Tata Coffee Limited vs) Cicb - Chemicon Private Limited on 17 October, 2016

IN THE COURT OF THE VI ADDL.CITY CIVIL & SESSIONS JUDGE
BENGALURU CITY
CCCH. 11

Dated this the 17th day of October, 2016

PRESENT: Sri.K.M.Rajashekar, B.Sc., LL.B.,
VI Addl. City Civil & Sessions Judge,
Bengaluru City.

A.S.NO: 61/2013

APPELLANT/ : TATA COFFEE LIMITED
PLAINTIFF A Company incorporated under the
Indian Companies Act, 1913 and having
its registered office at Pollibetta, Kodagu,
Karnataka and having its Corporate Office
at No.57, Railway Parallel Road,
Kumara Park West,
Bengaluru-560 020.

Reptd.through its Company Secretary &
Authorised Signatory -
Mr.N.S.Suryanarayanan

/Vs/

RESPONDENTS/ : 1) CICB - CHEMICON PRIVATE LIMITED
DEFENDANTS A Company incorporated under the
Companies Act, 1956 and having its office at
No.239, 3rd Main Road, Mahalakshmi Layout,
Bengaluru-560 086.
Reptd.by its Director and Chief
Executive Officer- Dr.K.Dinakara Kini.

2) Justice S.Venkataraman (Retd.)
Sole Arbitrator,
Office at 161, 2nd Block, 3rd Stage,
4th Main, 3rd 'F' Cross,
Basaveshwaranagar, West of Chord Road,
Bengaluru-560 079.

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JUDGMENT

The Plaintiff has preferred this suit under Section 34(2)(b)(ii) of the Arbitration and Conciliation Act, 1996 and sought for setting aside the impugned award dated 17.06.2013 passed by the learned Arbitrator, and to direct the Defendant No.1 to pay to the Plaintiff a sum of Rs.21,21,18,000/- as prayed for by the Plaintiff in its counter-claim in the arbitration proceedings and for costs.

2) In nutshell Plaintiff's case is that, the Defendant No.1 approached the Plaintiff in March, 2005 claiming that it possessed the technology to convert biomass to clean producer gas free of impurities that could be used as fuel to provide heat required in the process and for generation of electricity and proposed to install a biomass gasification plant in the Plaintiff's factory, which could use spent coffee waste generated in the factory for producing a gas, the Plaintiff expressed interest in the proposal. In January, 2006, the Defendant No.1 submitted a fresh proposal recommending using a gas engine based genset manufactured by Guascor of Spain instead of purchasing an indigenously manufactured DG set and modifying the same. Acting in good faith, the Plaintiff placed its Purchase Order dated 07.07.2006 to set up a fully functional integrated gasification plant in an eco-friendly manner and expected the Defendant No.1 to conduct a completely professional and business-like manner keeping in mind costs and timelines for commissioning of the plant. As the plant being set up by Defendant No.1 was a first of its kind in the world, it was specifically agreed and understood that as a part of the contract entered into between the parties, the financial exposure of the Plaintiff would be covered, at all times without fail, by bank guarantee for 105% of the advances given. The Plaintiff raised purchase orders on Guascor of Spain for the gas based genset and on Eqtec of Spain for supply of inert fluidizing bed material, nozzles and control system required for the plant. The Defendant No.1 furnished a bar-chart in September, 2006 committing to complete the supply of the plant and installation within 15th October, 2007 and commissioning and stabilization to be completed by February, 2008, but on request of the Plaintiff for an earlier commissioning of the plant, the Defendant No.1 undertook to complete the commissioning by September 15, 2007. But, as promised, the commissioning of the plant was not achieved by September, 2007. Thereafter, the Defendant No.1 made various modifications and changes to the plant, but failed to demonstrate the successful running of the plant and commissioning of the plant was revised several times. Defendant No.1 agreed to compensate the Plaintiff by paying interest on the investment of Rs.9 crores made by the Plaintiff if the plant was not successfully commissioned as per the terms of the Purchase Order by 15.12.2008. However, the Defendant No.1 was not able to commission the plant as agreed and accordingly, the parties entered into a Settlement Agreement dated 14.05.2009, whereby the Defendant provided a firm commitment to commission the plant by the end of September, 2009 and it was agreed that in the event of Defendant No.1 failing to complete the commissioning and handing over of the plant, the Plaintiff would be entitled to invoke the Bank Guarantee and recover the amounts advanced by it towards the plant and equipment. In November, 2009, on Defendant's request, the Plaintiff released the bank guarantees to the value of Rs.2 crores to Defendant No.1 in good faith. But inspite of several trial runs, the Defendant No.1 failed to successfully demonstrate the operation of the plant by running it continuously for 48 hours and providing guaranteed output. After unsuccessful trial run, when Defendant No.1 once again proposed for making further modifications to the design, the Plaintiff categorically informed that it would not be in a position to wait beyond 27.05.2010. Despite all efforts, the Defendant No.1 could not operate and deliver the

