HIGH COURT FOR THE STATE OF TELANGANA

COM.CA.No.35 OF 2022

Between

M/s Sree Durga Estates, a registered Partnership Firm
With Registration No.2148/2011, rep. By its Managing Partner
Boppana Ramesh, S/o. Sri Sai Chowdhary
R/o. Villa No.006, Indu Fortune Fields,
13th Phase KPHB Colony, Kukatpally Hyderabad.

... Appellant

AND
J.A.S. Padmaja, W/o. J. Venkata Ramudu
Aged about 59 years, Occ : Housewife
R/o. Villa No.1018, Mallikarjuna Krinss Villa
Sy.Nos.282 & 283, Puppalaguda Village,
Gandipet Mandal, Ranga Reddy District and 7 others

... Respondents

DATE OF JUDGMENT PRONOUNCED: 10.02.2023

SUBMITTED FOR APPROVAL:

HONOURABLE SRI JUSTICE P. NAVEEN RAO
AND
HONOURABLE SRI JUSTICE J. SREENIVAS RAO

1. Whether Reporters of Local newspapers may be allowed to see the judgment? Yes/No

2. Whether the copies of judgment may be marked to Law Reporters/Journals Yes/No

3. Whether Their Lordships wish to see the fair copy of the judgment? Yes/No

* **HONOURABLE SRI JUSTICE P. NAVEEN RAO**
AND
HONOURABLE SRI JUSTICE J. SREENIVAS RAO

+ COM.CA.No.35 OF 2022

% DATED 10TH FEBRUARY, 2023

Between :

M/s Sree Durga Estates, a registered Partnership Firm
With Registration No.2148/2011, rep. By its Managing Partner
Boppana Ramesh,

...Appellant

And
$ J.A.S. Padmaja & 7 others

...Respondents

<Gist:
>Head Note:
! Counsel for the Appellant : Sri V. Ravinder Rao, Sr. Counsel
Rep. By Sri Sathvik Makunur

^Counsel for Respondents : B. Adinarayana Rao Sr. Counsel
Rep. By Sri Srinivas Velgapudi

? CASES REFERRED:

1. (2016) 13 SCC 561
2. (2022) 2 SCC 275
3. (2019) 15 SCC 131
4. (2015) 3 SCC 49
5. (2019) 4 SCC 163

HONOURABLE SRI JUSTICE P. NAVEEN RAO
AND
HONOURABLE SRI JUSTICE J. SREENIVAS RAO

COMCA.No.35 OF 2022

Date: 10.02.2023

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Sy.Nos.282 & 283, Puppalaguda Village,
Gandipet Mandal, Ranga Reddy District
And 7 others

.....Respondents

The Court made the following:

HONOURABLE SRI JUSTICE P. NAVEEN RAO
AND
HONOURABLE SRI JUSTICE J. SREENIVAS RAO

COMCA.No.35 OF 2022

JUDGMENT:{*Per the Hon'ble Sri Justice J. Sreenivas Rao*}

The appellant filed this COMCA No.35 of 2022 under Section 13 of the Commercial Courts Act, 2015 R/w Section 37 of the Arbitration and Conciliation Act 1996 (hereinafter referred to as 'the Act, 1996')aggrieved by the order dated 12-09-2022 passed by the learned Special Judge, for Trial and Disposal of Commercial Disputes Court, Ranga Reddy District at L.B. Nagar in C.O.P. No.2 of 2022.

2. For the sake of convenience, hereinafter the parties will be referred to as "petitioner" and "respondents", as they were arrayed before the trial Court.

3. That the respondents in COP No.2 of 2022 are the absolute owners of the land admeasuring to an extent of Ac.5-02 gts in Sy.Nos.128 and 132 situated at Bachupally Village, Quthbullapur Mandal, Ranga Reddy District. Petitioner and respondents have entered into registered Development Agreement-Cum-General Power

of Attorney, herein after called as "DAGPA" vide registration No.6750 of 2017 dated 30.06.2017 in respect of land to an extent of Ac.4.24.8gts for development of the said land into a gated community with independent villas and another development agreement vide registration document No.6751 of 2017 in respect of land Ac.00-17.2gts for development of commercial building. While things stood thus, disputes arose between the parties. The respondent Nos.1 and 2 cancelled the development agreement by issuing a legal notice on 10.09.2019. When the petitioner rejected the advances by respondent Nos.1 and 2 for cancellation of the development agreement the respondents have invoked arbitration clause and filed Arbitration Application No.40/2020 for seeking appointment of Arbitrator before this Hon'ble Court and the same was allowed and 8th respondent herein was appointed as 'sole Arbitrator' for adjudication of the disputes between the parties by its order dated 04.08.2020.

