* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ O.M.P. (COMM.) 151/2018

Reserved on: 25th May, 2018
Date of decision : 9th July, 2018

BHARAT HEAVY ELECTRICALS LIMITED ..... Petitioner
Through: Mr.Ciccu Mukhopadhyay, Sr. Adv. with Mr.Abhijeet Sinha, Mr.Saurav Agrawal, Mr.S.Tiwari, Ms.Rashmi Gogoi, Advs.

versus

G+H SCHALLSCHUTZ GMBH ..... Respondent
Through: Mr.Abhimanyu Bhandari, Ms.Roohina Dua, Mr.Cheitanya Madan, Advs.

CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA

1. This petition has been filed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') challenging the Interim Award dated 31.10.2017 passed by the Arbitral Tribunal appointed by the parties in terms of Clause 16 of the Purchase Order No.B3V6474 dated 03.01.2014. The Arbitral Tribunal by its Impugned Award has *inter-alia* held as under:

> *"194. For the foregoing reasons, the Tribunal renders the following decisions:*
>
> *(a) the Purchase Order is subject to Indian law;*
>
> *(b) the Purchase Order was frustrated with effect from 27 March 2015;*

(c) Claimant is entitled to rely upon, and Respondent is in breach of, the provisions of Clause 25 of the Purchase Order;

(d) the jurisdiction of the Tribunal to hear the Parties on damages arising from the said breach is expressly reserved, as is the Tribunal's jurisdiction as to costs."

2. The facts giving rise to the disputes between the parties can be summarised as under:

a) The petitioner was charged with the construction of a power plant in Marib, Yemen by the Public Electric Company of Yemen(PEC);

b) On 29.04.2013, the petitioner commenced an internal process to identify the potential vendors for delivery of four identical Exhaust Gas Systems (EGS) for a gas turbine used in the Marib Project, to be supplied in two lots of two systems each;

c) On 03.01.2014 the petitioner issued a Purchase Order in favour of the respondent for supply of four identical Exhaust Gas Systems along with supervision for Erection and Commissioning of the same for the Marib Project in Yemen. The EGS was to be delivered by the respondent in two lots that is Lot-1 (Unit 1 and 2) and Lot-2 (Unit 3 and 4). The total value of the contract was EUR 7,901,710.12;

d) On 04.12.2014 an amendment was agreed between the parties by which the delivery of the Lot-1 was changed from 03.11.2014 to 11.01.2015, whereas for Lot-2 it was revised from 03.02.2015 to 13.04.2015. Certain supplies were made by the

respondent to the petitioner in terms of the Purchase Order and payments thereof were also made by the petitioner to the respondent and there is no dispute between the parties in relation to such supplies. The disputes between the parties relates only to the delivery of Indian Components of Unit 3 and 4 of Lot-2;

e) It is the case of the petitioner that on 21.01.2015, the Government of India had put a travel advisory asking the Indians to leave Yemen and to avoid all travel to Yemen due to deterioration of the political situation in Yemen;

(f) The petitioner, on 20.02.2015 wrote to the respondent to put on hold with immediate effect the Purchase Order till further communication. The relevant extracts from this letter are as under:-

> *"Due to current political turmoil in Yemen, our customer has put hold on accepting further supplies for Marib Ph-II Project till further communication. The matter is being discussed with our customer.*
> *However, in view of the above extra-ordinary situation, hold is being placed with immediate effect on BHEL's above mentioned purchase order till further communication. Accordingly, hold may be placed by you on all activities including dispatch/shipment related to this purchase order till further communication from BHEL.*
> *We regret for the situation and thank in advance for your understanding."*

(g) The respondent by its letter dated 20.02.2015 *inter-alia* informed the petitioner that Unit 3 was complete and had been successfully inspected by Llyods, the Inspecting Agency, while Unit 4 was in a very final stage of completion and recommended

that the work of Unit 4 should be completed and then stored in accordance with Clause 25 of the Purchase Order until further notice from the petitioner. The contents of this letter are important and reproduced herein below:

"Reference is made to your notification of hold for further supplies which we have received today.

From your notification it is understood that all activities including dispatch are to be put on hold which would include the stopping of the fabrication activities as well.