committed output. Having regard to the fact that almost three years had elapsed from the original promised date of commissioning of the plant, the Plaintiff terminated the contract and invoked the Bank Guarantee in May, 2010 and called upon the Defendant to remove all the equipment from its site. The Plaintiff too tried to mitigate its losses by inviting third party offers to purchase some of the equipment/gas engine, but of no avail. Thereafter, the Defendant initiated arbitration proceedings against the Plaintiff for recovery of Rs.13.99 cores and the Plaintiff made a counter-claim against the Defendant for recovery of Rs.21.21 crores, wherein, the Arbitral Tribunal directed the Plaintiff to pay to Defendant No.1 a sum of Rs.4,21,82,313/- together with interest on Rs.3,09,95,249/- at 12% p.a. from the date of award until payment, along with stamp duty on the award.

Being aggrieved by the impugned award, the Plaintiff has preferred this suit on the grounds that the impugned award is contrary to facts and applicable law and is in conflict with the public policy of India. The Arbitral Tribunal having concluded that the Purchase Order was a contract for setting up an integrated Gasifier Plant that produced the guaranteed output of electricity, producer gas and got water, the Tribunal erred in holding that the failure to demonstrate the performance guarantee by operating the Plant as stipulated in the contract was merely a breach of warranty and not a breach of a condition essential to the contract and has erred in ignoring the provision of the contract that obligated Defendant No.1 to keep the Plaintiff covered by bank guarantee to the extent of 105% of the contract value and by splitting the bank guarantee as some for advances and some for other purposes. The Tribunal has erred in holding that the agreed terms of settlement were obtained by coercion by the Plaintiff and the Plaintiff chose to waive Defendant No.1's performance of obligations by its own conduct and has erred in directing the Plaintiff to refund the payments received by the Plaintiff from Defendant No.1 under the provisions of the agreed terms of settlement and directing the Plaintiff to pay the Defendant No.1 a sum of Rs.49,49,951/- towards costs of supply, construction, erection and commissioning. The Tribunal has grossly erred in rejecting the Plaintiff's counter claim in spite of the fact that the Plaintiff had indisputably proved its counter-claim in evidence, which was not assailed and remained uncontroverted by Defendant No.1, hence, this suit for the aforesaid relief.

3) Suit notice was duly served on Defendant No.1 who marked his appearance through his counsel. The Defendant has entered his defence denying the plaint averments in general and para-wise and contended that the present suit is not maintainable and is liable to be rejected/dismissed in limine under Rule 5 of the High Court of Karnataka Arbitration (Proceedings before the Court) Rules, 2001, since it is not in accordance with the said Rules and prayed to dismiss the suit with exemplary costs since it is frivolous, misconceived, vexatious and not maintainable in law or on facts and has been filed only as deliberate delaying tactic to avoid complying with the Arbitration award dated 17.06.2013 passed by the sole Arbitrator.

4) Heard. Perused the records and also written arguments submitted by Plaintiff and Defendant No.1.

5) The points that arise for my consideration are :

(1) Whether the plaintiff proves that the impugned award is patently illegal and opposed to public policy of India?

(2) Whether Plaintiff makes out any of the grounds envisaged under Section 34 of the Arbitration and Conciliation Act, 1996, to set aside the award?

