

Union Of India vs M/S Incom Cables (Pvt.) Ltd on 28 February, 2022

IN THE COURT OF SH GURVINDER PAL SINGH,
DISTRICT JUDGE (COMMERCIAL COURT)-02,
PATIALA HOUSE COURT, NEW DELHI

OMP (Comm.) No. 140/2019

Union of India
Through: Principal Chief Materials Manager,
Northern Railway, Headquarter Office,
Baroda House, New Delhi-110001

..Petitioner

versus

M/s INCOM Cables (Pvt.) Ltd.
A-90, Naraina Industrial Area,
Phase-I, New Delhi-110028

..Respondent

| | | |
|------------------------|---|------------|
| Date of Institution | : | 27/07/2019 |
| Arguments concluded on | : | 14/02/2022 |
| Decided on | : | 28/02/2022 |

Appearances : Sh. Surendra Suryan, Ld. Counsel for petitioner.
Sh. Sumeet Kaul, Ld. Counsel for respondent.

JUDGMENT

1. Petitioner has filed the present objection petition under Section 34 of The Arbitration and Conciliation Act, 1996 (herein after referred as The Act), seeking setting aside of the impugned arbitral award dated 12/04/2019, received by petitioner on 29/04/2019, in case no. ARB/GD/1/P-08/2018 titled Incom Cables Pvt. Ltd vs Union of India of Ld. Sole Arbitrator Sh. A.K Verma, Retd GM/SER. Ld. Sole Arbitrator in the impugned arbitral award held imposition of general damages under para 702 of IRS Conditions to be not in conformity with IRS Conditions and quashed the issued recovery/demand notice dated 13/06/2018 for sum of Rs. 55,67,813/-. Ld. Sole Arbitrator also restrained petitioner to impose general damages of Rs.55,67,813/- under Clause 702 of IRS Conditions in future. Ld. Sole Arbitrator also held that petitioner had enough powers to settle the issues related to non supply of goods under the agreement through arbitration process.

2. I have heard Sh. Surendra Suryan, Ld. Counsel for petitioner; Sh. Sumeet Kaul, Ld. Counsel for respondent; perused the record of the case, filed brief written arguments on behalf of parties as well as part/portion of copies of arbitral proceedings record, as received from petitioner and through Ld. Sole Arbitrator. I have given my thoughtful consideration to the rival contentions put forth.

3. Several requests were sent to Ld. Sole Arbitrator for filing e-copy and physical copy of complete arbitral record with index and pagination in the Court, in terms of various orders of this Court. On

10/11/2021 Dy. CMM/HQ of petitioner filed 31 pages of incomplete arbitral record with Index including letter dated 18/03/2021 of Ld. Sole Arbitrator finding mention that only copy of award, order sheets no. 1, 2 and 3, CD and appointment letter etc. are available with him which were sent whereas remaining documents were lost during shifting of the house of Ld. Sole Arbitrator. On 08/12/2021 Dy. CMM/HQ of petitioner filed 74 pages of some copies of arbitral proceedings record with Index including letter of Ld. Sole Arbitrator dated 29/11/2021 addressed to PCMM Northern Railway inter alia with the mention that documents from claimant and respondent do not bear their signatures as he had extracted the soft copies from the laptop; however all documents bear signatures of Ld. Sole Arbitrator, whereas it had been already informed that documents of few arbitration cases including the instant case were lost by the Packer & Mover while shifting the flat of Ld. Sole Arbitrator. On 02/02/2022 Dy. CMM/DSL of petitioner filed 169 pages of incomplete arbitral proceedings record with affidavit and said affidavit find mentions that whatever documents were in possession of petitioner, their photocopies were obtained from official record and they were so filed.

4. Adumbrated in brief, material facts of the case of petitioner are as follows. Tender bearing no. 4108160177 was floated by petitioner for supply of "PVC insulated armoured unscreened, underground railway signaling cable copper conductor as per Specification No. IRS-S-63/2014 (Rev.4.0) or latest amendment as on the date of opening of tender size 19 core x 1.5 sq. MM". After understanding the terms and conditions of the tender document, respondent/claimant submitted its bid offer on 29/09/2016 with free will and without any kind of duress and coercion, which was opened on 29/09/2016. Respondent/ contractor was an old contractor and dealing with the petitioner since long in the same field. Five purchase orders were issued in favour of respondent for supply of "PVC insulated armoured unscreened, underground railway signaling cable copper conductor as per Specification No. IRS-S-63/2014 (Rev.4.0) or latest amendment as on the date of opening of tender size 19 core x 1.5 sq. MM" as per specification. Total cost of the contract awarded in favour of respondent/claimant vide the subject purchase order was Rs.14,83,26,525/-. As per Clause 3 of the purchase order, the entire material was to be delivered by respondent/claimant to petitioner within a period of 12 months from the date of purchase order as under:-

