

Prasar Bharati vs Arun Govil Creations on 28 February, 2022

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

OMP (Comm) No. 38/2018

Prasar Bharati
Doordarshan Bhawan,
Copernicus Marg,
New Delhi

..... Petitioner

versus

Arun Govil Creations,
305-306, Amarnath Towers,
Off Yari Road, Versova,
Andheri (West), Mumbai

..... Respondents

Date of institution	:	04.12.2018
Date of reserving judgment	:	20.01.2022
Date of decision	:	28.02.2022

JUDGME NT

1. This petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter called the 'Act') challenges the award dated 30.08.2018 passed by the Ld. Arbitrator Ms. Lalit Mohini Bhat, whereby a sum of Rs. 44,12,000/- along with interest @ 12% per annum w.e.f. 16.04.2017 till the date of payment and interest @ 12% per annum on Rs. 8,40,000/- (amount paid during the arbitral proceedings) for the period from 16.04.2017 to 24.11.2017 have been awarded in favour of OMP Comm No. 38/2018 Prasar Bharati Vs. Arun Govil Creations Page No.1 of 54 the respondent and against the petitioner. Cost of the proceedings has been quantified as Rs. 3,50,000/- including legal expenses.

Brief facts:

2. The facts relevant for disposal of this petition are that the respondent Arun Govil Creations entered into a contract with the petitioner Prasar Bharati (Broadcasting Corporation of India), whereby, it offered to produce and deliver episodes of programme / serial titled "Dharti Ki goad Mein" for the channel DD Kisan, commissioned by the petitioner under the Self Finance Commissioning Scheme. Clause 2 (vii) of the contract provided that the respondent would supply all episodes required for each four weeks period at least 10 days before the scheduled date of telecast of the first episode of that period. There were 130 episodes, each for a duration of 22½ minutes. Clause 4 (x) provided that the petitioner would telecast the

episodes every Monday to Friday from 1400 hrs to 1430 hrs. Clause 6 (i) provided that payment of the price of all episodes telecast in a month shall be made to the respondent after a period of 90 days calculated from the first day of the month following the month in which the episodes are telecast. Clause 6 (iii) provided that the respondent shall be paid at the rate of Rs. 4,00,000/- for each episode. Clause 6 (iv) provided that if actual duration of an episode is found to be less than specified in clause 6 (iii), pro rata deduction shall be made from the episode price. Clause 7 OMP Comm No. 38/2018 Prasar Bharati Vs. Arun Govil Creations Page No.2 of 54

(i) provided that if the producer fails to deliver any episode on time, he shall pay to DD a penalty equal to 1% of the episode price per day of delay per episode. If the producer fails to supply episode promos, DD may impose a penalty of Rs. 5000/-

for each episode. Clause 7 (iii) provided that amount of penalty shall be deducted from the episode price payable to the producer. Clause 15 (vi) provided that no failure or delay on the part of any of the parties relating to exercise of any right, privilege or remedy provided under the agreement shall operate as a waiver of such right.

3. On 26.06.2015, petitioner confirmed the telecast of the programme from 06th July 2015, every Monday to Friday at 1400 to 1430 hours. Various sanction orders specifying the set of episodes telecast and per episode payment details schedules were issued by the petitioner.

4. The petitioner made deductions in respect of several episodes in the sanction orders. In later episodes, petitioner also adjusted the amounts payable for previous episodes after their telecast. Withholding of these amounts (including amounts deducted / withheld on account of the late delivery of episodes) and interest thereon became the subject matter of dispute. The contract contained an arbitration clause. The parties could not agree on a mutually acceptable Arbitrator. The High Court appointed the Arbitrator to adjudicate upon the disputes and OMP Comm No. 38/2018 Prasar Bharati Vs. Arun Govil Creations Page No.3 of 54 differences between the parties.

5. The respondent filed its statement of claims alleging that it had supplied the episodes in compliance with the terms of the agreement, however, on each of the instances, petitioner deducted an amount primarily on the reasons that the duration of episodes was short and the episodes were not delivered on time. It was stated that it had delivered all the episodes without any delay and it was not liable for any penalty levied by the petitioner.

Per contra it was alleged by the petitioner that the tapes supplied by the respondent were found to be of short duration by 525 seconds, there were delays in submission of episodes 1- 2, 26-40, 46-60, 66-80 & 86-130 and the deductions were made as per the contract. It was stated that the requirement of submitting batch of episodes in advance was essential. It was stated that upon receipt of episodes, it entered in a log book. The episodes were previewed to ensure that they comply with the technical requirements and they do not contain any objectionable material. Since, the respondent did not supply the episodes in a time bound manner in accordance with the contract, it deducted the amounts. It was stated that there is no condition in the contract stipulating interest.

6. The Arbitrator formulated the points of disputes for determination. The parties led their evidence by filing the OMP Comm No. 38/2018 Prasar Bharati Vs. Arun Govil Creations Page No.4 of 54 affidavits of the witnesses. During the arbitral proceedings, on 24.11.2017, the petitioner issued a letter stating that the deductions made in terms of clause 6 (v) on account of short duration of episodes were in excess to the tune of 514 seconds. An amount of Rs. 1,52,296/- was refunded. It also refunded Rs. 8,40,000/- towards the deductions made for the first 20 episodes.

7. The Arbitrator after considering the submissions of the parties, passed the impugned award holding that the respondent had not defaulted in its obligation to deliver the tapes at least 10 days before the scheduled date of telecast of the first of the series or batch of four episodes; the deductions made by the petitioner were not justified under the contract because clause 7

(i) amounted to a penalty clause; the petitioner was not able to prove that the tapes were delivered in a delayed manner; and it could not establish any loss to be entitled to reasonable compensation. The Arbitrator observed that out of Rs. 52,52,000/-, the petitioner had paid back the respondent a sum of Rs. 8,40,000/- towards deductions made for the first 20 episodes, therefore, the respondent has to be paid a sum of Rs. 44,12,000/- towards the deductions wrongly made by the petitioner.

8. Qua interest, it was held that the agreement between the parties was of a commercial nature. Unreasonable withholding OMP Comm No. 38/2018 Prasar Bharati Vs. Arun Govil Creations Page No.5 of 54 of amounts payable by the petitioner to the respondent, in such cases, means that the party at fault should bear the liability to pay interest for the period, the amounts were unfairly not released. The Arbitrator granted 12% simple interest on the amounts finding it to be just & fair.

9. The petitioner challenged the award on the following grounds:

A. That the findings recorded by the Arbitrator are contrary to the public policy, law and the contract, which are based on no evidence. The Arbitrator failed to consider the plea taken by the petitioner that the contract did not treat delay as a breach.

B. That the Arbitrator failed to appreciate that Section 74 of the Indian Contract Act, which provides for compensation for breach of contract, where penalty is stipulated, is not attracted in the present case as there is no breach of contract nor a sum is named as an amount to be paid in case of such breach. It was not even the case of the respondent that the contract imposed reciprocal obligations on the parties.

C. That the Arbitrator erred in holding that clause 2

(iv), (v), (vi) & (vii) are part of a series of steps which the agreement contemplated to be undertaken by the parties. She ignored the fact that the petitioner never delayed the approval of the scripts resulting in delayed submission of tapes.

D. That the Arbitrator failed to appreciate the background of the contract, which would show that the delay was not considered as breach. In fact, the respondent was entitled to a higher amount, if it

had performed its obligation in time and a lesser amount, if there was delay in performance of the obligation. Such a contractual provision for variable consideration having regard to the time of performance cannot be said to be a penalty. Such deduction would not be a compensation for the losses but a mere enforcement of a contractual stipulation, which the Arbitrator OMP Comm No. 38/2018 Prasar Bharati Vs. Arun Govil Creations Page No.6 of 54 never dealt with. She erred in relying upon the circumstances for the refund of deductions in respect of first 20 episodes, since, admittedly, the contractually specified time was not available to the respondent for providing the episodes. However, insofar as episodes 21 onward are concerned, there was sufficient time to make available the episodes.

E. That the Arbitrator erred in holding that the contract was altered by conduct, which plea was never taken by the petitioner. It was stated that clause 15 (vi) of the agreement clearly provided that no forbearance or indulgence granted would constitute a waiver. It was never pleaded by the respondent that it was disabled from delivering the tapes in the scheduled time.

F. That the petitioner nowhere stated that any loss was caused to it on account of delay in submission of tapes. It is stated that every tape has to be previewed before its telecast and preview of tape is a continued process and any delay in submission thereof would perforce result into inconvenience and loss, which is not possible to be quantified in terms of money, which the Arbitrator failed to take note.