The present status of the project is as follows:

• LOT 1 (unit 1 and 2) European and India content are already delivered to CFR Hodeidah, Yemen

• LOT 2 (unit 3 and 4)

- *European content: Materials of unit 3 and 4 are shipped. ETA Hodeidah of carrying vessel is 07.03.2015.*
- *India content: Unit 3 is completed and successfully inspected by Lloyds. Unit 4 is in very final stage (blasting coating, packing) completion is scheduled by March 02, 2015.*

In view of the present status we would highly recommend that the works on unit 4 should be completed and then stored in accordance of contractual clause 25 until further notice given from BHEL.

Immediate stopping of the fabrication activities at this stage will make the materials suffer and would create significant additional costs related to the fabrication which would have to be claimed from 8HEL.

To avoid this we kindly request your confirmation to complete the balance activities. Meanwhile the fabrication activities will continue unless otherwise instructed."

(h) The petitioner vide its email dated 25.02.2015 informed the respondent that there is hold only on dispatch/shipment activities and there is no hold on other activities like engineering, manufacturing, testing etc and these activities can proceed in a normal manner. The email is reproduced herein below:

"Please refer to our trailing mail. After review of status, this is to inform that Hold will continue on dispatch/shipment activities only till further communication/clearance from BHEL. However, there is no hold on other activities like engineering, manufacturing, testing, etc. and these activities can proceed in a normal manner.

Please take appropriate action in line with the above."

(i) On 19.03.2015 the respondent informed the petitioner of completion of Lot-2 components in India and requested the petitioner to issue Material Dispatch Clearance Certificate (MDCC) as per Clause 11 of the Purchase Order. As the petitioner did not respond to this request, the respondent again wrote to the petitioner on 22.04.2015 requesting that the Letter of Credit may be amended since the MDCC had not been issued thus far;

(j) On 21.01.2015 the Government of India issued an advisory asking the Indians to leave Yemen due to war in Yemen and the same was followed by the large scale evacuation of Indians by air/sea resulting in demobilisation of the personnel of the petitioner, sub-contractor and consultants from the project;

(k) On 30.03.2015 the petitioner formally declared force majeure condition with effect from 27.03.2015 as per the Contract between the PEC and the petitioner;

(l) On 01.05.2015 the petitioner invoked the force majeure clause under the Purchase Order issued to the respondent;

(m) On 07.09.2015 the respondent wrote to the petitioner stating that according to Clause 25 the completed supplies of Lot-2 had been kept under storage and as in accordance with the Purchase Order the original delivery was scheduled on 13.04.2015, the six month storage period will end by 13.10.2015;

(n) The petitioner vide letter dated 14.10.2015 claimed that the force majeure condition subsisted and can only be reviewed once things improve in Yemen;

(o) The respondent vide its letter dated 15.10.2015 again relying upon Clause 25 of the Purchase Order, requested the petitioner to resolve the matter and accept the delivery of the material of Lot-2. On the other hand, the petitioner vide its letter dated 20.10.2015 informed the respondent that it was highly optimistic that the situation will improve in Yemen and requested the respondent for "further extension of the currently available storage facility for materials till the end of March, 2016 without any financial implications.";

(p) The respondent, however, by its letter dated 23.10.2015 rejected this request of the petitioner and on 23.11.2015 raised an invoice on the petitioner;

(q) The Legal Department of the respondent vide email dated 22.12.2015 called upon the petitioner to make the payment against the invoice so raised failing which, the respondent initiated the Arbitration Proceedings as per Clause 15 of the Purchase Order. In response, the petitioner vide letter dated 21.01.2016 requested the respondent not to initiate the Arbitration Proceedings and bear with the petitioner until further improvement of the situation in Yemen, which in the opinion of the petitioner, was expected by April, 2016;

(r) The respondent vide its letter dated 22.02.2016 made an offer of settlement to the petitioner, however, as there was no response from the petitioner, the respondent invoked the Arbitration Agreement and the arbitration proceedings have resulted in the Interim Award which has been impugned in the present petition.