- Quantity 300 KM to be supplied by the firm in the first six months, i.e. up to 20.01.2018 to the consignee, i.e. SSE/SIG/C/S/NNO against Indent No. 1009-39861 dated 24.04.2014.
- Quantity 120 KM to be supplied against indent No. 1009- 39963 dated 01.05.2014.
- Quantity 180 KM and remaining Quantity 331.2 KM to be supplied in the next six months The subject purchase order was issued subject to applicability of Indian Railway Standard Conditions of Contract (in short IRSCC) and the terms and conditions mentioned therein were binding upon the parties as well as upon the Ld. Sole Arbitrator. Time was the essence of the contract and respondent/ claimant was supposed to supply the material as per the agreement and within stipulated period of time. Respondent/ claimant failed to supply the first lot of 300 KM quantity of cable within the scheduled period. So, letter dated 08/09/2017 was written by petitioner intimating respondent/claimant that Railway Board expressed their concern over delay in non completion of

ongoing projects of Railway and had directed Zonal Railways to complete all pending official projects at the earliest. It was further intimated to respondent/claimant that petitioner was in urgent need of 120 KM cable for the consignee SSE/S/DSJ (Delhi) and respondent/claimant was requested to supply it by the end of September, 2017 and intimate regarding progress of execution of the project with targeted date. Various reminder letters were issued but claimant/respondent did not supply the lot of 120 KM cable to the consignee. There was extreme crises for signaling cable size 19 Core X 1.5 Sq, MM due to failure of respondent/claimant to supply the material despite passing of five months. Letter dated 28/11/2017 was written by petitioner requesting Director General, RDSO to take necessary action, including blacklisting/delisting of respondent/claimant firm. Respondent/claimant firm was delisted by the RDSO on 21/02/2018, whereas thereafter on the request of respondent/ claimant the firm was relisted on 15/06/2018. No alternative was left with petitioner except to proceed as per agreed terms and conditions of contract. Subject purchase order dated 10/07/2017 was cancelled vide Cancellation Advice dated 02/02/2018 with immediate effect in respect of first lot of 300 KM cable. Said purchase order was cancelled at the risk and cost of claimant/respondent and was issued without prejudice to the other rights of petitioner. Vide amendment letter dated 30/05/2018 in respect of cancellation letter dated 02/02/2018, respondent was intimated by petitioner that subject purchase order dated 10/07/2017 was cancelled vide cancellation letter dated 02/02/2018 in respect of first lot of 300 KM cable with risk and cost of respondent/claimant, which was now being modified that it has been cancelled with 10% general damages, which comes to the tune of Rs. 55,67,813/-. Respondent/claimant was supposed to supply 300 KM cable up to 20/01/2018 but he could not supply the material, hence purchase order was cancelled on 02/02/2018 for 300 KM cable only at the risk and cost of the firm but the same could not be finalized as during said period petitioner was delisted by the RDSO on 21/02/2018, hence the contract was cancelled with GD @ 10% only on 30/05/2018, while the actual loss was more than that. Petitioner incurred the amount of Rs.8,15,97,000/- in procuring 300 KM cable and the difference of the cost comes to Rs.2,59,18,875/-, but petitioner charged 10% to the tune of Rs.55,67,813/- as GD. Respondent/ claimant sent a notice dated 22/06/2018 through Counsel to the General Manager of petitioner invoking arbitration clause in respect of the subject purchase order and it was requested to appoint an arbitrator. Vide letter dated 04/10/2018, Ld. Sole Arbitrator was appointed by General Manager of petitioner with the reference "Whether Northern Railway could levy or recover General Damages vide demand notice dated 13.06.2018 from the Firm in view of the facts of the case and legal notice dated 22.06.2018".

5. Arbitral proceedings culminated into impugned arbitral award. Petitioner has impugned the arbitral award mainly on the following grounds. Ld. Sole Arbitrator did not apply his judicious mind at the time of passing the impugned award. Impugned award was not in accordance with the terms of contract and as per Section 28(3) of the Act and also Ld. Sole Arbitrator violated the provision of Section 34(2)(b)(II) of the Act. Impugned award is against the public policy. As per Clause 0700 of IRSCC, time was the essence of contract and respondent was supposed to adhere the time schedule for supplying the material but respondent failed to abide by the schedule of time. Non supply of material up to 20/01/2018 amounted to breach of contract.