G. That the findings of the Arbitrator in para 60 of the award would show that the Arbitrator rewrote the contract by holding that the tapes were only to be provided 10 days before the scheduled date of telecast. She wrongly held that the delay on the part of the respondent in submitting the tapes was on account of short time given to it, which plea was not taken by the respondent at all. It is stated that the respondent never raised any objection as to the date of approval of episodes but the Arbitrator despite being no such objection, faulted the petitioner for not stating something. She wrongly assumed that each tape was to be provided 10 days before each telecast. In fact, the tapes were to be provided for each 4 weeks period at least 10 days before the scheduled date of telecast of the first episode.

10. Notice of the petition was given to the respondent. The respondent filed its reply stating that the award has been OMP Comm No. 38/2018 Prasar Bharati Vs. Arun Govil Creations Page No.7 of 54 delivered on the basis of findings of facts, which are premised upon the evidences in the form of substantial unimpeachable documentary and oral evidences. The award reflects a correct view and interpretation of facts and law relevant to the disputes. Further, it is a settled position in law that an arbitral award is not to be interfered merely on the premise of existence of an alternate view, if any, and the petitioner is bound to show a patent illegality, perversity or violation of public policy. It was categorically observed in the award that there was no delay in delivery of the tapes to the petitioner, which led to any alleged loss to the petitioner in respect of which, the petitioner has been claiming penalty. It is stated that the petitioner in advancement of its submissions wants reappreciation of evidence, which is barred in view of proviso to Section 34 (2A) of the Act.

11. It is stated that the conduct of the petitioner itself was such as to put the respondent off its guard and lead it to believe that the timeline provided in the agreement itself was not being adhered to. Therefore, any alleged delay in the delivery of tapes cannot be attributed to the respondent. It has been rightly held by the Arbitrator that the conduct of the petitioner at many instances like - not following the time table for delivery of tapes, informing at the last moment for delivery of first round of tapes which was also successfully completed by the respondent, not raising any objections for late delivery, not informing the respondent of the alleged short duration of tapes OMP Comm No. 38/2018 Prasar Bharati Vs. Arun Govil Creations Page No.8 of 54 and not making deductions in the sanction order, led the respondent believe that it has accepted the delivery of tapes and has no objections as regards anything pertaining to the tapes. It is stated that all the episodes were accepted by the petitioner and were telecast on time without any delay. Therefore, there was no delay nor any actual loss / damage occasioned to the petitioner.

12. It is stated that the agreement did not mention the telecast date. The dates were subsequently informed by the petitioner via letters / communications. The respondent was informed of the telecast date of the first episode via letter dated 26.06.2015, which was received by the respondent on 29.06.2015, whereby, the date of telecast was mentioned as 06.07.2015. The tentative date on which, first 20 episodes were to be submitted was 25.06.2015, whereas, on that date, the respondent was not even aware of the telecast date. It with great difficulty managed to deliver some tapes on 29.06.2015 without getting sufficient time to shoot for the episodes. It is stated that the petitioner did not send any notice to bring the factum of delayed delivery to the respondent nor raised any protest regarding late delivery of episodes and its conduct made the respondent believe that the delivery of tapes was happening in a manner acceptable to the petitioner. It is stated that shooting 20 episodes within a week i.e. from 19.06.2015 to 25.06.2015 was impossible and all the subsequent delays happened because of late intimation of OMP Comm No. 38/2018 Prasar Bharati Vs. Arun Govil Creations Page No.9 of 54 telecast date by the petitioner, which made the respondent not submit the episode tapes 10 days prior. Therefore, the deduction equal to 1% of the episode price per day of delay per episode was illegal and against the principles of justice, equity and good conscience. Reliance is placed on the case Bhagwandas Matels Ltd Vs. Raghuvendra Agencies, C.S.No.392 of 1998, decided on 14.06.2011 by Madras High Court, where Section 55 of the Indian Contract Act was discussed. It was held that the essential requirement of Section 55 is that if the appellant wants to claim compensation for any loss occasioned by non performance of the contract within the stipulated time and if the appellant accepts the performance of contract, he must issue notice to the respondent of his intention to claim damages. In the event of parties, knowingly give a go-by to the stipulation as regards the time, the Courts are not left with any other conclusion but a finding that the parties themselves by their conduct have given a go-by to the original term of the contract as regards the time being the essence of the contract. It is stated that the petitioner had accepted the performance of the contract without any objection and did not issue any notice for compensation, so it was not legally entitled to make any deductions later. It is stated that the petitioner had not suffered damages on account of any late delivery as alleged nor suffered any legal injury by sustaining any loss, so there was nothing to compensate as laid down in part III of Section 55 of the Indian Contract Act.

OMP Comm No. 38/2018 Prasar Bharati Vs. Arun Govil Creations Page No.10 of 54

13. It is stated that in the sanction orders dated 07.01.2016 & 22.01.2016 for 20 episodes and 65 episodes respectively, there was neither any direction nor any mention about the deductions qua failure to deliver episodes on time. It is stated that belated deductions in sanction orders 7 & 27 are afterthought. The deductions, if any, should have been made from the sanction orders pertaining to the respective episodes. Once, no deduction was made for any alleged failure to deliver the episodes on time, the petitioner was estopped from making any deductions at a later time from the same episodes in view of doctrine of promissory estoppel. Reference is made of the cases *Manuelsons Hotels Pvt Ltd Vs. State of Kerala*, CA NO. 2480 OF 2008 decided on 11.05.2016 by Supreme Court of India and *Mumbai International Airport Pvt Ltd. Vs. Golden Chariot Airport*, CA No. 8201 OF 2010 decided on 22.09.2010 by Supreme Court of India to contend that a litigant cannot change and choose its stand to suit its convenience.

14. It is stated that the petitioner failed to show any damage or loss because of delay. Rather, it was the respondent, who had to suffer huge losses because of delay in clearing the payments by the petitioner, which were to be cleared within 90 days from the last date of airing of the episodes as mandated in the agreement. It is stated that the time schedule envisaged in the OMP Comm No. 38/2018 *Prasar Bharati Vs. Arun Govil Creations* Page No.11 of 54 agreement was not followed by the petitioner and the action of the petitioner qua making deductions was illegal, unjust and unfair.

15. It is stated that in this case, the petitioner itself had varied the terms of the agreement, implying the time to be not the essence of the contract. Clause 6 (i) of the agreement clearly provided that the payment shall be made after a period of 90 days calculated from the first day of the month following the month in which the episodes are telecast but the petitioner did not follow the time schedule and delayed the payments for which, it was liable to pay interest, which the Arbitrator has rightly granted.

16. The respondent denied the other averments made in the petition and stated that the objections are devoid of any reasoning / merit and are liable to be dismissed.

17. I have heard Sh. Rajeev Sharma, Sr. Advocate assisted by Ms. Shruti Sharma & Sh. Saket Chandra Ld. Counsels for the petitioner and Sh. Anshul Dhingra, Sr. Advocate assisted by Ms. Subhangda Singh, Ld. Counsels for the respondent.

18. Ld. Counsel for the petitioner reiterated what has been OMP Comm No. 38/2018 *Prasar Bharati Vs. Arun Govil Creations* Page No.12 of 54 stated in the petition. He contended that in the instant case, the respondent failed to perform its obligation under the agreement, which interalia provided that the respondent would be entitled to Rs. 4.0 lakhs per episode from the petitioner, which was variable in the following contingencies:

- (a) If the TRP of the programme fell below the benchmark (clause 6);
- (b) If the tapes were not submitted in time (clause 2 (vii) read with clause 7 (i));
- (c) If the tapes provided were of short duration (clause 6 (ii) & (v)).

19. Ld. Counsel referred clause 2 (vii), clause 2 (x), clause 7

(i) of the agreement and contended that on a conjoint reading of the above clauses, it is clear that the respondent had to provide all episodes required for each four weeks period, at least 10 days before the scheduled date of telecast of the first episode of that period and if it failed to do so, it would be liable to pay an amount equal to 1% of episode price per day of delay per episode meaning thereby that if an episode was to be telecast on 1st February, episodes for the period from 1 st February to 28th February would have to be provided by 21st January. Ld. Counsel stated that though the word 'Penalty' was used in respect of 1% amount but the said nomenclature is not decisive. Since, the contract did not treat late submission, a breach, rather, it permitted late submission on payment of a reduced consideration, thus, on a holistic reading of the contract, 1% amount was a deduction in the nature of a discount offered by OMP Comm No. 38/2018 Prasar Bharati Vs. Arun Govil Creations Page No.13 of 54 the respondent. Ld. Counsel contended that in the present case, the respondent failed to provide the tapes required for each four weeks period at least 10 days before the scheduled date of telecast of the first episode of that period, which delay is evident from the tabulated statement as shown in Annexure R-2 (at page 132 of the petition) and the letters (at page 136-167 of the petition) with which, the tapes were sent. Ld. Counsel stated that the delay in submission of tapes was in respect of episodes 1-20, 26-40, 46-60, 66-80 and 86-180, so the deduction clause i.e. clause 7 (i) became applicable and the requisite amounts were deducted by the petitioner. Ld. Counsel stated that during the proceedings, on the stand taken by the respondent that initially it had less time to produce the episodes, the deductions for episodes 1-20 were refunded to the respondent. Ld. Counsel stated that the respondent in its statement of claims in para 2.9 had stated that the tapes were submitted in time but during the cross examination, the respondent witness had admitted the delay but later he tried to justify the delay stating that it had adopted a particular production schedule. Ld. Counsel referred question no. 6 to 12, 21 & 22 (at page 205-207 of the petition) and contended that the Arbitrator has wrongly held that the tapes were submitted in time and the deductions made by the petitioner are hit by Section 55 & 74 of the Indian Contract Act holding that the petitioner has not disclosed when it conveyed its approval to the scripts and further it waived its right by not OMP Comm No. 38/2018 Prasar Bharati Vs. Arun Govil Creations Page No.14 of 54 effecting the deduction in the first instance.