4. Before the Arbitral Tribunal the respondents have filed claim petition in Arbitration Application No.40 of 2020 for seeking the following reliefs:

> "(i) Declare the Development Agreement-cum-General Power of Attorney dated 30.06.2017, vide document No.6750/2017 as invalid and cancelled.
>
> (ii) Direct the Respondent to execute a Deed of Cancellation of the Development Agreement-cum-General Power of Attorney, dated 30.06.2017 vide document No.6750/2017.
>
> (iii) Direct the Respondent to deliver the possession of the schedule property to the claimants.
>
> (iv) Direct the respondent to pay damages of Rs.2,00,00,000/- (Rupees Two Crores only) for breach of contract.
>
> (v) To award costs of this claim and also to pass an order or orders which this Hon'ble Court deem fit in the circumstances of this case".

4.1. In the said claim petition the respondents stated that in terms of the DAGPA dated 30-06-2017 the respondents No.1 & 2 and Late Inturi Lakshmi Prasanna are the owners and they are entitled to 50% of built-up area and the petitioner as developer is entitled for the remaining 50% of the built-up area to be constructed over the said property. The petitioner has agreed to complete the entire project within 30 months with a grace period of 6 months. The petitioner as a professional developer verified such land use in the proposed master plan which is also evident from land use information furnished by Hyderabad Metropolitan Development Authority. The petitioner undertook to obtain

required permissions from all the concerned authorities for deletion of 30 meters road from the proposed master plan.

4.2. It is further stated that the petitioner promised to obtain all such required permissions from the concerned authorities and necessary sanction for the construction of the proposed building within a period of 9 months from the date of DAGPA as the respondent No.1 & 2 and Late Inturi Lakshmi Prasanna have already made necessary application to the Hyderabad Metropolitan Development Authority for deletion of 30 meters road. The petitioner as a professional developer promised to pursue such application before the concerned authorities at his cost and expense.

4.3. The respondents further stated that the petitioner failed to obtain necessary orders for deletion of 30 feet road from the proposed master plan though more than 3 years have lapsed from the date of DAGPAs. In the absence of deletion of 30 meters road, the said property is not viable for development into a commercial building and independent villas. Thus, both the

DAGPAs stood frustrated and became unenforceable. The petitioner always sought time to get the necessary clearances 'and permissions to commence the project citing vague reasons. In those circumstances, the respondents were compelled to cancel DAGPAs by issuing Notice through their Advocate on 10-09-2019. But the petitioner did not give any reply, on the other hand he refused to execute a Registered Deed of Cancellation of Development Agreement Cum General Power of Attorney. At that stage the respondents have invoked Arbitration Clause to resolve the disputes.

4.4. Respondents further stated that basing upon the DAGPA the petitioner is claiming physical possession of the subject property, though actual physical possession of the property was not delivered to the petitioner. The petitioner however after filing of COP No.17 of 2019 for grant of injunction against the respondents erected a watchman room without the knowledge of the respondents and on such basis claimed possession over the said property. In view of the same the

respondents sought recovery of Possession from the petitioner and also claimed damages an amount of Rs.2 Crores.

4.5 The Claimants herein are also subjected to such mental agony due to the inordinate delay made by Respondent. The Claimant Nos.1 & 2 also planned to invest the sale proceeds to be realized from the sale of their share of villas in a profitable manner but could not do so due to the breach of Agreement committed by Respondent. The claimants therefore are entitled to claim compensation for such breach of contract committed by the Respondent. The Respondent is therefore, liable to pay a sum of Rs.50,00,000/-Rupees Fifty Lakhs Only) towards compensation for the breach of contract.

5. Before the Learned Arbitrator the petitioner filed statement of defence denying the claim made by the respondents, *inter alia* contending that at the time of execution of DAGPA only the respondents have delivered physical possession of the property to petitioner and they encircled Compound Wall, partly fenced with Barbed Wire, Constructed Rooms for Watchmen and Security and

the petitioner is in physical possession and enjoyment of above said land in the capacity of its Developer without any interferences or obstructions from whomsoever. The petitioner further submits that with an intention to develop the subject property as per the terms of DAGPA, he had applied and approached the Authorities by spending huge amounts apart from securing and safeguarding the said property. Thus, the petitioner all through is waiting for the approvals from the concerned Authorities to commence construction and complete the project at the earliest. But the respondents in spite of having complete knowledge about the persuasion of petitioner having seen the escalation of prices indulged in unlawful acts like issuing the Legal Notices to harass the petitioner and to cause wrongful loss thereon.