3. As far as the existence of the force majeure conditions are concerned, there is no dispute between the parties. Due to the political unrest in Yemen and the advisory issued by the Government of India the same, in fact, cannot be disputed. The Arbitral Tribunal also takes note of this position and has held as under:

> *"174. The Tribunal notes that the Indian government's decision to commence a full evacuation of its nationals from Yemen by reason of the war was taken on 25 March 2015. At that point, it seems to the Tribunal that the frustration of the Marib Project was beyond doubt, since it was no longer practically possible for Respondent to continue the works. But without prejudice to its*

submission that 20 February 2015 is the operative date, Respondent contends that, at the latest, the contract was frustrated on 30 Match 2015, when Respondent issued its force majeure notice to PEC, effective 27 March 2015. While, as a matter of fact, Respondent did not give notice to Claimant until May 2015, the Tribunal concludes that the deemed operative date for the frustration of the Purchase Order should be 27 March 2015. By then, manufacture pursuant to the Purchase Order was already complete."

4. The Arbitral Tribunal however holds that Clause 25 of the Purchase Order would come into effect to deal with a situation in an event of hold or force majeure impacting the supply of the components, even though the Purchase Order, otherwise would be a contract rendered impossible of performance. It therefore holds that the claimant is entitled to apply Clause 25 of the Purchase Order, which provides an alternative mechanism for the delivery of the components in situations such as those which arose at Marib and as the petitioner did not take the delivery of the components in India, it was in breach of its obligation under the Purchase Order. The relevant findings of the Arbitral Tribunal in this regard are reproduced herein below:

"186. In this case, the question is whether it is possible to regard the Purchase Order as containing two discrete items of supply (the components on the one hand and the supervision on the other) and, in those circumstances, whether the frustration of the underlying contract between PEC and Respondent would be an end to the Purchase Order as a whole or whether Clause 25 would operate to preserve the contract under the Ghose exception to the extent of the supply of the components.

187. On analysis of its terms, it seems to the Tribunal that the Purchase Order lends itself to such a construction. It cannot be disputed that the supply of the components constituted the overwhelming proportion of the supply. Further:

(a) the components and the supervision are priced independently (EUR7,842,110.12 for the components and EUR54,000 for the supervision, but subject to the actual number of days spent);

(b) the payment regimes are very different;

(c) the components were to be supplied against fixed delivery dates, whereas the supervision services were to be supplied "on intimation" by Respondent;

(d) there are differing warranty periods for the two scopes of supply;

(e) liquidated damages relate exclusively to the component supply;

(f) while there was one performance guarantee of 10% of the purchase order value, the entire value of the supervision services was less than 0.7% of the purchase order value;

(g) the vast majority of the provisions of the Purchase Order are directed to performance in respect of component supply- as is the entirety of Annexure PU-93.

188. In the opinion of the Tribunal, such a reading is sufficient to bring Clause 25 within the Ghose exception. It is effective to deal with the situation in which an event of hold or force majeure impacts upon the supply of the components, even though the Purchase Order otherwise would be a contract rendered practically impossible of performance.

189. The Tribunal has established on the facts that manufacture of the components was complete before

notice of frustration of the PEC contract was given to PEC by Respondent and, in any event, well before any such notification of such frustration was provided by Respondent to Claimant. But for the events, which led to the frustration of the contract, there is no reason to suppose that Claimant would not have been in a position to meet the revised LOT 2 April 2015 delivery date. Claimant thereafter gave notice of its intention to effect delivery to India in conformity with Clause 25. In the opinion of the Tribunal:

(a) Claimant was entitled to apply the provisions of Clause 25 of the Purchase Order;

(b) Clause 25 provides an alternative mechanism for the delivery of the components in circumstances such as those which arose at Marib; and

(c) Respondent is in breach of its obligations by reason of its failure to take the steps required of it to enable Claimant to effect delivery to India in lieu of Hodaidah pursuant to the terms of Clause 25 of the Purchase Order."

5. Before proceeding further it would be relevant to quote Clause 25 of the Purchase Order:

"Storage Conditions in Case of Hold by BHEL:

In the event of hold / force major conditions M/S G+H will keep material in their custody for 6 months without any storage charges to BHEL and if it is not possible to make shipment to Marib even after 06 months of the scheduled delivery, then to ship / dispatch the material to Mumbai / haridwar and claim the payment. The CFR value will remain unchanged in such eventuality."