20. Ld. Counsel defined 'perversity' stating:

Adopting an approach and coming to a conclusion that no reasonable person would adopt or draw;

Basing a conclusion on no evidence;

Taking into consideration material that ought not to be taken into consideration;

And not taking into consideration material that ought to be taken into consideration.

21. Ld. Counsel contended that in the instant case, perversity is at writ large. The Arbitrator by holding that the tapes were given in time as per the contract, even though, the respondent's witness

has admitted the delay, has committed an error. The tabulated statement at page 132 shows the delay ranging from 7-23 days, yet the Arbitrator held that the tapes were submitted in time.

22. Ld. Counsel further contended that the Arbitrator applied Section 74 of Indian Contract Act, notwithstanding the fact that the said provision applies only if there is a breach of contract. Ld. Counsel stated that in the instant case, the deductions were not on the footing of a breach. The opening words of Section 74 are "when a contract has been broken". In the present contract, it is an acceptable fact that there could be delays in submission of tapes. The petitioner accordingly accepted the delay and in terms of the contract, it made the deductions. Ld. Counsel OMP Comm No. 38/2018 Prasar Bharati Vs. Arun Govil Creations Page No.15 of 54 stated that by effecting deductions, the petitioner was not seeking compensation for breach but had given effect to an agreed contractual term. Ld. Counsel stated that the Arbitrator wrongly assumed that the petitioner had claimed compensation for the delay in submission of tapes, though, in fact, it never did so.

23. Ld. Counsel contended that the Arbitrator wrongly applied Section 55 of the Indian Contract Act to the situation of the present case. It was not the case of the petitioner that the time was of essence of contract. Since the contract permitted late submissions of tapes on payment of reduced compensation, time was not of essence of contract. In this case, the petitioner had not claimed compensation for the delay in submission of tapes. So, the deduction clause was applicable in the contract.

24. Qua the observations that the petitioner has not stated when it had approved the scripts, Ld. Counsel stated that the pleadings of the respondent would show that no such case was pleaded by the respondent that the approval of scripts was delayed by the petitioner. The Arbitrator carved out a new case, which was never pleaded by the respondent. The Arbitrator has wrongly held that the contract was altered by the petitioner. Ld. Counsel referred clause 15 (iv) and 15 (vi) and contended that the clauses clearly provide that the contract could only be OMP Comm No. 38/2018 Prasar Bharati Vs. Arun Govil Creations Page No.16 of 54 varied by a written instrument and no forbearance would amount to a waiver, so, the plea of alteration of contract was contrary to the express terms of the contract. Ld. Counsel contended that the Arbitrator perversely accepted the contention of the respondent that considering the schedule followed by the respondent, submission of tapes was within time. Ld. Counsel stated that impossibility does not mean self induced possibility. Nothing prevented the respondent from adopting the schedule, which would enable it to give tapes in time. Ld. Counsel contended that the short time initially could not have been the justification for delayed submission of tapes beyond episode 20 and upto episode 130. Ld. Counsel stated that the time was required for preview of the broadcast of the episodes to meet legal obligation. It was the duty of the broadcaster to see whether the episode was as per order or not. Only after his satisfaction, the episode could be aired. In this case, because of delayed submission of episodes by the respondent, the petitioner did not get sufficient time to preview. Ld. Counsel referred the terms of the agreement and contended that deductions were rightly made by the petitioner on account of late submission of episodes, which delays were also admitted by the respondent witnesses. Ld. Counsel stated that the deductions made by the petitioner at a later stage of sanction would not amount to forbearance. Ld. Counsel stated that the deductions, if any, could be made before making the final OMP Comm No. 38/2018 Prasar Bharati Vs. Arun Govil Creations

Page No.17 of 54 payments, which in the present case were also done by the petitioner.

25. Ld. Counsel for the respondent per contra argued on the lines of the reply to the petition. Ld. Counsel referred clause 6, clause 7 of the contract, sanction orders dated 07.06.2016 & 22.06.2016 and stated that all the episodes were telecast as per the schedule. The petitioner did not suffer any loss. The payment was linked with the progressive schedule. In this case, the petitioner did not make the timely payments but made the deductions at a later stage, which fact is evident from the sanction letters dated 07.01.2016, 22.02.2016, 02.06.2016 & 21.11.2016. Despite mails dated 27.12.2015, 18.03.2016 & 29.05.2016, the petitioner did not make the payments, nevertheless, the respondent continued submitting the episodes for timely telecast on DD Kisan. Ld. Counsel stated that the production schedule was fixed in advance, which the petitioner did not follow and as such it was not entitled to any deduction. Ld. Counsel stated that since in the instant case, the petitioner did not suffer any loss, it was not entitled to any deductions as held by the Arbitrator in the impugned award. Ld. Counsel stated that the scope in the petition under Section 34 of the Act is very limited. The Court cannot appreciate or reappreciate the evidence. The Arbitrator has recorded a detailed finding, which does not call for interference.

OMP Comm No. 38/2018 Prasar Bharati Vs. Arun Govil Creations Page No.18 of 54

26. I have given my thoughtful consideration to the rival contentions and perused the award and the documents.

27. 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 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 OMP Comm No. 38/2018 Prasar Bharati Vs. Arun Govil Creations Page No.19 of 54 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.

28. 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 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 OMP Comm No. 38/2018 Prasar Bharati Vs. Arun Govil Creations Page No.20 of 54 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.

29. In the case of Associate Builders v/s Delhi Development Authority, (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.

30. 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 back of the parties by the arbitrator would also qualify as a decision based on no evidence inasmuch as such decision is not OMP Comm No. 38/2018 Prasar Bharati Vs. Arun Govil Creations Page No.21 of 54 based on evidence led by the parties and therefore would also have to be characterized as perverse.

31. There is no objection or dispute relating to the appointment of the Arbitrator to whom the respondent had submitted its statement of claims. The arbitral proceedings confirm that the parties had regularly appeared before the Arbitrator and were given due opportunities to plead / defend their cases. The Arbitrator thereafter passed the impugned award dealing with the claims and the rival contentions of the parties. The legislative mandate clearly bars the Court to re- appreciate the evidence for deciding an objection under Section 34 of the Act. The parties are also not allowed to expand the scope of defences raised before the Arbitrator to get fresh adjudication from the Court. However, in order to see whether the Arbitrator has passed the award against the basis notions of justice or it is perverse as alleged by the petitioner, I deem it appropriate to consider the real controversy between the parties, which gave rise to the cause of action for filing the claims and the manner in which it were appreciated by the Arbitrator in reference to the terms & conditions of the contract.

32. It is relevant to reproduce some of the terms of the agreement.

"2. PRODUCTION, DELIVERY AND ESSENTIAL OMP Comm No. 38/2018 Prasar Bharati Vs. Arun Govil Creations Page No.22 of 54 ELEMENTS:

(i) The Second Party agrees to create, compose, shoot, produce, post-produce, edit, re-edit and deliver to Prasar Bharati the Episode (s) of the programme, as per the concept, general specifications and technical specifications more fully described in schedules "A" "B" & "C" respectively. The said Schedules may be amended by mutual agreement in writing from time to time if so deemed fit by the parties.

(ii) The second Party shall produce the program at his own cost and supply the episodes finished in all respects within the specified time frame.

(iii) Prasar Bharati shall have full creative and technical approval right over the Episodes and all elements thereof, including, without limitation, any outline, sketches, treatments, scripts, storyboards, online and mechanical works.

The Second Party must adhere to broadcasting code and guidelines of Prasar Bharati.

(iv) Out of the total number of episodes approved, the producer shall supply the detailed scripts of the episodes for the first four weeks within fifteen days of receipt of limitation of approval and the scripts of the remaining episodes within 30 days of the receipt to be submitted on a monthly basis within thirty days prior to its first telecast in the month.