(3) What Order?

6) My answer to the above points are :

Point No.1 - In the Negative;

Point No.2 - In the Negative;

Point No.3 - As per final order, for the following :

REASONS

7) Point No.1 and 2 : Since both these points are inter

related to each other, they are taken up together to avoid repetition of facts and for convenience of the court.

Upon going through the materials available on record, it is seen that the present Arbitration Suit is filed by the Plaintiff to set aside the arbitral award dated 17.06.2013 passed by learned sole Arbitrator Hon'ble Justice Sri.S.Venkataraman (Retd.), in CMP.No.54/2011, wherein, the learned Arbitrator directed the Plaintiff to pay a sum of Rs.4,21,82,313/- together with interest at 12% per annum on Rs.3,08,95,249/- from the date of award till the date of payment and Rs.10 lakhs towards costs.

The claim of the Plaintiff indicates that, the Defendant No.1 approached the Plaintiff for installation of an unique project which can convert biomass to clean producer gas free of impurities that could be used as fuel to provide heat for generation of electricity and proposed to install a biomass gasification plant in the Plaintiff's factory, which could use spent coffee waste generated in the factory for producing a gas and produce electricity by gas engine based genset. Accepting the same, the Plaintiff entered into an contractual agreement and directly Purchased one engine manufactured by Guascor of France based on the recommendation of Defendant No.1 and expected them to commission the project as agreed. The financial exposure of the Plaintiff was covered by bank guarantee for 105% of the advances given. The Defendant No.1 agreed to complete the supply of the plant and installation within 15th October, 2007 and commissioning and stabilization to be completed by February, 2008. But, the commissioning of the plant was not achieved by September, 2007 as promised. Thereafter, the Defendant No.1 failed to demonstrate the successful running of the plant as per agreed terms. Defendant No.1 agreed to compensate the Plaintiff by paying interest on the investment of Rs.9 crores made by the Plaintiff if the plant was not successfully

commissioned as per the terms of the Purchase Order by 15.12.2008. However, the Defendant No.1 was not able to commission the plant as agreed and accordingly, the parties entered into a Settlement Agreement dated 14.05.2009 and it was agreed that in the event of Defendant No.1 failing to complete the commissioning and handing over of the plant, the Plaintiff would be entitled to invoke the Bank Guarantee and recover the amounts advanced by it towards the plant and equipment. When the project was not successful in spite of all efforts, the Plaintiff terminated the contract and invoked the Bank Guarantee in May, 2010. Thereafter, the Defendant initiated arbitration proceedings against the Plaintiff for recovery of Rs.13.99 cores and the Plaintiff made a counter-claim against the Defendant for recovery of Rs.21.21 crores, wherein, the Arbitral Tribunal directed the Plaintiff to pay to Defendant No.1 a sum of Rs.4,21,82,313/- together with interest on Rs.3,09,95,249/- at 12% p.a. from the date of award until payment, along with stamp duty on the award, etc.

8) Before taking the case on merits, it is significant to note that the parties to the arbitration proceedings have very limited scope to challenge the arbitration award. The Arbitration and Conciliation Act, 1996, provides very limited scope for setting aside the arbitral award. The aggrieved parties can challenge the arbitral award only under Section 34 of the Arbitration and Conciliation Act, 1996. For the sake of convenience, the provisions of Section 34 of the Arbitration and Conciliation Act, 1996, is reproduced herewith :

> " 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 my be set aside by the Court only if -
>
> (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 provisions of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

(b) the Court finds that -

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

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

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

The Arbitration and Conciliation (Amendment) Act, 2015 provides :

"18. In Section 34 of the Principal Act.-

(I) In sub-section (2), in clause (b), for the Explanation, the following Explanations shall be substituted, namely :-

(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.", (II) after sub-section (2), the following sub-section shall be inserted, namely :-

"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 re-appreciation of evidence."