Accordingly, on account of breach of contract, the purchase order was cancelled on 02/02/2018 at the risk and cost of respondent/ claimant. Modification Advice was issued on 30/05/2018 in respect

of cancellation letter dated 02/02/2018 and it was notified to respondent that the contract had been cancelled for non supply of required material with 10% general damages. Letter dated 13/06/2018 was sent to claimant thereby requesting them to deposit an amount of Rs. 55,67,813/- on account of extra expenditure and general damages due to procuring the material from the other contractor. Due to non supply of balance quantity of 499.20 KM cable the other five purchase orders were again cancelled on 25/07/2018. Ld. Sole Arbitrator did not consider Clause 0125 of IRSCC, according to which "The term and expression, not herein defined, shall have the meanings assigned to them in the Indian Sales of Goods Act, 1930 or The Indian Contract Act, 1872 or The General Clauses Act, 1897, as the case may be". Each and every contract, including the present one, is governed by the Indian Contract Act, 1872 which will supersede the provision of IRSCC. Petitioner was entitled to receive from respondent/claimant compensation for any loss or damages caused to him, in terms of Section 73 of The Indian Contract Act for failure of respondent/claimant to supply the agreed quantity of material as per contract. The observations of Ld. Sole Arbitrator that there is no provision in Clause 0702 of IRSCC to claim general damages is perverse and against the facts and law and impugned award is liable to be set aside being patently illegal and against the public policy. Respondent was an old contractor and was much aware about the consequences of non supply of the material within original delivery period/ schedule of time but deliberately respondent took false and frivolous plea that he could not supply the material due to delisting of respondent firm from the approved vendors by the RDSO on 21/02/2018, while the original delivery period for supply of the material was 20/01/2018, whereas another false plea that the material could not be supplied due to demonetization by Government of India causing inability to respondent/claimant to supply material was also rejected by Ld. Sole Arbitrator. Petitioner should have been allowed by Ld. Sole Arbitrator to recover general damages as per Section 73 of The Indian Contract Act, 1872. Ld. Counsel for petitioner argued in terms of the above said grounds for impugning the arbitral award and prayed for setting aside the impugned award and consequently direct the respondent to pay Rs. 55,67,813/- to petitioner with interest @ 24% and cost of proceedings.

6. Despite opportunities no reply to the petition was filed by respondent/claimant. However, respondent/claimant through Ld. Counsel filed written arguments. Ld. Counsel for respondent argued that Ld. Sole Arbitrator had passed a reasoned award after going through the facts of the case and in the light of the settled law on the subject. The impugned award does not warrant any judicial interference. It was argued that the intent of the legislature in enacting the Act was to minimize the supervisory role of Courts in the arbitral process. Petitioner has failed to show what is the patent illegality in passing of award by Ld. Sole Arbitrator and how the award is against the public policy. There is no fraud which has been pleaded by petitioner in the petition/objection. The imposition of general damages by petitioner @ 10% of the outstanding value of the contract which comes to Rs. 55,67,813/- was beyond the terms of the contract entered into between the parties. IRSCC Clause 0702 does not mention about imposing general damages @ 10%. This clause only permitted imposition of liquidated damages @ 2% of the price of any store. Petitioner had tried to justify the imposition of general damages as per Section 73 of The Contract Act, 1872. Petitioner could not travel beyond the scope of contract entered into between the parties. Arbitral Tribunal is the creature of contract and cannot travel beyond the terms of contract entered between the parties. Ld. Sole Arbitrator had duly applied his mind and followed the due process of law in adjudicating of the dispute between the parties to the lis. Award passed by Ld. Sole Arbitrator need not be

interfered with. Award passed by Ld. Sole Arbitrator was in consonance with the contract entered between the parties. Ld. Sole Arbitrator did not travel beyond the reference of the dispute in adjudicating process and passed reasoned order. Re-examining and re-appreciation of evidence cannot be done in the ambit of Section 34 of the Act. Ld. Counsel for respondent prayed for dismissal of the petition/objections of the petitioner.

7. An arbitral award can be set aside on the grounds set out in Section 34 (2) (a), Section 34 (2) (b) and Section 34 (2A) of the Act in view of Section 5 of the Act and if an application for setting aside such award is made by party not later than 3 months from the date from which the party making such application had received the signed copy of the arbitral award or if a request had been made under Section 33 of the Act, from the date on which that request had been disposed of by the Arbitral Tribunal. If the Court is satisfied that the applicant was prevented by sufficient cause from the making the application within the said period of three months it may entertain the application within further period of 30 days, but not thereafter.