6. A bare reading of the above Clause would show that the parties had agreed that in the event of a force majeure condition, the petitioner would not be completely discharged of its obligation to pay for the components. Instead, the respondent shall keep the material in its custody for six months without any storage charges to the petitioner and if even after expiry of this period it is not possible to make the shipment to Marib, Yemen, the material would be supplied at Mumbai/Haridwar and the respondent would be entitled to claim the payment as per the Cost and Freight (CFR) value.

7. Learned senior counsel for the petitioner submits that the Purchase Order stood frustrated with effect from 27.03.2015 and therefore, in terms of the Clause 56 of the Indian Contract Act became void.

8. Learned senior counsel for the petitioner submits that once the contract becomes impossible of performance, there is an automatic discharge of contract under Section 56 of the Indian Contract Act. He submits that as the contract stood discharged on 27.03.2015 and admittedly the scheduled date of delivery of the material was 13.04.2015, there was no contract in existence on 13.04.2015 of which the petitioner could have been held in breach. He placed reliance on the following judgments:-

a) ***Sushila Devi v Hari Singh,*** (1971) 2 SCC 288;

b) ***Firm Meghraj Nathmal v. Firm Motilal Suresh Chand***, 1963 SCC OnLine Raj 120;

c) ***State Bank of India v. Earnest Traders Exporters, Importers & Commission Agents***, (1997) 41 DRJ 659;

d) ***Andhra Pradesh State Electricity Board, Hyderabad v. A.P. Carbides Limited***, 1985 SCC OnLine AP 146;

e) ***Kumaraswamy and Anr. v. Appachi Gounder and Anr***., 1999 SCC OnLine Mad 175

9. Section 56 of the Indian Contract Act is reproduced herein below:

> *"56.* ***Agreement to do impossible act –*** *An agreement to do an act impossible in itself is void.*
>
> ***Contract to do act after wards becoming impossible or unlawful.-*** *A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.*
>
> ***Compensation for loss through non-performance of act known to be impossible or unlawful.—****Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know, to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise."*

10. In ***Satyabrata Ghose v. Mugneeram Bangur & Co. and Anr.***, AIR 1954 SC 44, the Supreme Court explained the effect of Section 56 of the Contract Act as under:

> *"**9.** The first paragraph of the section lays down the law in the same way as in England. It speaks of something which is impossible inherently or by its very nature, and no one can obviously be directed to perform such an act. The second paragraph enunciates the law relating to discharge of contract by reason of supervening impossibility or illegality of the act agreed to be done.*

The wording of this paragraph is quite general, and though the illustrations attached to it are not at all happy, they cannot derogate from the general words used in the enactment. This much is clear that the word "impossible" has not been used here in the sense of physical or literal impossibility. The performance of an act may not be literally impossible but it may be impracticable and useless from the point of view of the object and purpose which the parties had in view; and if an untoward event or change of circumstances totally upsets the very foundation upon which the parties rested their bargain, it can very well be said that the promissor finds it impossible to do the act which he promised to do.

10. *Although various theories have been propounded by the Judges and jurists in England regarding the juridical basis of the doctrine of frustration, yet the essential idea upon which the doctrine is based is that of impossibility of performance of the contract; in fact impossibility and frustration are often used as interchangeable expressions. The changed circumstances, it is said, make the performance of the contract impossible and the parties are absolved from the further performance of the contract impossible and the parties are absolved from the further performance of it as they did not promise to perform an impossibility. The parties shall be excused, as Lord Loreburn says*

> *"If substantially the whole contract becomes impossible of performance or in other words impracticable by some cause for which neither was responsible."*

In Joseph Constantine Steamship Line Limited v. Imperial Smelting Corporation Ltd., Viscount Maugham observed that the "doctrine of frustration is only a special case of the discharge of contract by an impossibility of performance arising after the contract was made". Lord Porter agreed with this view and rested the doctrine on the same basis. The question was considered and

discussed by a Division Bench of the Nagpur High Court in Kesari Chand v. Governor-General-in-Council and it was held that the doctrine of frustration comes into play when a contract becomes impossible of performance, after it is made, on account of circumstances beyond the control of the parties. The doctrine is a special case of impossibility and as such comes under Section 56 of the Indian Contract Act. We are in entire agreement with this view which is fortified by a recent pronouncement of this Court in Ganga Saran v. Ram Charan , where Fazl Ali, J., in speaking about frustration observed in his judgment as follows:

"It seems necessary for us to emphasise that so far as the courts in this country are concerned, they must look primarily to the law as embodied in Sections 32 and 56 of the Indian Contract Act, 1872."