9) To add to this, the land mark judgment rendered by the Hon'ble Supreme Court of India in Civil Appeal No.10531/2014 reported in AIR 2015 SC 620 between Associate Builders Vs. Delhi

Development Authority dated 25.11.2014 extends a wider scope to Section 34 of the Arbitration and Conciliation Act, 1996. Their Lordships have clearly mandated that :

"an extent of judicial intervention notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part. (Section 5) It is important to note that, the 1996 Act was enacted to replace the 1940 Arbitration Act in order to provide for an arbitral procedure which is fair, efficient and capable of meeting the needs of Arbitration; also to provide that the tribunal gives reasons for an arbitral award; to ensure that the tribunal remains within the limits of its jurisdiction; and to minimize the supervisory roles of courts in the arbitral process.

Therefore, in our view, the phrase "public policy of India" used in Section 34 in context is required to be given a wider meaning. It can be stated that the concept of public policy connotes some matter which concerns public good and the public interest. What is for public good or in public interest or what would be injurious or harmful to the public good or public interest has varied from time to time. However, the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award is likely to adversely affect the administration of justice. Hence, in our view in addition to narrower meaning given to the term "public policy" in Renusagar case is required to be held that the award could be set aside if it is patently illegal. The result would be, award could be set aside if it is contrary to :

(a) Fundamental policy of Indian law; or

(b) The interest of India; or

(c) Justice or morality, or

(d) In addition, if it is patently illegal.

Illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy.

Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court. Such award is opposed to public policy and is required to be adjudged void.

103. Such patent illegality, however, must go to the root of the matter. The public policy, indisputably, should be unfair and unreasonable so as to shock the conscience of the court. Where the Arbitrator, however, has gone contrary to or beyond the expressed law of the contract or granted relief in the matter not in dispute would come within the purview of Section 34 of the Act.

35. Without meaning to exhaustively enumerate the purport of the expression "fundamental policy of Indian law", we may refer to three distinct and fundamental juristic principles that must necessarily be understood as a part and parcel of the fundamental policy of Indian law. The first and foremost is the principle that in every determination whether by a court or other authority that

affects the rights of a citizen or leads to any civil consequences, the court or authority concerned is bound to adopt what is in legal parlance called as "judicial approach" in the matter. The duty to adopt a judicial approach arises from the very nature of the power exercised by the court or the authority does not have to be separately or additionally enjoined upon the fora concerned. What must be remembered is that the importance of a judicial approach in judicial and quasi-judicial determination lies in the fact that so long as the court, tribunal or the authority exercising powers that affect the rights or obligations of the parties before them shows fidelity to judicial approach, they cannot act in an arbitrary, capricious or whimsical manner. Judicial approach ensures that the authority acts bona fide and deals with the subject in a fair, reasonable and objective manner and that its decision is not actuated by any extraneous consideration. Judicial approach in that sense acts as a check against flaws and faults that can render the decision of a court, tribunal or authority vulnerable to challenge.

The third juristic principle is that a decision which is perverse or so irrational that no reasonable person would have arrived at the same is important and requires some degree of explanation. It is settled law that where-

1. a finding is based on no evidence, or

2. an arbitral tribunal takes into account something irrelevant to the decision which it arrives at; or

3. ignores vital evidence in arriving at its decision.

such decision would necessarily be perverse.

A broad distinction has, therefore, to be maintained between the decisions which are perverse and those which are not. If a decision is arrived at on no evidence or evidence which is thoroughly unreliable and no reasonable person would act upon it, the order would be perverse. But if there is some evidence on record which is acceptable and which could be relied upon, howsoever compendious it may be, the conclusions would not be treated as perverse and the findings would not be interfered with.

It must clearly be understood that 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.

Thus an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score.

A Court does not sit in appeal over the award of an Arbitral Tribunal by reassessing or re-appreciating the evidence. An award can be challenged only under the grounds mentioned in Section 34(2) of the Act.

The third ground of public policy is, if an award is against justice or morality. These are two different concepts in law. An award can be said to be against justice only when it shocks the conscience of the court. An illustration of this can be given. A claimant is content with restricting his claim, let us say to Rs.30 lakhs in a statement of claim before the Arbitrator and at no point does he seek to claim anything more. The arbitral award ultimately awards him 45 lakhs without an acceptable reason or justification. Obviously, this would shock the conscience of the court and the arbitral award would be liable to be set aside on the ground that it is contrary to "justice".