(v) DD shall convey approval of the scripts within fifteen days of the receipt or reasonable time as the case may be.

(vi) The Second Party shall commence production of the programme after the scripts have been approved by Prasar Bharati. The programme should strictly conform to the approved script and no change shall be made by the second party without written approval of the Prasar Bharti.

(vii) Based on the approved scripts, the Producer shall supply all episodes required for each 4 weeks period at least 10 days before the scheduled date of telecast of the first episode of that period.

(ix) The Producer shall supply promos (video, audio and print) / publicity material for the programmes on a regular basis. Promos material for build-up publicity shall be supplied within 30 days after the signing of the agreement. Thereafter, episodic promos/ episodic publicity material shall be supplied two weeks before elecast of each episode.

(x) The tapes submitted by the Second Party would be previewed by the Preview Committee of the concerned Channel / Kendra of Doordarshan. If the Preview Committee OMP Comm No. 38/2018 Prasar Bharati Vs. Arun Govil Creations Page No.23 of 54 suggests any modification in the program on the basis of the approved script, the Second Party shall carry out the same at his own cost within the shortest possible time but not later than 3 days after the date the tapes are returned.

(xii) Doordarshan will check at the telecast masters on HD (preferable) in DVC PRO 50 format tapes for technical quality and if the tapes are technically rejected by Doordarshan, the Second Party shall carry out necessary corrections as desired by Doordarshan at his own cost within the shortest possible time but not later than 3 days after the tapes are returned. The telecast masters submitted after necessary corrections shall be checked for technical quality again and if the tapes fail the technical quality for the second time or on subsequent checks, the Second Party shall have to pay penalty in accordance with clause 7 (i), (ii) & (iii).

3. CONSIDERATION AND FACILITIES

(i) Subject to any in consideration for the full and timely performance and observance by the Second Party of all its warranties and on the delivery of satisfactory Program under the agreement without any material breach of its obligations by the Producer Second Party, Prasar Bharati agrees to pay and the Second Party agrees to accept payment of episode price in the manner as specified in Clause 6 of this agreement. In addition, applicable Service Tax amount at the prevailing rate shall also be paid to the Second Party.

(ii) The manner of calculation of episode price as set out in Clause 6 is linked to TRP ratings. The Second Party unconditionally accepts the said method of calculation and agrees to abide by the same under all circumstances, whatever be the reason and whosoever be responsible for the TRP ratings or changes therein.

4. RIGHTS

(i) The Second Party hereby assigns to Prasar Bharati, the entire copyright, whether vested, contingent or future, all rights of action and all other rights whatsoever in and to the Programme including broadcasting rights and new media rights whether now known or in future created for the full period of copyright throughout the world including all renewals, reversions and extensions, if any. It is agreed that Prasar Bharati may exercise the rights granted herein at any OMP Comm No. 38/2018 Prasar Bharati Vs. Arun Govil Creations Page No.24 of 54 time and even after a period of one year from the date of assignment and the provisions regarding lapsing of assignment contained in Section 19 (4) of the Copyright Act shall have no application / effect on this agreement.

(x) Prasar Bharati shall be at liberty to telecast the programme on its channels as its discretion. To begin with, Prasar Bharati has decided to telecast it on DD Kisan Channel on every Monday to Friday at 1400 hrs to 1430 hrs (frequency).

6. PAYMENT

(i) Payment of the price of all episodes telecast in a month shall be made to the Second Party after a period of 90 days calculated from the first day of the month following the month in which the episodes are telecast.

(ii) Payment for the programme shall be linked to its grading. The producer shall be entitled to payment of the episode price corresponding to its grading.

(iii) Producer shall be paid at the rate of Rs. 4,00,000/- for each individual episode of 22 minutes of the programme supplied by him and telecast by Prasar Bharati.

(iv) An additional amount of 40% of episode price will be paid for dubbing in ten (10) regional languages.

(v) The actual duration of an episode of the programme supplied by the Second Party is found to be less than that specified in Clause 6 (iii), pro rata deduction shall be made from the Episode Price.

7 PENALTY

(i) The producer fails to deliver any episode on time, he shall pay to DD a penalty equal to 1% of the episode price per day of delay per episode. If the producer fails to supply the episode promos / episodic publicity material, DD may impose a penalty of Rs. 5000/- for each episode for which such material is not supplied.

(ii) If the telecast master submitted after necessary corrections in accordance with the provisions of Clause 2 (vii) fails the technical quality for the second time or on subsequent checks, the Second Party shall pay Prasar Bharati a penalty equal to 1% of the Episode Price for each rejected type for each time of rejection.

(iii) The amount of penalty shall be deducted from the episode price payable to the Producer.

OMP Comm No. 38/2018 Prasar Bharati Vs. Arun Govil Creations Page No.25 of 54

11. TERMINATION Prasar Bharati shall have the right to terminate this agreement in the following circumstances:

(i) If the second party commits a breach of any of the terms of this agreement (express or implied) which is not cured by him within fifteen days of service of a notice on him by Prasar Bharati specifying the breach.

15. GENERAL

(vi) No failure or delay on the part of any of the parties to this agreement relating to the exercise of any right, privilege or remedy provided under this agreement shall operate as a waiver of such right, power, privilege or remedy or as a waiver of any preceding or succeeding breach by the other party to this agreement, nor shall any single or partial exercise of any right, power, privilege or remedy preclude any other or further exercise of any right, power, privilege or remedy provided in this agreement, all of which are severally and jointly, and are not exclusive of each other, or of any other rights or remedies otherwise available to a party at law or in equity.

33. A perusal of record reveals that the respondent had offered to produce and deliver episodes of a programme / serial titled "Dharti Ki God Me" for the channel DD Kisan commissioned by the petitioner under the Self Financed Commissioning Scheme. It entered into a contract with the petitioner. As per the contract, the respondent had to supply the episodes required for each four weeks period at least 10 days before the scheduled date of telecast of the first episode, failing which, it was to pay a penalty equal to 1% of the episode price per day of delay per episode. Each episode

was of a duration of OMP Comm No. 38/2018 Prasar Bharati Vs. Arun Govil Creations Page No.26 of 54 22 ½ minutes. It was stipulated that in case duration was found to be less than 22 ½ minutes, pro rata deduction shall be made from the episode price. The petitioner confirmed the telecast of programme on 26.06.2015, which was to start from 06.07.2015, on every Monday to Friday between 1400 hrs to 1430 hrs. The price per episode was Rs. 4.0 lakhs. Several sanction orders were released by the petitioner regarding the telecast of programme giving the details of set of episodes to be telecast and the payments for each episode as detailed in para 9 of the award. Deductions were made by the petitioner on account of short duration of programmes / episodes under clause 6 (v) and failure on the part of the respondent to deliver the episodes in time under clause 7 (i) of the contract. All these deductions led to disputes.

34. Record reveals that the respondent had sent a mail dated 27.12.2015 alleging that no payment was made to it, though, the first & second payment for the episodes telecast in July & August became due in the end of October & November 2015. It was also stated that shooting of all the 130 episodes has already been completed. The petitioner did not respond to the mail. The respondent vide mails dated 29.02.2016 and 18.03.2016 also asked the petitioner to examine the mixed master tape of the episodes to determine the alleged short duration of the episodes, followed with the mails dated 29.05.2016, 31.10.2016 & OMP Comm No. 38/2018 Prasar Bharati Vs. Arun Govil Creations Page No.27 of 54 07.12.2016 calling upon the petitioner to return the penalty wrongly deducted but nothing fruitful happened. The petitioner then invoked the arbitration.