8. Section 34 (1) (2), (2A) and (3) of The Arbitration and Conciliation Act, 1996 read as under:-

"34. Application for setting aside arbitral award- (1) Recourse to a court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub- section (3).

(2) An arbitral award may be set aside by the court only if-

(a) the party making the application furnishes proof that-

(i) a party was under some incapacity, or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration;

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

(b) the court finds that-

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

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

Explanation 1 - For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,-- (i) the making of the award was induced or affected by fraud or corruption or was in violation of Section 75 or Section 81; or (ii) it is in contravention with the fundamental policy of Indian law; or (iii) it is in conflict with the most basic notions of morality or justice.

Explanation 2.-- 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.

(2A) 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 reappreciation of evidence.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal:

Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter."

9. Supreme Court in case of Associate Builders vs. Delhi Development Authority, (2015) 3 SCC 49 has held that the 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. It is held that once it is found that the arbitrator's approach is neither arbitrary nor capricious, no interference is called for on facts. 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.

Also was held therein that:

"33. "...when a court is applying the 'public policy' test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award....

Once it is found that the arbitrators approach is not arbitrary or capricious, then he is the last word on facts.."

10. Supreme Court in case of Ssangyong Engineering & Construction Co. Ltd. vs. National Highways Authority of India, 2019 SCC OnLine SC 677 has held that under Section 34 (2A) of the Act, a decision which is perverse while no longer being a ground for challenge under "public policy of India", 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 based on evidence led by the parties and therefore would also have to be characterized as perverse. It is held that a finding based on no evidence at all or an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside on the ground of patent illegality.

11. Cancellation Advice C.A. No. 000507 dated 02/02/2018 issued by petitioner to respondent/claimant reads as under:-

"

From, Office of Principal Chief Materials, NR CANCELLATION ADVICE Manager, Northern Railway, Baroda House, New Delhi-110001 C.A.No:000507 DATE:02-FEB-18 To, INCOM CABLES PRIVATE LIMITED-NEW DELHI A-90, NARAINA INDUSTRIAL AREA, PHASE-I NEW DELHI-110028 [Tel: 1141411132] (V.Code:4417) Dear Sirs, Sub : Cancellation of P.O.No. 08160177146733 dated 10-JUL-17 Ref. : THIS OFFICE L. NO. 08160177 dated 20-NOV-17 Please note that this office Purchase Order referred above is hereby cancelled with immediate effect for the items and quantities mentioned below.

Sr. P.L.No. POSR Consignee Order Qty. Qty. Cancelled Reason for Cancellation: Failed to supply.

Penalty imposed : A fresh purchase will be arranged at your risk and expenses, if necessary.

Remarks:

This letter is issued without prejudice to other rights of the President Of India under the contract and under law.

CA-Key:
8800

Sd/-
R.K VERMA, DY.CMM/SIG/C-I
for Principal Chief Materials Manager,

for and on behalf of the President of India

Copy to : FA&CAO/K.GATE
FA&CAO/K.GATE
Consignees
RDSO"

12. Modification Advice dated 30/05/2018 issued by petitioner to respondent/claimant reads as under:-

"

From, Office of Principal Chief Materials, NR MODIFICATION ADVICE Manager, Northern Railway, Baroda House, New Delhi-110001 M.A.No:002337 dated 30/05/18 [P.O. No. 08160177146733 dt. 10/07/17] DATE:30-MAY-18 To, INCOM CABLES PRIVATE LIMITED-NEW DELHI A-90, NARAINA INDUSTRIAL AREA, PHASE-I NEW DELHI - 110028 [Tel: 1141411132] (V.Code: :4417) Dear Sirs, Sub : Amendment to P.O. No. 08160177146733 dated 10/07/17 Ref : Nil dated 30-MAY-18 Please note that the following amendments are hereby issued with immediate effect to this office Purchase Order referred above. All the other terms and conditions remain unaltered.

| Sr. No | Para/Title | From | Amended as |
|--------|------------|----------|---|
| 1 | Remarks | Existing | Earlier PO was cancelled for Sr. 001 for qty 120 Km [Consignee SSE/SIG/S/DSJ] and PO Sr. 004 for qty 180 Km [Consignee SSE/SIG/S/DSJ] with risk and cost of firm vide Cancellation Advice No. 000507 dt. 02/02/18. Now the PO is cancelled for Sr. 001 for qty 120 Km and PO Sr. 004 for qty 180 Km with 10% General Damages i.e. Rs. 55,67,813/- |

Please acknowledge receipt of the same.