We hold, therefore, that the doctrine of frustration is really an aspect or part of the law of discharge of contract by reason of supervening impossibility or illegality of the act agreed to be done and hence comes within the purview of Section 56 of the Indian Contract Act. It would be incorrect to say that Section 56 of the Contract Act applies only to cases of physical impossibility and that where this section is not applicable, recourse can be had to the principles of English law on the subject of frustration. It must be held also, that to the extent that the Indian Contract Act deals with a particular subject, it is exhaustive upon the same and it is not permissible to import the principles of English law dehors these statutory provisions. The decisions of the English Courts possess only a persuasive value and may be helpful in showing how the Courts in England have decided cases under circumstances similar to those which have come before our courts."

xxxxx

> ***15.*** *These differences in the way of formulating legal theories really do not concern us so long as we have a statutory provision in the Indian Contract Act. In deciding cases in India the only doctrine that we have to go by is that of supervening impossibility or illegality as laid down in Section 56 of the Contract Act, taking the word "impossible" in its practical and not literal sense. It must be borne in mind, however, that Section 56 lays down a rule of positive law and does not leave the matter to be determined according to the intention of the parties.*
>
> *xxxxx*
>
> ***20.*** *It is well settled and not disputed before us that if and when there is frustration the dissolution of the contract occurs automatically. It does not depend, as does recission of a contract on the ground of repudiation or breach, or on the choice or election of either party. It depends on the effect of what has actually happened on the possibility of performing the contract. What happens generally in such cases and has happened here is that one party claims that the contract has been frustrated while the other party denies it. The issue has got to be decided by the court "ex post facto, on the actual circumstances of the case".*

11. Applying the above principle to the facts on the present case, it cannot be denied that the contract would have stood frustrated due to the political unrest in Yemen. However, as noted by the Arbitral Tribunal as well, this would not be sufficient or come in aid of the stand urged by the petitioner. In ***Satyabrata Ghose*** (supra) the Supreme Court further reiterated that if the parties had contemplated the possibility of an intervening circumstance affecting the performance of the contract but expressly stipulate that the contract would stand despite such circumstance, there can be no case of frustration. Paragraph 17 of the

judgment is instructive of this proposition of law and is reproduced as under:

> *"**17.** It must be pointed out here that if the parties do contemplate the possibility of an intervening circumstance which might affect the performance of the contract, but expressly stipulate that the contract would stand despite such circumstance, there can be no case of frustration because the basis of the contract being to demand performance despite the happening of a particular event, it cannot disappear when that event happens. As Lord Atkinson said in Matthey v. Curling "a person who expressly contracts absolutely to do a thing not naturally impossible is not excused for non-performance because of being prevented by the act of God or the King's enemies … or vis major". This being the legal position, a contention in the extreme form that the doctrine of frustration as recognised in English law does not come at all within the purview of Section 56 of the Indian Contract Act cannot be accepted."*

12. In the present case therefore, the parties had clearly, in Clause 25 of the Purchase Order, agreed that the force majeure condition would not operate to discharge the parties of their contractual obligation as far as supply of material and payment thereof is concerned. It further provided for the code of conduct to be adopted by the parties if such force majeure condition come to operate; the respondent shall have to keep the materials in their custody for six months without any storage charges payable by the petitioner, and the petitioner, if it is not possible to make the shipment to Marib even after expiry of this period of six months, shall accept the delivery of such materials at Mumbai/Haridwar upon payment to the respondent. Therefore, in the facts of the case, Section 56 of the

Indian Contract Act would have no application as far as the supply of the materials under the Purchase Order is concerned.