35. Record reveals that during initiation of arbitral proceedings, the petitioner released the security deposit of Rs. 4.0 lakhs retained by it vide sanction order dated 18.03.2017. In the statement of claim, the respondent claimed Rs. 61,91,178.00 for the wrongly deductions made by the petitioner towards short duration / late submissions of episodes and interest. Per contra, it was alleged by the petitioner that the tapes supplied by the respondent were of short duration by 525 seconds and there was delay in submission of episodes 1-20, 26-40, 46-60, 66-80 & 86-130, which led to deductions on 13.01.2016 & 18.06.2016. It relied on a tabular chart showing the delay in the delivery of tapes as under:

Section	Order	Date of	No. of Episodes	Page	Deductions	No	Sanction order	Reference
		due to failure of the to deliver paper	Point vii (d) of book	the sanction order	01 of			
2015	□6	07.01.2016	20 (Episodes 64 Nil telecasted in July 2015)	16 of 2015	□6			
22.02.2016	65	(Episodes 66 Nil telecasted from August to October	OMP Comm No.					
38/2018 Prasar Bharati Vs. Arun Govil Creations								
Page No.28 of 54								
07 of 2016	□7							
02.06.2016	29	(episodes 68 Rs. 4000/□telecasted from * also reversed	November to					
under Sanction								
December 2015 order dated	21.11.2016	27 of 2016	□7	21.11.2016	16			
(episodes 70 Rs.								

telecasted from
December 15-Jan
16)

52,5

Ded
made
per

deduc

been
all

Sr. No.	Episode No.	Date of Telecast	Date of receipt of episode [as per library certificate]	Date of which tapes ought to have been delivered as per clause 2 (vii)	no. of days delayed for submission	Deductions @ 1% per episode
1	26	10.08.2015	30.07.2015	23.07.2015		7
2	27	11.08.2015	30.07.2015	23.07.2015		7
3	28	12.08.2015	30.07.2015	23.07.2015		7
4	29	13.08.2015	30.07.2015	23.07.2015		7
5	30	14.08.2015	30.07.2015	23.07.2015		7
6	31	17.08.2015	07.08.2015	23.07.2015		15
7	32	18.08.2015	07.08.2015	23.07.2015		15
8	33	19.08.2015	07.08.2015	23.07.2015		15
9	34	20.09.2015	07.08.2015	23.07.2015		15
10	35	21.08.2015	07.08.2015	23.07.2015		15
11	36	24.08.2015	15.08.2015	23.07.2015		23
12	37	25.08.2015	15.08.2015	23.07.2015		23
13	38	26.08.2015	15.08.2015	23.07.2015		23

OMP Comm No. 38/2018		Prasar Bharati Vs. Arun Govil Creations			Page No.29 of	
14	39	27.08.2015	15.08.2015	23.07.2015	23	92000
15	40	28.08.2015	15.08.2015	23.07.2015	23	92000
16	46	07.09.2015	25.08.2015	20.08.2015	5	20000
17	47	08.09.2015	25.08.2015	20.08.2015	5	20000
18	48	09.09.2015	25.08.2015	20.08.2015	5	20000
19	49	10.09.2015	25.08.2015	20.08.2015	5	20000
20	50	11.09.2015	25.08.2015	20.08.2015	5	20000
21	51	14.09.2015	01.09.2015	20.08.2015	12	48000
22	52	15.09.2015	01.09.2015	20.08.2015	12	48000
23	53	16.09.2015	01.09.2015	20.08.2015	12	48000
24	54	17.09.2015	01.09.2015	20.08.2015	12	48000
25	55	18.09.2015	01.09.2015	20.08.2015	12	48000
26	56	21.09.2015	09.09.2015	20.08.2015	20	80000
27	57	22.09.2015	09.09.2015	20.08.2015	20	80000
28	58	23.09.2015	09.09.2015	20.08.2015	20	80000
29	59	24.09.2015	09.09.2015	20.08.2015	20	80000
30	60	25.09.2015	09.09.2015	20.08.2015	20	80000
31	66	05.10.2015	22.09.2015	17.09.2015	5	20000
32	67	06.10.2015	22.09.2015	17.09.2015	5	20000
33	68	07.10.2015	22.09.2015	17.09.2015	5	20000
34	69	08.10.2015	22.09.2015	17.09.2015	5	20000
35	70	09.10.2015	22.09.2015	17.09.2015	5	20000
36	71	12.10.2015	30.09.2015	17.09.2015	13	52000
37	72	13.10.2015	30.09.2015	17.09.2015	13	52000
38	73	14.10.2015	30.09.2015	17.09.2015	13	52000

39	74	15.10.2015	30.09.2015	17.09.2015	13	52000
40	75	16.10.2015	30.09.2015	17.09.2015	13	52000
41	76	19.10.2015	08.10.2015	17.09.2015	21	84000
42	77	20.10.2015	08.10.2015	17.09.2015	21	84000
43	78	21.10.2015	08.10.2015	17.09.2015	21	84000

OMP Comm No. 38/2018		Prasar Bharati Vs. Arun Govil Creations			Page No.30 of 54	
44	79	22.10.2015	08.10.2015	17.09.2015	21	84000
45	80	23.10.2015	08.10.2015	17.09.2015	21	84000
46	86	02.11.2015	20.10.2015	15.10.2015	5	20000
47	87	03.11.2015	20.10.2015	15.10.2015	5	20000
48	88	04.11.2015	20.10.2015	15.10.2015	5	20000
49	89	09.11.2015	20.10.2015	15.10.2015	5	20000
50	90	10.11.2015	20.10.2015	15.10.2015	5	20000
51	91	11.11.2015	27.10.2015	15.10.2015	12	48000
52	92	12.11.2015	27.10.2015	15.10.2015	12	48000
53	93	13.11.2015	27.10.2015	15.10.2015	12	48000
54	94	16.11.2015	27.10.2015	15.10.2015	12	48000
55	95	17.11.2015	27.10.2015	15.10.2015	12	48000
56	96	18.11.2015	05.11.2015	15.10.2015	21	84000
57	97	19.11.2015	05.11.2015	15.10.2015	21	84000
58	98	20.11.2015	05.11.2015	15.10.2015	21	84000
59	99	23.11.2015	05.11.2015	15.10.2015	21	84000
60	100	24.11.2015	05.11.2015	15.10.2015	21	84000
61	101	25.11.2015	16.11.2015	14.11.2015	2	80
62	102	26.11.2015	16.11.2015	14.11.2015	2	80
63	103	27.11.2015	16.11.2015	14.11.2015	2	80
64	104	30.11.2015	16.11.2015	14.11.2015	2	80
65	105	01.11.2015	16.11.2015	14.11.2015	2	80
66	106	02.12.2015	21.11.2015	14.11.2015	7	28000
67	107	03.12.2015	21.11.2015	14.11.2015	7	28000
68	108	04.12.2015	21.11.2015	14.11.2015	7	28000
69	109	07.12.2015	21.11.2015	14.11.2015	7	28000
70	110	08.12.2015	21.11.2015	14.11.2015	7	28000
71	111	09.12.2015	26.11.2015	14.11.2015	12	48000
72	112	10.12.2015	26.11.2015	14.11.2015	12	48000
73	113	11.12.2015	26.11.2015	14.11.2015	12	48000

OMP Comm No. 38/2018		Prasar Bharati Vs. Arun Govil Creations			Page No.31 of 54	
74	114	14.12.2015	26.11.2015	14.11.2015	12	48000
75	115	15.12.2015	26.11.2015	14.11.2015	12	48000
76	116	16.12.2015	01.12.2015	14.11.2015	17	68000
77	117	17.12.2015	01.12.2015	14.11.2015	17	68000
78	118	18.12.2015	01.12.2015	14.11.2015	17	68000
79	119	21.12.2015	14.12.2015	14.11.2015	30	120000
80	120	22.12.2015	14.12.2015	14.11.2015	30	120000
81	121	23.12.2015	14.12.2015	12.12.2015	2	80

82	122	24.12.2015	14.12.2015	12.12.2015	2	80
83	123	25.12.2015	18.12.2015	12.12.2015	6	24000
84	124	28.12.2015	18.12.2015	12.12.2015	6	24000
85	125	29.12.2015	18.12.2015	12.12.2015	6	24000
86	126	30.12.2015	18.12.2015	12.12.2015	6	24000
87	127	31.12.2015	28.12.2015	12.12.2015	16	64000
88	128	01.01.2016	28.12.2015	12.12.2015	16	64000
89	129	04.01.2016	28.12.2015	12.12.2015	16	64000
90	130	05.01.2016	28.12.2015	12.12.2015	16	64000

36. It was alleged that since, the respondent did not supply the episodes in time in accordance with the contract, it was entitled to make the deductions, which condition, the respondent had agreed at the time of entering into the agreement. It was also stated that all the amounts were paid in time and there was no condition stipulating interest in the contract.

37. The Arbitrator formulated the points of disputes for determination as under:

OMP Comm No. 38/2018 Prasar Bharati Vs. Arun Govil Creations Page No.32 of 54

(1) Whether the episodes were delivered by the claimant / respondent within the prescribed period;

(2) Whether the tapes submitted by the claimant / respondent were of requisite duration;

(3) Whether the deductions made by the respondent / petitioner are not as per the contract between the parties; (4) What amount if any is the claimant / respondent entitled to from the respondent / petitioner;

(5) If issue no. 4 is decided in favour of claimant / respondent, whether the claimant / respondent is entitled to interest if so, on what amount, at what rate and for what period;

(6) Relief.

38. The parties led their evidence by filing the affidavits of the witnesses, who were also cross examined. The respondent produced the documents Annexure A to P, which included the agreement, petitioner's letter dated 26.06.2015 confirming the telecast of the programme w.e.f. 06.07.2015 and sanction orders etc. The respondent produced the telecast certificates covering the period from July 2015 to January 2016 showing the dates of telecast, time when the telecast ended, total duration of programme, duration of promos between the programme, next duration of programme, log book, tabular statements showing the delays calculated by it in regard to delivery of episodes and the copies of covering letters & mails of the respondent along with DVDs of the programmes.