If the Arbitrator commits an error in the construction of the contract, that is an error within his jurisdiction. But if he wanders outside the contract and deals with matters not allotted to him, he commits a jurisdictional error. Extrinsic evidence is admissible in such cases because the dispute is not something which arises under or in relation to the contract or dependent on the construction of the contract or to be determined within the award. The ambiguity of the award can, in such cases, be resolved by admitting extrinsic evidence. The rationale of this rule is that the nature of the dispute is something which has to be determined outside and independent of what appears in the award. Such a jurisdictional error needs to be proved by evidence extrinsic to the award.

The court while considering challenge to arbitral award does not sit in appeal over the findings and decision of the Arbitrator, which is what the High Court has practically done in this matter. The umpire is legitimately entitled to take the view which he holds to be the correct one after considering the material before him and after interpreting the provisions of the agreement. If he does so, the decision of the umpire has to be accepted as final and binding."

10) In the background of provisions of Section 34 of the Act and the mandates of Hon'ble Supreme Court in the above referred judgment, if we analyze the case on hand, it indicates that Plaintiff herein who is Respondent in the Arbitration case has come up with this suit under Section 34 of the Arbitration and Conciliation Act, 1996.

11) The learned counsel for the Plaintiff vehemently argued that the learned Arbitrator gravely erred in passing the award in spite of holding that the order was an indivisible contract for setting up an integrated Gasifier Plant that produced electricity, producer gas and hot water, but rejected the claim of the Plaintiff holding that the purchase order comprised of three independent and severable contracts, even though the Defendant No.1 had committed breach of contract, instead of holding that the entire project itself was an issue and the tribunal ought to have fixed the entire liability on the Defendant. The learned counsel further argued that the act of the Tribunal is patently illegal for the reason that the learned Arbitrator held that the Plaintiff could have achieved 40% of the savings which were expected to be achieved if the plant had been successfully commissioned as stipulated. This is contradictory to the earlier findings. The learned counsel vehemently argued that the Arbitrator cannot go beyond the scope of the agreement and the observation of the Arbitrator is contrary to Section 12 of the Sale of Goods Act. The Arbitrator has no business to invoke equity, ends of justice in an arbitration proceedings. The learned Arbitrator has to stick on to the terms of the agreement squarely, but in this case, the Arbitrator has erred in following the mandatory requirements of the Arbitration and Conciliation Act, hence, the act is patently illegal. The learned counsel further argued that there was a performance guarantee and not warranty as contemplated

under the Agreement, in spite of that, the learned Tribunal held that it is only a breach of warranty, which is contrary to the scope of Arbitration etc.

12) On the other hand, the learned counsel appearing for the Defendant vehemently argued that the Plaintiff is trying to artificially and as an afterthought make out a case under Section 34(2)(b) by adopting the diversionary tactics, absolutely there are no inconsistencies in the findings. The award is in a systematic manner and the reasoning and finding arrived by the learned Arbitrator is in accordance with the mandatory requirements of the Arbitration and Conciliation Act. The proof of each issue depended on distinct and independent bundles of relevant facts. The learned Arbitrator has given due importance to all the evidence available on record and given proper finding and arrived at a fair and just conclusion. The judgment relied by the Plaintiff are not at all applicable to the case on hand, as all the judicial reasoning relied by the Plaintiff are rendered before the amendment of the Act came into force, since the amendments were brought in precisely to overcome the confusion that had arisen owing to a multiplicity of judicial rulings. The judgment relied by the Plaintiff cannot be applied to the case on hand, etc.

13) Upon going through the materials available on record, it is seen that undisputedly the Plaintiff and Defendant No.1 had entered into a contractual obligations, wherein, the Defendant herein agreed to install a plant and machinery with a performance guarantee to produce gasification of biomass from coffee husk and burn it in an imported specified gas engine and produces steam hot water and electricity etc. It is equally an undisputed fact that the work was not materialized as per the guarantee agreement; rather, there were some short comings. In that regard, matter was dealt before the learned Arbitrator, wherein, the learned Arbitrator had directed the Plaintiff herein to pay Rs.4 Crores and Odd with interest etc.

