) Part IV of the supply order r/w Clause 6.12.1 (b) and 10.10.1 (d) of DPM 2009 and in the said clauses, it is nowhere provided that supply order shall be cancelled in case, PBG is not submitted within the specified date; that the date of furnishing PBG was extended till 20.03.2022 vide letter dated 09.03.2015; that non-filing of PBG is not the ground to cancel the supply order as the amount could be deducted even from the first bill to be raised by the respondent; that after the samples were re-approved vide letter dated 13.05.2015; FDR equivalent to the amount of PBG was furnished on 16.05.2015 which was OMP Comm No. 100/2020 UOI Vs. Surekha International Page No.40 of 47 accepted by the petitioner and therefore, the extended date did not remain sacrosanct; that because of the extension, time did not become the essence of the contract; that the petitioner after cancelling the supply order, vide letter dated 10.08.2015 Ex.CW-1/C13 had written that the case is under investigation and action shall be taken as per outcome and has rightly held referring findings on issue no.2, 3 and 4, that the act of the petitioner to cancel the supply order/contract appears to be pre-meditated, arbitrary and unlawful and not tenable in law.

53. As evident from the record, there is no report qua the investigation of alleged submission of forged and fabricated PBG by the respondent. No post decisional hearing qua the alleged forged bank guarantee was given to the respondent which is against the principles of natural justice and fair play as enshrined under Article 14 of the Constitution. I, therefore, find no substance in the contention of the petitioner which does not require interference.

54. Now coming on issue no.5 i.e. cost of the proceedings and interest on the security amount, it is true that the arbitrator is competent to award interest and cost as provided under Section 31 (7) of the Act and as per Section 15 and 16 of the MSME Act, 2006, all the dues of MSME units have to be cleared within 15 days lest the other party shall be liable to pay compound interest with monthly rests on the amount from the OMP Comm No. 100/2020 UOI Vs. Surekha International Page No.41 of 47 appointed date at three times of the bank rate notified by the Reserve Bank and that the petitioner vide its letter dated 30.07.2015, had requested for the encashment of FDR which was released on 28.08.2015 and the petition for appointing an arbitrator was disposed of vide order dated 20.03.2019.

55. It is also true that the respondent is SSI Unit and the petitioner had received the amount on 28.08.2015 but there was dispute whether the said amount was rightly realized or not. Though the arbitrator has given compound interest on the amount of FDR at 12% per annum with quarterly rests w.e.f. 28.08.2015 till the realization of the amount but it is also expected that the interest must be the prevailing rate of interest and reasonable looking into the issue involved in the present matter and that the government agency was involved which did not realize the interest on the amount more than the normal banking rates. It is well settled that the court has power to vary the rate of interest.

In the case of Vedanta Limited v/s Shenzhen Shandong Nuclear Power, Civil Appeal No. 10394 of 2018, the Hon'ble Supreme Court held that the courts may reduce the interest rate awarded by an Arbitral Tribunal where such interest rate does not reflect the prevailing economic conditions or where it is not found reasonable, or promotes the interests of justice. I am of the view that interest of justice would be made if the respondent is given simple interest @ 9% per annum w.e.f. 28.08.2015 i.e. the day when the amount against the FDR was realized till the OMP Comm No. 100/2020 UOI Vs. Surekha International Page No.42 of 47 realization of the amount.

56. As regards, cost of litigation which the arbitrator has awarded cost of Rs. 1,00,000/-, it appears to be on higher side. I reduce the cost from Rs. 1,00,000/- to Rs. 35000/-. As regards fee, the arbitrator has rightly calculated the fees which does not call for interference.

57. In the case of Delhi Metro Rail Corporation Ltd Vs. Delhi Airport Metro Express Pvt Ltd, 2019 SCC OnLine Del 6562, it was held that the care must be taken that the Court does not rewrite or create a new contract or an award in which case it is impermissible to dissect and segregate. Reference was made to Section 23 of the Contract Act. It was held that these principles can be applied to an award after referring to the decision of the Supreme Court in J.C. Budhiraja Vs. Chairman, Orissa Mining corporation Ltd, (2008) 2 SCC 444, wherein it was held that the entire award need not be set aside and part of the award which is valid and separable can be upheld.

58. In view of the law laid in the case of DMRC (supra), where reliance was placed on the case J.C. Budhiraja (supra), I am of the opinion that the entire award need not be set aside and part of the award which is valid and separable can be upheld.