39. The respondent witness had stated that there was no delay in the delivery of episodes and it was the petitioner, which did not release the amounts due under the agreement on time and OMP Comm No. 38/2018 Prasar Bharati Vs. Arun Govil Creations Page No.33 of 54 made the deductions without any justification. He, however, stated that because of the petitioner's late intimation of the initial telecast date and delay in giving the schedule letter, it became impossible for the respondent to shoot / provide episodes 10 days in advance of the first block of episodes.

40. The petitioner's witnesses had stated that there was delay in submission of tapes. They relied on a chart and stated that tape nos. 23 & 111 were found to be of short duration by 3 & 8 seconds but admitted that late submission of tapes did not lead to delay in the telecast of any episode. They admitted that deduction of Rs. 8,40,000/- on account of delay in submission of tapes for episodes 1-20 was wrong. They stated that this amount was paid to the respondent.

41. It was argued on behalf of the respondent before the Arbitrator that it had delivered all the episodes without any delay, it was not liable for any penalty levied under clause 7 (i) of the agreement; the petitioner itself was in breach of material terms of the agreement for non payment and delay in payment of the outstanding dues; and all the tapes were of the required duration. The case of Thomas Hughes Vs. Metropolitan Railway Co. 1877 (2) AC 429, was referred, where it was held that even if the plaintiff did not intend to abandon the notice, yet if his conduct was such as to put the defendants off their OMP Comm No. 38/2018 Prasar Bharati Vs. Arun Govil Creations Page No.34 of 54 guard and lead them to believe that six months notice would have not be insisted upon, there is no ground for relief in equity. It was also contended before the Arbitrator that the petitioner had induced the respondent to believe that it has accepted the delivery of episodes and has no objection as regards anything pertaining to the tapes, so the respondent would have been given relief in equity. Since, no notice was ever sent to the respondent qua the delayed delivery, so its conduct led the respondent to believe that delivery of tapes was in a manner acceptable to the petitioner and it was in accordance with the agreement. It was also argued that the petitioner did not suffer any loss and the tapes were submitted at the earliest possible / within reasonable time, though, in the first place, it never got reasonable time to make the programme episodes but the petitioner taking advantage of its own wrong made the deductions based on delay. It commercially exploited and earned monies from the content of the episodes produced by it (respondent) by broadcasting the same on its channels. Section 55 of the Indian Contract Act was also referred along with the case of Bhagwandas Matels (supra) to contend that since, the petitioner did not issue any notice of its intention to claim deductions and accepted the delivery of tapes without raising any objection, it could not contend that the respondent committed the breach of contract. Reference was also made of the case Mumbai International Airporat Pt Ltd (supra) to OMP Comm No. 38/2018 Prasar Bharati Vs. Arun Govil Creations Page No.35 of 54 contend that a litigant cannot change and choose its stand to suit its convenience.

It was argued on behalf of the petitioner that initially the tapes supplied by the respondent were of shorter duration by 525 seconds and there was delay in submission of tapes / episodes, which led to deductions. Clause 2 (vii) of the contract was referred and it was argued that for determining whether the tapes were supplied in time or not, date of telecast of episodes in each four weeks period was required and date of delivery of tapes for each four weeks period was to be seen. The respondent

witness has admitted that there was late delivery of tapes. The petitioner has only enforced a contractual clause by making 1% deduction per day on account of delay in submission of tapes. It was argued that the plea taken by the respondent that the late submission was a chain reaction is afterthought and beyond pleadings. Impossibility means inherent impossibility and not a self induced impossibility. It was also argued that the mere fact that the deductions were not made initially would not give rise to waiver, acquisition or estoppel referring clause 15 (vi) of the contract.

On promissory estoppel, it was argued that there is nothing on record to show that it had promised to the respondent that it would not enforce the contractual terms regarding supply of tapes required for each four weeks period at least 10 days before the scheduled date of telecast of the first OMP Comm No. 38/2018 Prasar Bharati Vs. Arun Govil Creations Page No.36 of 54 episode of that period. Since, the agreement did not envisage its becoming void on account of late delivery and Section 55 of the Indian Contract Act has no application. It was argued that since the parties had agreed that if the tapes were not provided within a certain timeline, the consideration payable would stand reduced accordingly. It was also argued that it was not a case of compensation for loss but enforcement of a condition providing for reduced consideration in the event of delayed performance.

42. The Arbitrator after considering the contentions of the parties held that during the arbitral proceedings on 24.11.2017, the petitioner had issued a letter stating that the deductions made in terms of clause 6 (v) of the agreement on account of short duration of episodes had been made in excess to the tune of 514 seconds and the amount of Rs. 1,52,296/- was refunded. She referred the cross examination of the petitioner witness and held that only two episodes i.e. episode no. 33 & 111 were short by 3 & 8 seconds, so in these circumstances, the amount of Rs. 1,52,296/- refunded to the respondent has satisfied its claim in respect of deductions made in respect of 514 seconds and the respondent is entitled only to that amount and no other account. The respondent has not challenged this finding. It has thus become absolute.

43. In the impugned award, the Arbitrator again referred the OMP Comm No. 38/2018 Prasar Bharati Vs. Arun Govil Creations Page No.37 of 54 above letter, which also finds mention of refund / repayment of Rs. 8,40,000/-, with service tax of Rs. 1,21,800/- qua the deductions made in respect of first 20 episodes on the ground that they were delivered late. She also reproduced the cross examination of the petitioner witness Sh. Upadhyay interalia as under:

"Q17. Why did the respondent take a view that the deductions are wrongful?

A. The agreement between the parties was signed on 19.06.2015 and first telecast was scheduled on 06.07.2015. It was learned by Prasar Bharti that according to the date of signing of the agreement and the first date of telecast which was 06.07.2015 practically it was not possible for the production house / claimant to follow such schedule.

44. In the said letter and during the testimony of the petitioner witness, it was conceded by the petitioner that as per the agreement, which was signed on 19.06.2015, the first episode was to be

telecast on 06.07.2015, shooting for the first 20 episodes could not possibly be undertaken by the respondent in the prescribed time and the deduction made earlier was refunded. It was also admitted by the petitioner that a week i.e. (19.06.2015 to 25.06.2015) was not adequate for delivery of 20 episodes. The Arbitrator has held that the petitioner had not informed the respondent about the telecast date. She observed that the last of the first series of episodes was delivered on 14.07.2015, the telecast date of the first episode of next 20 episodes i.e. episode no. 21 to 40 was 03.08.2015 and the date OMP Comm No. 38/2018 Prasar Bharati Vs. Arun Govil Creations Page No.38 of 54 of delivery of those 20 episodes was 23.07.2015. Therefore, 8 days (from 15.07.2015 to 23.07.2015) were available to the respondent for delivery of tapes for those episodes. It was rightly held that the conduct of the petitioner clearly shows that such time period was insufficient for the delivery of episodes.

45. The Arbitrator also considered clause 7 (i), clause 2 (vii) of the agreement and has rightly held that clause 2 (vii) cannot be read in isolation, it requires to be considered in the backdrop of series of steps outlined in clauses 2 (vi), 2 (v), 2 (vi) as per which, the respondent had to submit the scripts, the petitioner had to convey its approval within 15 days of their receipt and thereafter, the respondent had to commence production adhering to the scripts. The Arbitrator has considered clause 2

(vii) which interalia provided that all episodes for each 4 week period had to be submitted at least 10 days before the scheduled date of telecast of the first episode of that period and analysed the tabular chart (of delayed tapes delivery) submitted by the petitioner and found merit in the arguments of the respondent that since the telecast date was informed to it during the last moment, it disabled it from delivering tapes as per the schedule given in the contract. The Arbitrator has rightly observed that except episode 36, which was given 9 days before the date of telecast, all the other episodes were given or supplied to the petitioner 10 days or more earlier to the date of telecast of the OMP Comm No. 38/2018 Prasar Bharati Vs. Arun Govil Creations Page No.39 of 54 first of the series of 4 episodes.

46. I am also of the view that since making of episodes was contingent / dependent on the previous episodes, so, all subsequent delays happened because of late intimation of telecast date by the petitioner, which made the respondent at times not submit the episode tapes 10 days prior as stipulated in the agreement. The conduct of the petitioner shows that it had given a go-by to the original term of the contract as regards the time being the essence of the contract. It accepted the performance of the contract without any objection. It was held in the case of Manuelsons Hotels Pvt Ltd Vs. State of Kerala (supra) that promissory estoppel is a doctrine whose foundation is that an unconscionable departure by one party from the subject matter of assumption which may be of fact or law, present or future, and which has been adopted by the other party as the basis of some course of conduct, act or omission, should not be allowed to pass muster. It was held in the case of Mumbai International Pvt Ltd (supra) that if a person of his own accord, accepts a contract on certain terms and works out the contract, he cannot be allowed to adhere to and abide by some of the terms of the contract which proved advantageous to him and repudiate the other terms of the contract which might be disadvantageous to him.