14) Upon going through the materials available on record, it is seen that even though as rightly argued by the learned counsel for the Plaintiff it appears that the end product is the expected output as per the first agreement, but, much water has flown under the bridge after the work progressed. Both the parties have entered into additional agreements modifying the earlier agreement to suit their convenience. It is also seen that even though the Plaintiff herein is concerned about the end product in the first agreement, but during the course of project, an additional agreement came into force, wherein, the Plaintiff herein himself imported the gasifier engine from Guascor, France. Hence, as rightly pointed by the learned counsel appearing for the Defendant, the Plaintiff had indicated that they themselves could place order for importing Guascor's gas based generator and other few items to be imported from M/s.Eqtec, which resulted in deviation from the original agreement cannot be ruled out.

15) As rightly pointed out by the learned counsel for the Defendant, that "the Plaintiff themselves in order to avail exemption from Central Excise duty and Customs duty spilt the contract into three objects with a separate consideration for each object and that actually three separate and severable contracts", holds some water. The observations in the award at page-14 indicate that Ex.C206(4) Minutes of Meeting dated 03.11.2005 held by the Plaintiff's firm establish that it was the Plaintiff who wanted to claim exemption from Customs duty and Excise duty on the ground that the Plaintiff was an Export Oriented Unit. This undisputed document shows that the Plaintiff told the Defendant

that they would place a purchase order and furnish copy of EOU certificate to enable to claim exemption from customs duty and excise duty adds strength to the Defendant's claim in this regard. Hence, as rightly observed by the learned Arbitrator, even though as per the initial agreement entered into between the parties, there is a single contract for the whole project, but that has been made divisible by the subsequent conduct of the parties referred to above by entering into additional agreements, hence, I do not find any stuff in the claim of the Plaintiff in this regard.

16) Apart from that, the learned Arbitrator has rendered sound reasoning regarding bank guarantee, wherein, it is clearly held that, merely because the contract stipulates as to when the Plaintiff can encash the bank guarantees that itself does not automatically become entitled the Plaintiff to encash the entire amount of the bank guarantee. When a contract is broken, the party who suffers by such breach is entitled to receive from the defaulting party compensation for any loss or damage caused to him, which naturally arose in the usual course of things from such breach. Under Section 74, the defaulting party is liable to pay reasonable compensation not exceeding the amount named or the penalty stipulated for. It is also observed by the learned Arbitrator that, Section 13(2) of the Sale of Goods Act stipulates that where a contract of sale is not severable and the buyer has accepted the goods or part thereof, the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty and not as a ground for rejecting the goods and treating the contract as repudiated, unless there is a term of the contract, expressed or implied to that effect. Herein is the case, admittedly except failure to run the engine for the period stipulated and except producer of electricity to the expected standards, all other functions of the project is still successful and running even now. Hence, as rightly held by the learned Arbitrator this could be a breach of warranty and not breach of guarantee, that too, in the absence of parties failure to stick on to the original agreement throughout.

17) The materials available on record indicates that even though with some extra efforts there were possibilities of making this project successful as expected, but it appears that there were some misunderstanding creped in between the Plaintiff and Defendant in respect of premature encashment of bank guarantee, that resulted the Plaintiff herein to terminate the contract without providing additional time for making necessary rectification of the errors. It is an undisputed fact that this is not a proven technology, rather on experimental basis the Defendant attempted to install the project. Apart from that, it is also an undisputed fact that some parts of the project imported by the Defendant were incorporated in the Gasification plant after delivery. The correspondence shows that in connection with the controversy regarding the return of bank guarantee, the Plaintiff had stopped operating the plant. However, materials on record indicates that the Plaintiff herein have accepted supply of gasifier and had treated the title to the same having passed to them. Hence, the learned Arbitrator has rightly arrived at a conclusion that Clause 7 Read with Clause 12 of Ex.R.15 entitles the Plaintiff to encash the bank guarantee and levy liquidated damages upto 0.5% upto contract value, if the performance parameters are not met in full. These provisions are consistent with the right of the Plaintiff in case of breach of warranty and are not consistent with the breach of a condition entitling the Plaintiff to reject the goods or treat the contract as repudiated. Hence, I do not find any patent illegality on the act of the learned Arbitrator by holding that this contract is a breach of warranty.