[MA-Key:91616]

Sd/-
R.K VERMA, DY.CMM/SIG/C-I
for Principal Chief Materials Manager,
for and on behalf of the President of India

Copy to : Paying Authority;
Bill Passing Authority
Consignees
Inspecting Authority"

13. Recovery notice dated 13/06/2018 sent by petitioner to respondent/claimant reads as under:-

"

STORES DEPARTMENT

RECOVERY NOTICE

R.A.No.

To,
Income Cables Private Limited-New Delhi
A-90, Naraina Industrial Area, Phase-I,
New Delhi-110028
[Tel:1141411132] (V.Code: :4417)

F
Office of Pr. C
Northern Railw
Baroda Hou
New Delhi-11000
Dated:13/06/20

Dear Sirs,

Sub : Recovery Notice against P.O. No. 08160177146733 dated 10-Jul-17 Ref: Cancellation Advice No. 002337 dated 30/05/18 In continuation to this office Cancellation Advice cited above, you are hereby informed that the Purchaser is entitled to claim a sum of Rs. 55,67,813/- (Rupees Fifty Five Lakhs Sixty Seven Thousand Eight Hundred Thirteen only) toward extra expenditure in General Damages in terms of clause 0702 of the IRS Conditions of Contract 1970 governing the said contract.

You are hereby called upon to pay the said sum to the credit of the Accounts Officer, viz Bill Paying Officer and forward the Chief Cashiers receipt to this office within 21 days from the date of issue of this letter, failing which the Purchaser will be compelled to take further action as per the terms and Conditions of the Contract.

Alternatively you can convey your willingness for deduction of an equivalent amount from your pending bills.

Please acknowledge receipt of this letter.

Sd/-

CA-Key

Nikhil Rawat, SMM/
For Principal Chief Materials Ma
for and on behalf of the President

Copy to : FA&CA0/K.GATE
Consignees
RDSO"

14. Relevant Clauses 0125 & 0702 of IRSCC read as under:-

"0125. Terms and expression not herein defined shall have the meanings assigned to them in the Indian Sale of Goods Act, 1930 (as amended), or the Indian Contract Act, 1872 (as amended) or the General Clauses Act, 1897 (as amended), as the case may be. 0702. Failure and Termination:- If the Contractor fails to deliver the stores or any instalment thereof within the period fixed for such delivery in the contract or as extended or at any time repudiates the contract before the expiry of such period the Purchaser may without prejudice to his other rights:-

(a) Recover from the Contractor as agreed liquidated damages and not by way of penalty a sum equivalent to 2 per cent of the price of any stores (including elements of taxes, duties, freight, etc.) which the Contractor has failed to deliver within the period fixed for delivery in the contract or as extended for each month or part of a month during which the delivery of such stores may be in arrears where delivery thereof is accepted after expiry of the aforesaid period, or

(b) Cancel the contract or a portion thereof and if so desired purchase or authorize the purchase of the stores not so delivered or others of a similar description (where stores exactly complying with particulars are not in the opinion of the Purchaser, which shall be final, readily procurable) at the risk and cost of the Contractor. It shall, however, be in the discretion of the purchaser to collect or not, the security deposit from the firm/firms on whom the contract is placed at the risk and expense of the defaulted firm.

Where action is taken under Sub clause (b) above, the Contractor shall be liable for any loss which the Purchaser may sustain on that account provided the purchase, or, if there is an agreement to purchase 1 such agreement is made, in case of failure to deliver the stores within the period fixed for such delivery in the contract or as extended within six months from the date of such failure and in case of repudiation of the contract before the expiry of the aforesaid period of delivery, within six months from the date of cancellation of the contract. The Contractor shall not be entitled to any gain on such purchase and the manner and method of such purchase shall be in the entire discretion of the Purchaser. It shall not be necessary for the Purchaser to serve a notice of such purchase on the

Contractor.

Note-In respect of the stores which are not easily available in the market and where procurement difficulties are experienced the period for making risk purchase shall be nine months instead of six months provided above."

15. Section 73 of The Indian Contract Act, 1872 reads as under:-

"73. Compensation for loss or damage caused by breach of contract.--When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.

Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

Compensation for failure to discharge obligation resembling those created by contract.--When an obligation resembling those created by contract has been incurred and has not been discharged, any person injured by the failure to discharge it is entitled to receive the same compensation from the party in default, as if such person had contracted to discharge it and had broken his contract.

Explanation.--In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account."

16. Following are the discussion and decision of Ld. Sole Arbitrator on Claim nos. 1 and 2:-

"Claim no 1 : Pass an award, quashing & setting aside the Recovery/Demand Notice dated 13.06.2018 for Rs. 55,67,813/- claiming General Damages;

The imposition of General damages under para 702 of IRS conditions is not in conformity with IRS conditions which do not allow imposition of General damages. IRS conditions permit levy of Liquidated damages under clause 702. Therefore issue of Recovery /Demand notice dated 13-6-18 (Annex - 17) for sum of Rs 55,67,813 under IRS conditions clause 702 is incorrect and stands quashed.