Now to sum up:

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59. On a careful study of the award and the record, I find that Ld. Arbitrator has considered all the relevant facts & circumstances and the case laws referred by the parties, he has given a logical interpretation to the terms of the contract and arrived at the findings, which do not smack from arbitrariness.

60. The Supreme Court in catena of judgments while deliberating on the doctrine of perversity has held that a decision is perverse or irrational, if no reasonable person could have arrived at it in the given set of facts and circumstances and where a finding is based on "no evidence" or if an Arbitral Tribunal takes into account something irrelevant and "ignores vital evidence", such decisions would necessarily be perverse. (H. B. Gandhi, Excise & Taxation Officer-Cum Assessing Authority Vs. Gopi Nath & Sons, 1992 Supp (2) SCC 312(at P-317), Kuldeep Singh VS. Commissioner of Police (1999) 2 SCC 10, Patel Engineering Ltd Vs. North Eastern Electric Power Corporation Ltd, SLP (C) No. 3584-85 of 2020 and Dyna Technologies Pvt Ltd Vs. Crompton Greaves Ltd (2019) SCC OnLine SC 1656). The 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 it is patently illegal or is contrary to the substantive provisions of law and against the terms of the contract as held in the case of (Venture Global Engg.

Vs. Satyam Computers Service Ltd, (2008) 4 SCC 190, MMTC Ltd. Vs. M/s Vedanta Ltd, CA No. 1862/2014, Associated Builders Vs. Delhi Development OMP Comm No. 100/2020 UOI Vs. Surekha International Page No.44 of 47 Authority, 2014 (4) Arb. LR 307 (SC) and Lifelong Meditech (P) Ltd Vs. United India Insurance Co. Ltd, 2018 (1) Arb. LR 34 (Delhi). The findings of fact as well as of law of the Arbitrator are ordinarily not amenable to interference under Section 34 & 37 of the Act as held in the case of NHAI Vs. BSC-RBM-Pati Joint Venture, 2018 (1) Arb. LR 570 (Del). It is only where the finding is either contrary to the terms of the contract between the parties or ex-facie perverse that interference by the Court is necessary.

61. It is also settled that an interpretation placed on a 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 re-appreciated by the Court under Section 34 of the Act. Legal position is no more res integra that the Arbitrator having been made the final Arbitrator 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. 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 which is not permissible. It is thus clear that the section 34 does not envisage every award to be challenged but limits the challenge to only those awards which are against the public policy of India or are OMP Comm No. 100/2020 UOI Vs. Surekha International Page No.45 of 47 patently illegal. The expansive scope of challenge to an award under the ground of patent illegality as held in "ONGC v. Saw Pipes Ltd" (2003) 5 SCC 705 is further reduced by the Supreme court in the recent judgment titled Ssyangyong Engineering v. NHAI, 2019 SCC OnLine SC 677.

62. Having examined the various contentions of the petitioner on the touchstone of the parameters of interference as explicitly laid down by the Supreme Court in several judgments referred to above, I am of the view that the impugned Award, except the interest for pre-award period and cost, does not suffer from any infirmity or error apparent on the face of record. It is not for this Court to sit in appraisal of the evidence led before the learned Arbitrator and this Court will not open itself to the task of being a judge on the evidence placed before the Arbitrator which was subject matter of dispute. In the present case, the Arbitrator has deliberated on the issues under reference which were within his competence and as per the agreement entered into between the parties. The Arbitrator has duly explained the reasons for arriving at his decisions. There is nothing to indicate that award is in conflict with the basic notions of justice and the fair play and fundamental policy of Indian law or in contravention of the terms of the agreement or it lacks reasoning as pleaded in the petition.

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63. In view of the foregoing discussions, impugned award is maintained except the interest and the cost part and is rewritten as under:

The petitioners are directed to make the payments of Rs. 29,55,775/- with simple interest @ 9% per annum w.e.f. 28.08.2015 till its realization and also to make the additional payment of cost of litigation for a sum of Rs. 35000/- + the arbitrator's

fees i.e. Rs. 1,88,887/-, total amounting to Rs. 2,23,887/- with simple interest @ 9% per annum w.e.f. date of passing of award till its realization.

64. The petition is disposed of accordingly. Parties are left to bear their own costs.

65. File be consigned to record room.

Announced in open court
today i.e. 14th July 2022

(SANJIV JAIN)
District Judge (Commercial - 03)
Patiala House Courts, New Delhi

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