18) Relying upon the judgment reported in 2015 SCC Bom 4154 between Bajrangal Anilkumar Jaju Vs. Vyasya Bank Ltd., the learned counsel for the Plaintiff made much on the word 'coercion' used by the learned Arbitrator in his award, wherein, their Lordships have held that :

> " "Coercion" defined - "Coercion" is the committing, or threatening to commit, any act forbidden by the Indian Penal Code, or the unlawful detaining, or threatening to detain, any property, to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement."

I have carefully gone through the judgment relied by the learned counsel. The facts and circumstances of the case is entirely different compared to the facts and circumstances of this case. Hence, as rightly argued by the learned counsel for the Defendant, the Plaintiff herein is a huge gigantic company having good hold in the market. The Defendant herein is a very small company compared to Plaintiff. Added to that, Defendant has already provided 105% of the Bank Guarantee which is lying with the Plaintiff. Hence, even though there may not be any direct coercion or threat for entering into additional contract or modification of terms of contract, but there is a fear of repudiation for flimsy reasons are quite possible. Hence, as rightly claimed by the Defendant, in order to avoid any mistakes from their side which resulted in total repudiation, the Defendant has mended to the tune of the Plaintiff cannot be ruled out. Hence, I do not find any patent illegality on the part of the learned Arbitrator by holding that on 14.05.2009 the Plaintiff called the Defendant to their office, forced him to accept Ex.C.108 which is ostensibly an agreed terms of settlement but is actually a diktat imposed by the Plaintiff to the Defendant by holding out the threat of immediately and right away invoking the bank guarantees. Hence, the materials on record indicate that in pursuance of the agreement, the Plaintiff would temporarily refrain from enforcing the bank guarantees.

19) It is also seen that the Plaintiff herein has encashed the bank guarantees furnished by the Defendant towards the M/s.Guascor and M/s.Eqtec, the gas engine and allied products. Hence, I do not find any patient illegality by the learned Arbitrator holding that the Defendant was provided the bank guarantees for supply to be made by M/s.Guascor and M/s.Eqtec, only to facilitate the import of those items as those suppliers were not willing to provide bank guarantee as sought for by the Plaintiff and were also not agreeable for the terms of payment put by the Plaintiff and those letters do not indicate any agreement between the parties imposing a liability on the Defendant to furnish bank guarantee with regard to the value of the imported items to cover the Plaintiff's financial exposure in that regard. Hence, once the supplies were made and accepted by the Plaintiff, they had no right to encash the bank guarantee furnished by the Defendant in respect of those items. Hence, I do not find any unreasonable act which could be termed as patent illegallity by holding that because of the economic duress exercised by the Plaintiff, the settlement is voidable at the option of the Defendant. Hence, it is clear that the Plaintiff themselves had by their conduct dispensed with the performance by the Defendant of the obligations under the deed of settlement.

20) It is also seen that the spray drier was being run from the gas produced. But the Defendant herein was reluctant to restart the unit due to issue regarding bank guarantee and when the machine was restarted, there was a damage to the filter bags on account of the Plaintiff's staff operating the