Claim No 2 : Pass an award restraining the Respondent permanently from claiming/demanding Rs. 55,67,813/- as General Damages from the Claimant;

Recovery /Demand notice dated 13-6-18 (Annex - 17) for sum of Rs 55,67,813 is quashed under claim no 1. Tribunal also restrain respondents to impose General

damages of Rs 55,67,813 under clause 702 of IRS conditions in future."

17. Before above said discussion and decision on Claim nos. 1 and 2, Ld. Sole Arbitrator in the impugned award duly appreciated the relevant facts of the matter, pleadings of the parties, evidence led before Arbitral Tribunal, issues framed, relevant clauses of IRSCC, Section 73 of The Indian Contract Act, 1872. It is also fact of the matter that in the material placed before this Court including the copies of the arbitral proceedings record above said, parties to the arbitration did not place copy of entire tender conditions of subject matter. Purchase order in question inter alia embodies that deliveries were to be made by respondent/claimant subject to Indian Railways Standard Conditions of Contract and General Conditions of Contract for the Stores Department of Railway. No separate contract inter se parties to the lis or parties to the arbitration was either placed before Ld. Sole Arbitrator or before this Court. Since the purchase order in question embodied the applicability of IRSCC to the contract, it does not lie in the mouth of petitioner to cry hoarse terming wrong application of clause 0702 of IRSCC by Ld. Sole Arbitrator and adjudicating thereon. Above elicited clause 0702 of IRSCC in clear and precise terms specifies that purchaser/petitioner could only recover from contractor/ respondent/claimant as agreed liquidated damages and not by way of penalty a sum equivalent to 2% of price of any stores which contractor/respondent/claimant had failed to deliver within the period fixed for delivery in the contract or in the extended period of contract. The entire text of (i) Cancellation Advice dated 02/02/2018; (ii) Modification Advice dated 30/05/2018 and

(iii) Recovery Notice dated 13/06/2018; as reproduced above; do not find mention of any actual loss suffered by present petitioner on account of failure of respondent/claimant in delivery of the stores agreed in terms of the purchase order in question to petitioner at the time of issuance or service of these documents upon respondent/claimant and also the extent of loss suffered or in what manner loss was suffered. Cancellation Advice dated 02/02/2018 only find mentions the reason for cancellation to be failure of respondent to supply the stores and with respect to penalty imposed there is mention that fresh purchase will be arranged at risk and expenses of respondent/claimant, if necessary. Modification Advice dated 30/05/2018, above said, find mentions that now the purchase order is cancelled for Sr. 001 for quantity 120 Km and PO Sr. 004 for quantity 180 Km with 10% general damages i.e., Rs. 55,67,813/- ; which was so issued in the form of amendment. Above said Recovery Notice dated 13/06/2018 sent by petitioner to respondent/claimant embodies the fact that petitioner as purchaser was entitled to claim Rs. 55,67,813/- towards extra expenditure in General Damages in terms of clause 0702 of IRSCC, 1970 governing the said contract. Needless to mention that in (i) Cancellation Advice dated 02/02/2018; (ii) Modification Advice dated 30/05/2018 and (iii) Recovery Notice dated 13/06/2018, there is no mention of invocation of Section 73 of The Indian Contract Act, 1872. Edifice raised by petitioner to impugn the award to be not in conformity with Section 73 of The Indian Contract Act, 1872 crumbles to ground in the absence of any averment with respect to Section 73 of The Indian Contract Act, 1872 in (i) Cancellation Advice dated 02/02/2018; (ii) Modification Advice dated 30/05/2018 and (iii) Recovery Notice dated 13/06/2018. In absence of averment of any actual loss suffered by the petitioner as on the dates i.e, (i) on 02/02/2018 when the Cancellation Advice was issued; (ii) on 30/05/2018 when Modification Advice was issued and (iii) on 13/06/2018 when Recovery Notice was issued; Ld. Sole Arbitrator adjudicated within the four corners of all the conditions laid in

IRSCC and did not travel beyond the parameters of contract between the parties which in clear and precise terms embodied the application of IRSCC to the contract in question.