13. In ***Energy Watchdog v. Central Electricity Regulatory Commission & Ors.*** (2017) 14 SCC 80, the Supreme Court approved the approach to frustration as stated in *Edwinton Commercial Corpn. v. Tsavliris Russ (Worldwide Salvage & Towage) Ltd. (The Sea Angel), 2007 EWCA Civ 547 : (2007) 2 Lloyd's Rep 517 (CA)* in paragraph 41

> ***"41.*** *Indeed, in England, in the celebrated Sea Angel case [Edwinton Commercial Corpn. v. Tsavliris Russ (Worldwide Salvage & Towage) Ltd. (The Sea Angel), 2007 EWCA Civ 547 : (2007) 2 Lloyd's Rep 517 (CA)], the modern approach to frustration is well put, and the same reads as under:*
>
> *"111. In my judgment, the application of the doctrine of frustration requires a multi-factorial approach. Among the factors which have to be considered are the terms of the contract itself, its matrix or context, the parties' knowledge, expectations, assumptions and contemplations, in particular as to risk, as at the time of the contract, at any rate so far as these can be ascribed mutually and objectively, and then the nature of the supervening event, and the parties' reasonable and objectively ascertainable calculations as to the possibilities of future performance in the new circumstances. Since the subject-matter of the doctrine of frustration is contract, and contracts are about the allocation of risk, and since the allocation and assumption of risk is not simply a matter of express or implied provision but may also depend on less easily defined matters such as "the contemplation of the parties", the application of the doctrine can often be a difficult one. In such circumstances, the test of "radically different" is important: it tells us that the doctrine is not to*

be lightly invoked; that mere incidence of expense or delay or onerousness is not sufficient; and that there has to be as it were a break in identity between the contract as provided for and contemplated and its performance in the new circumstances. (Emphasis Supplied)"

14. In the facts of that case it further held as under:

***"47.** We are, therefore, of the view that neither was the fundamental basis of the contract dislodged nor was any frustrating event, except for a rise in the price of coal, excluded by Clause 12.4, pointed out. Alternative modes of performance were available, albeit at a higher price. This does not lead to the contract, as a whole, being frustrated. Consequently, we are of the view that neither Clause 12.3 nor 12.7, referable to Section 32 of the Contract Act, will apply so as to enable the grant of compensatory tariff to the respondents. Dr Singhvi, however, argued that even if Clause 12 is held inapplicable, the law laid down on frustration under Section 56 will apply so as to give the respondents the necessary relief on the ground of force majeure. Having once held that Clause 12.4 applies as a result of which rise in the price of fuel cannot be regarded as a force majeure event contractually, it is difficult to appreciate a submission that in the alternative Section 56 will apply. As has been held in particular, in Satyabrata Ghose case [Satyabrata Ghose v. Mugneeram Bangur & Co., 1954 SCR 310 : AIR 1954 SC 44] , when a contract contains a force majeure clause which on construction by the Court is held attracted to the facts of the case, Section 56 can have no application. On this short ground, this alternative submission stands disposed of.*

(Emphasis Supplied)"

15. Similar is the situation in the present case. The parties had contemplated a force majeure condition affecting the contract and had provided for an alternate mode of performance in form of Clause 25 of

the Purchase Order. Therefore, Section 56 of the Contract Act can have no application to the facts of the present case.

16. The contention of the learned senior counsel for the petitioner that as the date of the delivery of the materials was 13.04.2015, Clause 25 would not apply, would run counter to the bare reading of Clause 25 of the Purchase Order. Clause 25 of the Purchase Order as quoted above, clearly shows that the force majeure condition being contemplated therein could have taken place prior to the scheduled date of the delivery and would disable the petitioner to accept such delivery on such scheduled date of delivery.

17. In any case, the Arbitral Tribunal having interpreted the terms of the Purchase Order and specifically Clause 25 thereof in a manner which cannot be said to be unreasonable or perverse, it is not for this Court to interfere with such interpretation in exercise of its power under Section 34 of the Act.

18. In ***Associate Builders v. Delhi Development Authority***, (2015) 3 SCC 49, the Supreme Court while explaining the ground of patent illegality as a ground for setting aside an Arbitral Award, explained the law as under:

> *"42.3. (c) Equally, the third subhead of patent illegality is really a contravention of Section 28(3) of the Arbitration Act, which reads as under:*
>
> ***"28. Rules applicable to substance of dispute.*** *(1)-(2)*
>
> *(3) In all cases, the Arbitral Tribunal shall decide in accordance with the terms of the contract and shall*

take into account the usages of the trade applicable to the transaction."