As evident from the record, the petitioner did not give OMP Comm No. 38/2018 Prasar Bharati Vs. Arun Govil Creations Page No.40 of 54 sufficient / reasonable time to the respondent as per the contract to submit the first 20 episodes. So, how could it expect from the respondent to submit the remaining episodes within the time frame as provided in the contract. Further, it did not raise any objection as to the delay when the respondent submitted the next / remaining tapes of the episodes. It made the deductions only at the final stage of the telecast. Even, it did not follow the payment schedule as provided in the agreement as evident from the record and there were delays in payments even beyond 90 days many a times. In the case of Union of India Vs. Revri Co. AIR 1976 SC 2257, it was held:

"It must be remembered that the contract is a commercial document between the parties and it must be interpreted in such a manner as to give efficacy to the contract rather than to invalidate it. It would not be right while interpreting a contract, entered into between two lay parties, to apply strict rules of construction which are ordinarily applicable to a conveyance and other formal documents. The meaning of such a contract must be gathered by adopting a common sense approach and it must not be allowed to be thwarted by a narrow pedantic and legalistic interpretation."

47. Similar approach was taken in the case of Sumitomo Heavy Industries Limited Vs. Oil Natural Gas Commission of India, 2010 (11) SCC 296, where the Supreme Court approved "a common sense approach and not a narrow pedantic and legalistic interpretation".

48. In the impugned award, the Arbitrator has referred the OMP Comm No. 38/2018 Prasar Bharati Vs. Arun Govil Creations Page No.41 of 54 above judgments, interpreted the contract and held that the conditions of the agreement clearly specify that not only are timelines mandatory - because the consequence of violating them attracts penal payments but also they cannot be seen alone. Thus, clause 2 (iv), (v), (vi) & (vii) are part of the series, which the agreement contemplated of steps that had to be undertaken by the respondent, on the one part and the petitioner, on the other. It was on the approval of the scheme by the petitioner, the respondent had to send the scripts of first set of 20 episodes; approval of those scripts was to follow (by the petitioner) based on which shooting schedule was to be fixed and shooting of episodes to take place. Thereafter, it was the duty of the respondent to supply the tapes "Based on the approved scripts, the Producer shall supply all episodes required for each 4 week period at least 10 days before the scheduled date of telecast of the first episode of that period" (as per clause 2 (vii) of the agreement). It was held that the petitioner has nowhere stated that it approved all the scripts in time, to enable the shooting of such approved scripts. If the petitioner's conduct in the carrying out of its obligations under the agreement, in conceding that the time for shooting the first 20 episodes was too short, is taken into account, the respondent was justified in claiming that a similar pattern of conduct (of both parties) continued throughout the agreement for shooting and the shortness of time for production and later, delivery of OMP Comm No. 38/2018 Prasar Bharati Vs. Arun Govil Creations Page No.42 of 54 tapes, for the rest of the episodes. I am of the view that the Arbitrator has logically and reasonably interpreted clause 2

(vii) of the agreement.

49. The Arbitrator has also rightly observed that in this case, the petitioner had invoked clause 7 (i) and proceeded to deduct 52,52,000/- without any intimation about the particulars of why the deductions for late delivery were made. It was held that clause 7 (i) has to be read along with clause 2 particularly sub- clause (vii). It was held that a complete analysis of the tabular chart relied by petitioner and reproduced herein-above shows that in except one or two instances, all the tapes were delivered 10 days or more before the dates fixed for telecast. Thus, on a plain and common-sense interpretation of the agreement, the petitioner could not have withheld the amounts at all.

50. In the instant case, it was also conceded by the petitioner witness Mr. Upadhyay that no episode was telecast late. It was held that the evidence on record shows that no advertisement was aired during the episodes. The petitioner has not at any stage or time proved that the timing of handing over of tapes (assuming there to be delay) had hindered or caused inconvenience, needing it to spend more money or use more manpower than what was planned or actually used or done in the normal course. The Arbitrator has rightly observed that this OMP Comm No. 38/2018 Prasar Bharati Vs. Arun Govil Creations Page No.43 of 54 kind of evidence was necessary because the total quantum (initially) withheld by the petitioner was equal to about 10% of the whole consideration payable.

51. I am in agreement with the contention of Ld. Counsel for the respondent that the deduction equal to 1% of the episode price per day of delay per episode was against the principles of justice, equity and good conscience. In the case of Bhagwandas Matels Ltd (supra), it was held that if the appellant wants to claim compensation for any loss occasioned by non performance of the contract within the stipulated time under Section 55 of the Indian Contract Act, and if the appellant accepts the performance of contract, he must issue notice to the respondent of his intention to claim damages. In the event of parties, knowingly give a go-by to the stipulation as regards the time, the Courts are not left with any other conclusion but a finding that the parties themselves by their conduct have given a go-by to the original term of the contract as regards the time being the essence of the contract.

It is evident from the record that the petitioner had accepted the performance of the contract without any objection and did not issue any notice for compensation, so it was not legally entitled to make any deductions later. Further, the petitioner has not suffered damages on account of any late delivery as alleged nor suffered any legal injury by sustaining OMP Comm No. 38/2018 Prasar Bharati Vs. Arun Govil Creations Page No.44 of 54 any loss, so there was nothing to compensate as laid down in part III of Section 55 of the Indian Contract Act. Further, once no deduction was made for any alleged failure to deliver the episodes on time, the petitioner is estopped from making any deductions at a later time from the same episodes in view of doctrine of promissory estoppel in view of the judgments in the cases of Mumbai International Airport Ltd (supra), where it was held that a litigant cannot change and choose its stand to suit its convenience.

52. The Arbitrator referred Section 74 of the Indian Contract Act and stated that the Supreme Court in catena of judgments has held that the party who wants to enforce a penalty clause cannot get the entire amount but a "reasonable compensation"

not exceeding the amount agreed under the contract. A claim of liquidated damages cannot be granted unless the party aggrieved proves that it sustained loss due to the default of the other party. One cannot compensate a person who has not suffered any loss or damage. In the absence of proof of damage for any breach of obligations, no sum of money named in a contract can be claimed. There may be cases where the actual loss or damage is incapable of proof. Section 74 exempts a party from duty (to prove damages) and enables him to claim compensation in spite of his failure to prove the actual extent of the loss or damage but the party must establish that he has suffered some loss or damage. The proof of this basic requirement of "loss / damage" is not done away with by Section 74. It merely dispenses with the proof of the "actual loss / damage". The Courts, in such cases where it is difficult to ascertain the precise amount of damages, have the discretion to award reasonable compensation to the aggrieved party. The Arbitrator referred the judgments on this point of law including of Fateh Chand Vs. Balkishan Dast, 1964 (1) SCR 515, Maula Bux Vs. Union of India, 1969 (2) SCC 554 and Union of India Vs. Rampur Distillery and Chemicals Co. Ltd 1973 (1) SCC

649. In Fateh Chand case, it was held:

"The Section undoubtedly says that the aggrieved party is entitled to receive compensation from the party who has broken the contract, whether or no actual damage or loss is proved to have been caused by the breach. Thereby it merely dispenses with proof of "actual loss or damage". It does not justify the award of compensation when in consequence of the breach no legal injury at all has resulted, because compensation for breach of contract can be awarded to make good loss or damage which naturally arose in the usual course of things, or which the parties, knew when they made the contract, to be likely to result from the breach".

53. In Maula Bux case (supra), it was held:

"In case of breach of some contracts it may be impossible for the Court to assess compensation arising from breach, while in other cases compensation can be calculated in accordance with established rules. Where the Court is unable to assess the compensation, the sum named by the parties if it be regarded as a genuine pre-estimate may be taken into consideration as the measure of reasonable compensation, but not if the sum named is in the nature of a penalty. Where loss in terms of money can be determined, the party claiming compensation must prove the loss suffered by him".

OMP Comm No. 38/2018 Prasar Bharati Vs. Arun Govil Creations Page No.46 of 54

54. The Arbitrator has logically concluded that the condition which the petitioner relies on and enforces through the deduction of amounts otherwise payable to the respondent are expressly

named as 'penalty'. While the mere use of the word 'penalty' cannot decide the issue, nevertheless, since the petitioner has admitted that none of its telecasts were delayed nor advertisements were affected and on the other hand from the chart it produced during the arbitral proceedings and relied on, it is also clear that no kind of monetary or pecuniary loss was caused to it, the complete lack of any evidence or proof of any damage, leads to the conclusion that the petitioner did not suffer any injury. The Arbitrator referred the quantum of deductions made from the episodes and rightly observed that such operation of clause 7 (i) is nothing but a penalty and the deductions made cannot be permitted. Further, the petitioner has not led any evidence to show that such or any lesser amount of damages had occurred.