18. In the case of Vishal Engineers & Builders vs Indian Oil Corporation Ltd., FAO (OS) 204 of 2010, decided by Delhi High Court on 30/11/2011, it was inter alia held that it was duty of the Court not to enforce penalty clause but only to award a reasonable compensation, which had been held to be statutorily imposed upon Courts by Section 74 of the Contract Act and Court had to adjudge in every case, reasonable compensation for breach of contract having regard to conditions which existed on date of breach.

It was held therein that if there was absence of any loss, whatsoever, an aggrieved party could not claim that it was still entitled to liquidated damages without, at least, proving a semblance of loss.

19. Supreme Court in the case of Kailash Nath Associates vs Delhi Development Authority, MANU/SC/0019/2015 had elicited the law on compensation for breach of contract under Section 74 as follows:-

"43. On a conspectus of the above authorities, the law on compensation for breach of contract Under Section 74 can be stated to be as follows:

1. Where a sum is named in a contract as a liquidated amount payable by way of damages, the party complaining of a breach can receive as reasonable compensation such liquidated amount only if it is a genuine pre-estimate of damages fixed by both parties and found to be such by the Court. In other cases, where a sum is named in a contract as a liquidated amount payable by way of damages, only reasonable compensation can be awarded not exceeding the amount so stated. Similarly, in cases where the amount fixed is in the nature of penalty, only reasonable compensation can be awarded not exceeding the penalty so stated. In both cases, the liquidated amount or penalty is the upper limit beyond which the Court cannot grant reasonable compensation.

2. Reasonable compensation will be fixed on well known principles that are applicable to the law of contract, which are to be found inter alia in Section 73 of the Contract Act.

3. Since Section 74 awards reasonable compensation for damage or loss caused by a breach of contract, damage or loss caused is a sine qua non for the applicability of the Section.

4. The Section applies whether a person is a Plaintiff or a Defendant in a suit.

5. The sum spoken of may already be paid or be payable in future.

6. The expression "whether or not actual damage or loss is proved to have been caused thereby" means that where it is possible to prove actual damage or loss, such proof is not dispensed with. It is only in cases where damage or loss is difficult or impossible to prove that the liquidated amount named in the contract, if a genuine pre-estimate of damage or loss, can be awarded.

7. Section 74 will apply to cases of forfeiture of earnest money under a contract. Where, however, forfeiture takes place under the terms and conditions of a public auction before agreement is reached, Section 74 would have no application."

20. Delhi High Court in the case of Essban Paints Pvt. Ltd. vs Union of India & Anr., MANU/DE/0648/2001 held that in case the contract was not performed and there was breach thereof by the petitioner, it was for the respondent to prove the loss suffered because of such breach and to forfeit the security only to the extent of loss.

21. Delhi High Court in the case of United Telecoms Limited vs Mahanagar Telephone Nigam Limited, MANU/DE/ 0969/2012 inter alia held that it is well established that in a contract on its breach, penalty can be levied on the defaulting party only if the other party had suffered and the same is proved.

22. Supreme Court in the case of Navodaya Mass Entertainment Ltd. vs J.M. Combines, MANU/SC/0735/2014 held that the scope of interference of the Court is very limited. Court would not be justified in reappraising the material on record and substituting its own view in place of the Arbitrator's view. Where there is an error apparent on the face of the record or the Arbitrator has not followed the statutory legal position, then and then only it would be justified in interfering with the award published by the Arbitrator. Once the Arbitrator has applied his mind to the matter before him, the Court cannot reappraise the matter as if it were an appeal and even if two views are possible, the view taken by the Arbitrator would prevail. (See: Bharat Coking Coal Ltd. v. L.K. Ahuja MANU/SC/0335/2004: (2004) 5 SCC 109; Ravindra and Associates v. Union of India, MANU/SC/1761/2009 : (2010) 1 SCC 80; Madnani Construction Corporation Private Limited v. Union of India and Ors.; MANU/SC/1869/2009 : (2010) 1 SCC 549; Associated Construction v. Pawanhans Helicopters Limited, MANU/SC/7630/2008 : (2008) 16 SCC 128; and Satna Stone and Lime Co. Ltd. v. Union of India and Anr., MANU/SC/7640/2008 : (2008) 14 SCC 785).