This last contravention must be understood with a caveat. An Arbitral Tribunal must decide in accordance with the terms of the contract, but if an arbitrator construes a term of the contract in a reasonable manner, it will not mean that the award can be set aside on this ground. Construction of the terms of a contract is primarily for an arbitrator to decide unless the arbitrator construes the contract in such a way that it could be said to be something that no fair-minded or reasonable person could do.

43. *In McDermott International Inc. v. Burn Standard Co. Ltd.,(2006) 11 SCC 181 this Court held as under: (SCC pp. 225-26, paras 112-13)*

"112. It is trite that the terms of the contract can be expressed 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 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. [See Pure Helium India (P) Ltd. v. Oil and Natural Gas Commission, (2003) 8 SCC 593:2003 Supp (4) SCR 561 and D.D.Sharma v. Union of India.] (2004) 5 SCC 325.

113. Once, thus, it is held that the arbitrator had the jurisdiction, no further question shall be raised and the court will not exercise its jurisdiction unless

it is found that there exists any bar on the fact of the award."

44. *In MSK Projects (I) (JV) Ltd. v. State of Rajasthan, (2011)10 SCC 573: 2012 3 SCC (Civ) 818, the Court held : (SCC pp. 581-82, para 17)*

"17. 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. (See Gobardhan Das v. Lachhmi Ram, AIR 1954 SC 689, Thawardas Pherumal v. Union of India, AIR 1955 SC 468, Union of India v. Kishorilal Gupta & Bros.,AIR 1959 SC 1362, Alopi Parshad & Sons Ltd. v. Union of India, AIR 1960 SC 588, Jivarajbhai Ujamshi Sheth v. Chintamanrao Balaji, AIR 1965 SC 214 and Renusagar Power Co. Ltd. v. General Electric Co. (1984) 4 SCC 679: AIR 1985 SC 1156)"

45. *In Rashtriya Ispat Nigam Ltd. v. Dewan Chand Ram Saran, (2012) 5 SCC 306, the Court held: (SCC pp. 320-21, paras 43-45)*

"43. In any case, assuming that Clause 9.3 was capable of two interpretations, the view taken by the arbitrator was clearly a possible if not a plausible one. It is not possible to say that the arbitrator had

travelled outside his jurisdiction, or that the view taken by him was against the terms of contract. That being the position, the High Court had no reason to interfere with the award and substitute its view in place of the interpretation accepted by the arbitrator.

44. The legal position in this behalf has been summarised in para 18 of the judgment of this Court in SAIL v. Gupta Brother Steel Tubes Ltd. [(2009) 10 SCC 63: (2009) 4 SCC (Civ) 16] and which has been referred to above. Similar view has been taken later in Sumitomo Heavy Industries Ltd. v. ONGC Ltd. [(2010) 11 SCC 296: (2010) 4 SCC (Civ) 459] to which one of us (Gokhale, J.) was a party. The observations in para 43 thereof are instructive in this behalf.

45. This para 43 reads as follows: (Sumitomo case [(2010) 11 SCC 296 : (2010) 4 SCC (Civ) 459] , SCC p. 313)

> *43. ... The umpire has considered the fact situation and placed a construction on the clauses of the agreement which according to him was the correct one. One may at the highest say that one would have preferred another construction of Clause 17.3 but that cannot make the award in any way perverse. Nor can one substitute one's own view in such a situation, in place of the one taken by the umpire, which would amount to sitting in appeal. As held by this Court in Kwality Mfg. Corpn. v. Central Warehousing Corpn. [(2009) 5 SCC 142 : (2009) 2 SCC (Civ) 406] 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."

19. ***In National Highways Authority v. ITD Cementation India Limited***, (2015) 14 SCC 21 the Supreme Court again reiterated the limits of power conferred under Section 34 in the following words:

"25.It is thus well settled that construction of the terms of a contract is primarily for an arbitrator to decide. He is 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 contract. The court while considering challenge to an arbitral award does not sit in appeal over the findings and decisions unless the arbitrator construes the contract in such a way that no fair-minded or reasonable person could do."

20. In view of the above, I find no merit in the present petition and the same is accordingly dismissed, with no order as to cost.

NAVIN CHAWLA, J

JULY 09, 2018/Arya