55. In the impugned award, on issue no. 1, 3 & 4, the Arbitrator has made the following conclusions:

Issue no. 1: That the claimant had not defaulted in regard to its obligation under the contract, to deliver the tapes at least 10 days before the scheduled date of telecast of the first of the series or batch of 4 episodes. Issue no. 1 is answered in favour of the claimant.

Issue no. 3: As regards this issue, it is held that the OMP Comm No. 38/2018 Prasar Bharati Vs. Arun Govil Creations Page No.47 of 54 deductions made by the respondent were not justified under the contract between the parties, because Clause 7 (i) amounted to a penalty clause: the respondent was not able to prove that the tapes were delivered in a delayed manner; it could not also establish any loss to be entitled to reasonable compensation.

Issue no. 4: As discussed above, out of the total 52,52,000/- the respondent had paid back the claimant a sum of 8,40,000/- towards deductions made for the first 20 episodes. Therefore, the claimant has to be paid the sum of 44,12,000/- towards deductions wrongly made by the respondent.

56. It is true that in the present case, the contract did not treat the delay as a breach but the conduct of the petitioner was such as to put the respondent off its guard and lead it to believe that the timeline provided in the agreement was not being adhered to. In this case, the petitioner did not follow the timeline for delivery of tapes and had informed at the last moment for delivery of first round of tapes. It never raised objection for the late delivery nor issued any notice to the respondent before making any deduction in the sanction orders. Further, all the episodes were telecast on time.

57. As regards contention that the deduction was not a compensation for the losses but a mere enforcement of a contractual stipulation, it was observed in the preceding paras that in this case, the petitioner did not initially enforce the contractual stipulations. It had given lesser time to the respondent to submit the tapes of first 20 episodes. Even then, OMP Comm No. 38/2018 Prasar Bharati Vs. Arun Govil Creations Page No.48 of 54 the respondent submitted the tapes to ensure timely telecast of the episodes. Though, the petitioner had made the deductions even for the first 20 episodes but when it realized its mistake, it released the deductions during the arbitral proceedings. As regards contention that in so far as episodes 21 onward are concerned, there was sufficient time

to make available the episodes, I am of the view that making of episodes was contingent / dependent on the previous episodes. Admittedly, clause 15 (vi) of the agreement provided that no forbearance or indulgence granted would constitute a waiver but in this case, no notice was given by the petitioner when the tapes were submitted late. It accepted the delivery without any objection. I am not in agreement with the contention of Ld. Counsel for the petitioner that the Arbitrator rewrote the contract by holding that tapes were only to be provided 10 days before the schedule date of telecast, in this case, the Arbitrator has referred the tabular chart submitted by the petitioner, considered all the circumstances and then given the observations by making logical interpretation of the agreement clauses. It was also admitted by the petitioner witness that all the episodes were telecast on time as per the scheduled date of telecast. In this case, the petitioner itself had varied the terms of the agreement. It did not follow the payment schedule and delayed the payments. That being the position, no interference is called for on the findings given by the Arbitrator on issue no. 1, 3 & 4.

OMP Comm No. 38/2018 Prasar Bharati Vs. Arun Govil Creations Page No.49 of 54

58. A perusal of award reveals that all the contentions which have been raised by the petitioner / its counsel were raised and considered and dealt by the Arbitrator. She has logically & fairly interpreted the clauses of the agreement and come to the conclusion in the impugned award. It is not for this Court to sit in appraisal of the evidence led before the Arbitrator nor this Court can open itself to the task of being a Judge on the evidence placed before the Arbitrator. It would be outside the scope of Section 34 of the Act to reappreciate the entire evidence and come to the conclusion because such an approach would defeat the purpose of arbitral proceedings. A possible view by the Arbitrator on facts has necessarily to pass muster as the Arbitrator is the ultimate master of the quality & quantity of evidence to be relied upon when he / she delivers the arbitral award. Once, it is found that the Arbitrator's approach is not arbitrary and capricious, then he / she is the last word on facts.

59. In *Mc Dermott International Inc v. Burn Standard Co.*

Ltd and Ors, CA No. 4492 of 1998, decided on 12.05.2006, the Supreme Court observed as under:

"It is trite that the terms of the contract can be express or implied. The conduct of the parties would also be a relevant factor in the matter of construction of a contract. The construction of the contract agreement, is within the jurisdiction of the arbitrators having regard to the wide nature, scope and ambit of the arbitration agreement and they cannot, be said to have misdirected themselves in OMP Comm No. 38/2018 Prasar Bharati Vs. Arun Govil Creations Page No.50 of 54 passing the award by taking into consideration the conduct of the parties. It is also trite that correspondences exchanged by the parties are required to be taken into consideration for the purpose of construction of a contract. Interpretation of a contract is a matter for the arbitrator to determine, even if it gives rise to determination of a question of law."

60. In the case of Patel Engineering Ltd Vs. North Eastern Electric Power Corp Ltd, 2020 (7) SCC 167, it was observed that in paragraphs (39) & (40) of Ssangyong Engineering (supra), the Court reiterated paragraphs (42.2) & (42.3) of Associate Builders (supra), wherein, it was held that construction of the terms of a contract is primarily for Arbitrator to decide, unless the Arbitrator construes a contract in a manner, which no fair minded or reasonable person would take i.e. if a view taken by the arbitrator is not even a possible view to take. It was held that the ground of patent illegality is a ground available under the statute for setting aside a domestic award, if the decision of the arbitrator is found to be perverse or so irrational that no reasonable person would have arrived at the same; or the construction of the contract is such that no fair or reasonable person would take or that the view of the arbitrator is not even a possible view.

61. It was held in the case of State Trading Corporation of India Ltd Vs. Teopfer International Asia PTE Ltd FAO (OS) 242/2014 that Section 34 proceeding which in essence is the OMP Comm No. 38/2018 Prasar Bharati Vs. Arun Govil Creations Page No.51 of 54 remedy of annulment, cannot be used by one party to convert the same into a remedy of appeal. Finality of the award is very important. 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 Arbiter of resolution of dispute between the parties, the award is not open to challenge on the ground that Arbitrator has reached at a wrong conclusion. If we were to start analyzing the contract between the parties and interpreting the terms and conditions thereof and which will necessarily have to be in the light of the contemporaneous conduct of the parties, it will be nothing else than sitting in appeal over the arbitral award and which is not permissible.

62. Now coming to issue nos. 5 & 6 i.e. interest, it is not in dispute that the contract between the parties was of commercial nature. Unreasonable withholding of amounts / not releasing the payment in times would mean that the party at fault should bear the liability to pay interest for the period the amount was withheld / not paid. In the instant case, the Arbitrator has granted simple interest @ 12% per annum on the amounts due on the sum of Rs. 44,12,000/- w.e.f. 16.04.2017 including pendente-lite and future interest. The Arbitrator has also OMP Comm No. 38/2018 Prasar Bharati Vs. Arun Govil Creations Page No.52 of 54 ordered interest on Rs. 8,40,000/-, the sum paid by the petitioner during the arbitral proceedings for the period from 16.04.2017 to 24.11.2017 @ 12% per annum. I am of the view that the interest given by the Arbitrator is quite reasonable. Admittedly, the agreement does not contain an interest clause but since, it being a commercial transaction and the case being of delayed payments, the Arbitrator was right in holding that the interest would be payable to the respondent, which was also within the competence of the Arbitrator in terms of Section 31 (7) of the Act and Section 3 of the Interest Act 1978.

Conclusion:

63. Now to sum up, in the instant case, most of the grounds raised by the petitioner to challenge the award are factual in nature which have been already considered and adjudicated in the impugned award. It is outside the scope of Section 34 of the Act to

reappreciate the entire evidence and come to conclusion because such an approach would defeat the purpose of arbitration proceedings.

64. 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, does not suffer from any infirmity or error apparent on the face OMP Comm No. 38/2018 Prasar Bharati Vs. Arun Govil Creations Page No.53 of 54 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 her competence and as per the agreement entered into between the parties. The Arbitrator has duly explained the reasons for arriving at her 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.

65. For the aforesaid discussions, no interference is called for in the impugned award.

66. The petition is accordingly dismissed with no other as to costs.

67. File be consigned to record room.

Announced in open court today i.e. 28.02.2022 (Sanjiv Jain) District Judge (Commercial) - 03 Patiala House Courts, New Delhi OMP Comm No. 38/2018 Prasar Bharati Vs. Arun Govil Creations Page No.54 of 54