23. The proceedings under Section 34 of the Act are summary in nature and the scope of enquiry in the proceedings under Section 34 of the Act is restricted to specified grounds for setting aside only, as was held in the case of Canara Nidhi Limited vs M. Shashikala & Ors., 2019 SCC Online SC 1244. The Court would not construe the nature of claim by adopting too technical an approach or by indulging into hair-splitting, otherwise the whole purpose behind holding the arbitration proceedings as an alternative to Civil Court's forum would stand defeated, as was held in the case of Sangamner Bhag Sahakari Karkhana Ltd. vs Krupp Industries Ltd., AIR 2002 SC 2221. An award is not open to challenge on the ground that the arbitrator had reached a wrong conclusion or had failed to appreciate some facts, but if there is an error apparent on the face of the award or if there is misconduct on the part of the arbitrator or legal misconduct in conducting the proceedings or in

making the award, the court will interfere with the award; as was held by Supreme Court in the case of Oil & Natural Gas Corporation vs M/s Wig Brothers Builders & Engineers Pvt. Ltd., (2010)13 SCC 377. Reappraisal of evidence by the court is not permissible and as a matter of fact, exercise of power to reappraise the evidence is unknown to a proceeding under the Arbitration Act; as was held by Supreme Court in the case of Ispat Engineering & Foundry Works vs Steel Authority of India Ltd., (2001) 6 SCC 347. In order to provide a balance and to avoid excessive intervention, the award is not to be set aside merely on the ground of an erroneous application of the law or by re-appreciating evidence; as was held by Supreme Court in the case of P.R Shah, Shares & Stock Brokers Pvt. Ltd vs B.H.H. Securities Pvt. Ltd. & Ors., (2012) 1 SCC 594. At global level the doctrine of 'Contra Proferentem' is generally applied by the Judges/Arbitrator in the cases where a contract appears ambiguous to them; the Judges/Arbitrator in India have appreciated and adopted similar line of reasoning in the cases involving ambiguous contract wherein it is believed that 'an ambiguity is needed to be resolved' in order to find the correct intention of the contract. If the conclusion of the arbitrator is based on a possible view of the matter, the court is not expected to interfere with the award and if the Arbitrator relies on a plausible interpretation out of the two possible views, then it would not render the award perverse; as was held by Supreme Court in the case of M/s Sumitomo Heavy Industries Ltd. vs Oil & Natural Gas Commission of India, 2010 (11) SCC

296. Award is not open to challenge on the ground that the Arbitral Tribunal had reached a wrong conclusion or had failed to appreciate the facts; the appreciation of evidence by the arbitrator is never a matter which the Court considers in the proceeding under Section 34 of the Act, as the Court is not sitting in appeal over the adjudication of the arbitrator.; as was held by Delhi High Court in the case of NTPC Ltd vs Marathon Electric Motors India Ltd., 2012 SCC OnLine Del 3995. Supreme Court in the case of Associate Builders vs Delhi Development Authority, (2015) 3 SCC 449 has restricted the scope of public policy, so the Court does not act as a Court of appeal and consequently errors of fact cannot be corrected. An error relating to interpretation of the contract by an arbitrator is an error within his jurisdiction and such error is not amenable to correction by Courts as such error is not an error on the face of the award; as was held by Supreme Court in the case of Steel Authority of India Ltd. vs Gupta Brother Steel Tubes Ltd., (2009) 10 SCC

63.

24. Relying upon the law laid in the precedents above said, it can be said that not only the reasonings of Ld. Sole Arbitrator are logical, but all the material and evidence were taken note of by Ld. Sole Arbitrator and this Court cannot substitute its own evaluation of conclusion of law or fact to come to the conclusion other than that of Ld. Sole Arbitrator. Cogent grounds, sufficient reasons have been assigned by Ld. Sole Arbitrator in reaching the just conclusion and no error of law or misconduct is apparent on the face of the record. This Court cannot re-appraise the evidence and it is not open to this Court to sit in the appeal over the conclusion/findings of facts arrived at by Ld. Sole Arbitrator, who is Retired General Manager/SER and was competent to make assessment while taking into consideration the facet of the matter. Re-appraisal of the matter cannot be done by this Court. No error is apparent in respect of the impugned award. I do not find any contradiction in the observations and findings given by Ld. Sole Arbitrator. The impugned award does not suffer from vice of irrationality and perversity. The conclusion of the Ld. Sole Arbitrator is based on a possible

view of the matter, so the Court is not expected to interfere with the award. Even impugned award passed by Ld. Sole Arbitrator cannot be set aside on the ground that it was erroneous. The award is not against any public policy nor against the terms of contract of the parties. No ground for interference is made out. None of the grounds raised by the petitioner attract Section 34 of the Act. For the foregoing reasons, the petition is hereby dismissed.

25. The parties are left to bear their own costs.

26. File be consigned to record room.

GURVINDER GURVINDER PAL SINGH
PAL SINGH Date: 2022.02.28
12:15:08 +0530

ANNOUNCED IN
OPEN COURT
th

(GURVINDER PAL SINGH)
District Judge (Commercial Court)-02

On 28 February, 2022. Patiala House Court, New Delhi.

(DK)