plant in spite of specific direction by the Defendant not to operate in their absence. Added to that, M/s.Guascor Company failed to provide assistance of two engineers for trial run, which also resulted in malfunctioning. Hence, the learned Arbitrator has arrived at a conclusion that the Plaintiff validly terminated the contract on the ground of breach committed by the Defendant, but that does not unnecessarily mean that they were entitled to the entire amount of such bank guarantees without reference to the damages which they are entitled as per the terms of the contract. Hence, absolutely there were no irregularities by the learned Arbitrator in holding that the work entrusted to the Defendant was indivisible. The price and charges for supply, construction and erection and commissioning supervision are separately given and advances are also given separately under these three heads. That must be because of Clause 13 which stipulates the limit of liability of the Defendant to the price of item/equipment or service which is at issue. The above provision starts with a non-obstance clause and the language used is emphatic, unambiguous and clear and as such, its ordinary meaning will have to be taken. Even if there are any clauses which may run counter to Clause 13, they have to be construed in such a way that Clause 13 is not violated. Admittedly, the parties had agreed to start a project which was first of its kind in the world. In fact, the Defendant at first wanted to complete the project at their own cost and to transfer it to the Plaintiff after successful commissioning. But the Plaintiff who wanted to save the excise duty and tax liability wanted the Defendant to straight away sell the plant. Therefore, there is nothing strange in the parties agreeing to limit the liability of the Defendant in case some problem arises in the execution of the project. Hence, the learned Arbitrator has rightly arrived at a conclusion that it is a settled principle that a person who suffers loss on account of the breach committed by the other has to take reasonable steps to mitigate or minimize the loss. If he fails to do so, he cannot claim damages for any such loss which he ought reasonably to have avoided.

21) The learned counsel for the Plaintiff relying on the judgment reported in 2003 (5) SCC 705 in the case of ONGC Vs. Saw Pipes argued that in exercising jurisdiction, the Arbitral Tribunal cannot act in breach of some provision of substantive law or the provisions of the Act. Hence, it would be patently illegal which would be interfered under Section 34 of the Act.

The learned counsel further relied upon Renusagar's case and argued that the award could be set aside if it is contrary to fundamental policy of Indian law or the interest of India; or justice or morality, or if it is patently illegal.

The learned counsel for the Plaintiff relied on the decision of the Hutti Gold Mines Co. Ltd., Vs. Mr.Khaleel Ahmed Dakhani and Karnataka Soaps and Detergents Limited Vs. Olivia Impex Private Limited rendered by the Hon'ble Supreme Court of India and argued that if the award would be in conflict with the Public Policy of India, if the same is in contravention with the fundamental policy of Indian laws, it is submitted that in the present case, the award is in contravention to the fundamental policy of Indian laws, hence, requires to be set aside.

22) Upon careful perusal of the materials available on record and the grounds urged by the Plaintiff for setting aside the arbitral award, I am of the opinion that, absolutely no grounds are made out by the Plaintiff to establish any of the grounds mentioned in the plaint or any of the grounds available in Section 34(b) of the Arbitration and Conciliation Act, 1996. The judgment referred supra

rendered by the Hon'ble Supreme Court in Associate Builders Vs. Delhi Development Corporation makes it very clear that this court cannot sit on an appellate jurisdiction and the arbitral award cannot be set aside on trivial grounds. The Hon'ble Supreme Court consistently mandated that, if the Arbitrator wonders outside the work and deals with the matter not allotted to him, then only it can be termed as judicial error. Herein is the case, the learned Arbitrator has dealt the matter squarely within the four corners of the matter allotted to him. Added to that, no act is done by the learned Arbitrator which could be termed the award as perverse or unfair and unreasonable so as to shock the conscience of the court. The Plaintiff has utterly failed to establish that the learned Arbitrator has gone contrary to or beyond the expressed law of the contract or granted relief in the matter not in dispute. Under these circumstances, I hold that the Plaintiff has utterly failed in establishing that the award passed by the learned Arbitrator falls within any of the Clauses of Section 34 of the Arbitration and Conciliation Act, 1996, much less, any of the grounds mentioned in the plaint is established. Accordingly, I answer the above points in the negative.

23) Point No.3 : For the foregoing reasons and answer to Point No.1 and 2, the present Arbitration suit fails. In the result, I proceed to pass the following :

> ORDER The Arbitration suit filed by the Plaintiff under Section 34(2)(b)(ii) of the Arbitration and Conciliation Act, 1996, for setting aside the arbitral award dated 17.06.2013 passed by the Hon'ble Arbitrator in CMP.No.54/2011; is hereby dismissed with costs.
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> (Dictated to the Judgment Writer, transcribed and computerized by her, transcript thereof corrected and then pronounced by me in open Court, dated this the 17th October, 2016.) (K.M.RAJASHEKAR) VI Addl.City Civil & Sessions Judge Bengaluru City.