5.1 That the petitioner further stated that they have filed C.O.P.No.17 of 2019 on the file of Hon'ble XIII Additional District Judge-cum-Commercial Court, Ranga Reddy District at L.B. Nagar U/Sec.9 of the Act, 1996 for grant injunction restraining

Inturi Lakshmi Prasanna and the respondents 1 and 2 from alienating and interfering with the peaceful possession and enjoyment of petitioner over the said property. Upon consideration the learned judge was pleased to passed order directing both the parties to maintain *status quo* and the said orders are still subsisting and prayed for dismissal of the claim made by the respondents.

6. The learned Arbitral Tribunal basing on the claim statement and statement of defence of the respective parties framed the following points of disputes.

> "(i) Whether the respondent constructed compound wall(partly) and fenced with barbed wire around the subject Property?
>
> (ii) Whether the respondent failed to discharge its obligation of obtaining necessary orders from the authorities concerned for deletion of 30 Meter Road, and construction permission?
>
> (iii) Whether the respondent knew of the existence of 30 Meter Road in the subject land in the year 2013 itself?
>
> (iv) Whether the respondent committed the breach of its obligations and thus frustrated the performance of Development Agreement-cum-General Power of Attorney dated 30.06.2017 bearing document No.6750/2017?
>
> (v) Whether the respondent is liable to execute a Deed of Cancellation of Development Agreement-cum-General Powerof Attorney dated 30.06.2017 bearing document No.6750/2017?
>
> (vi) Whether the respondent is obliged to deliver the possession of the subject land?

(vii) Whether the respondent is liable to pay damages of Rs.2,00,00,000/- (Rupees Two Crores only) to the claimant for the reason of committing breach of contract?

(viii) To what relief the claimant is entitled to?".

7. Before the Arbitral Tribunal on behalf of the respondents CW.1 to CW.3 are examined and Exs.C1 to C13documents were marked and on behalf of petitioner RW.1 to RW.3 are examined and Exs.R.1 to R.29 documents were marked. The learned Arbitral Tribunal after considering the contentions of the respective parties, documentary evidence on record and also after hearing both the parties passed award on 04.08.2020 by giving cogent findings in respect of each point. With regard to Point No.1, the learned Arbitral Tribunal held that the petitioner has failed to establish that he constructed compound wall around the subject property existed on the date of execution of Ex.C.5. Insofar as Point Nos.2 to 4 are concerned the learned Arbitral Tribunal after giving cogent reasons in Paras 6.2.2 to 6.2.14 of the Award, holds that the respondents/claimants have to pay an amount of Rs.2,01,31,497/- to the petitioner/developer along with interest @ 18% per annum from 01.10.2020 to 22.10.2021 which comes to Rs.38,42,082/-. In all the respondents/ claimants have to pay Rs.2,39,73,579/-. In respect of Point Nos.5 &

6 are concerned, the learned Arbitral Tribunal was pleased to hold that Ex.C.5 development agreement DAGPA becomes void and petitioner has to execute the deed of cancellation of Ex.C5 DAGPA dated 30.06.2017 and deliver possession of the subject property to the respondents/claimants and further held that the petitioner/ developer is not liable to pay damages an amount of Rs.2,00,00,000/- to the respondents/claimants. The learned Arbitral Tribunal granted the following relief:

> a). The petitioner/developer will execute the deed of cancellation of Ex.C.5 DAGPA dated 30.06.2017 document bearing No.6750/2017 and deliver possession of subject property to the respondents/claimants on as is whether is condition within three months from the date of the Award.
>
> b). The respondents/claimants will pay Rs.2,39,73,579/- within three months from the date of award to the petitioner/ developer, failing which the award amount shall carry interest @ 18% p.a. from the date of award to the date of payment.
>
> c). The respondents/claimants and petitioner/developer shall bear their own costs.

8. Questioning the award, passed by the learned Arbitral Tribunal petitioner filed COP No.2 of 2022 under Section 34 of the Act, 1996 before Special Court for Trial and disposal of Commercial Disputes, Ranga Reddy District at L.B. Nagar. The learned Special Judge, after considering the grounds raised by the petitioner, evidence on record, Hon'ble Apex Court judgments as well as High Court Judgments and

also the provisions of Section 34 of the Act, 1996 dismissed the COP No.2 of 2022 by its order dated 12.09.2022.

9. Aggrieved by the order passed by the Principal Special Court for Tribal and Disposal of Commercial Disputes, Ranga Reddy District at L.B.Nagar in COP.No.2/2022 dated12.09.2022 the petitioner filed the above COMCA.No.35/2022.

10. Learned Senior Counsel Sri V. Ravinder Rao appearing on behalf of the petitioner vehemently contended that the court below without properly appreciating the contentions/grounds raised by the petitioner, and also evidence on record erroneously dismissed COP.No.2/2022 and simply confirmed the Award of the Arbitral Tribunal. He further submits that the respondents have invoked the provisions of Section 56 of the Indian Contract Act, 1872, though the same is not applicable to the facts and circumstances of the case. He also contended that the Commercial Court as well as learned Arbitrator failed to consider the Ex.R.5 which clearly demonstrates that the application submitted by the respondents for deletion of 30 meter wide road to the HMDA is pending till date and further

demonstrates that the application under consideration does not result in an impossibility to perform the contract as it had not attained finality. In view of the same, the effect of Section 56 of the Indian Contract Act, 1872 could not have been applied. He further contended that the Court below ought to have considered that the time was not the essence of the contract not only because Ex.C.5 never contemplated such an obligation but the jurisprudence and past precedents expressly hold that time is never the essence in a contract relating to an immovable property. He further contended that the Court below as well as learned Arbitral Tribunal not appreciated the judicial precedents submitted by the petitioner.

11. In support of his contention the learned Senior Counsel relied upon the following judgments:

1. **Delhi Development Authority Versus Kenneth Builders and Developers Private Limited and Others**[1]

2. **State of Chhattisgarh and Another Versus Sal Udyog Private Limited**[2]

3. **Ssangyong Eng.& Construction Company Limited Versus National Highways Authority of India (NHAI)**[3]

[1](2016) 13 SCC 561
[2](2022) 2 SCC 275
[3](2019) 15 SCC 131

4. **Associate Builders Versus Delhi Development Authority[4]**

12. On the other hand, Sri B. Adinarayana Rao, learned Senior Counsel representing on behalf of respondents contended that the appeal filed by the petitioner is not maintainable under law and the Court below after considering the contentions of the respective parties, documentary evidence on record and also after hearing both the parties rightly dismissed the COP.No.2/2002 by giving cogent reasons by its order dated 12.09.2022 and upheld the Award dated 23.12.2021 passed by the Arbitral Tribunal in A.A. No.40 of 2020. He further contended that scope of Section 37 of the Act is very limited. The learned Senior Counsel further contended that the Arbitral Tribunal passed the award dated 23.10.2021 within the parameters of the dispute between the parties only and the Arbitral Tribunal has not committed any illegality, irregularity in the impugned award. The court below after considering all the grounds raised by the petitioner passed the impugned order confirming the award passed by the Arbitral Tribunal, and there are no grounds to interfere with the impugned order and the appeal filed by the

[4](2015) 3 SCC 49

petitioner is not maintainable under law and the same is liable to be dismissed.

13. After hearing the rival contentions of the parties to the appeal, the points that predominantly emerge for consideration are as follows:

> *(1) Whether the order passed by the Commercial Court in COP No.2 of 2022 confirming the Award passed by learned Arbitral Tribunal dated 23.10.2021, is valid under law?*
>
> *(2) Whether the Court below rightly exercised the powers conferred under Section 34 of the Act while upholding the Award of the learned Arbitral Tribunal?*
>
> *(3) To what relief?"*

POINT NOS.1 AND 2

14. The pleadings, submissions and documentary evidence on record disclose that the respondents are the absolute owners of the land admeasuring an extent of Acs.5.02 guntas in Sy.Nos.128 and 132 situated at Bachupally Village, Quthbullapur Mandal, Ranga Reddy District. Petitioner and respondents have entered into registered Development Agreement-Cum-General Power of Attorney,

herein after called as "DAGPA" vide registration No.6750 of 2017 dated 30.06.2017 in respect of land to an extent of Acs.4.24.8 guntas for development of the said land into a gated community with independent villas and another development agreement vide registration document No.6751 of 2017 in respect of land Ac.00-17.2 guntas for development of commercial building. While things stood thus, disputes arose between the parties. The respondent Nos.1 and 2 cancelled the development agreement by issuing a legal notice on 10.09.2019. As the petitioner did not accept the cancellation of the development agreement, the respondents have invoked arbitration clause and filed Arbitration Application No.40/2020 for seeking appointment of Arbitrator before this Hon'ble Court and the same was allowed and 8th respondent herein was appointed as 'sole Arbitrator' for adjudication of the disputes between the parties by its order dated 04.08.2020.

15. The respondents have filed claim petition before the learned Arbitral Tribunal seeking (i) to declare the DAGPA dated 30.06.2017, as invalid and cancelled; (ii) to direct the petitioner to

execute a Deed of Cancellation of the DAGPA; (iii) to direct the petitioner to deliver the possession of the schedule property to the respondents;(iv) to direct the respondent to pay damages of Rs.2,00,00,000/- (Rupees Two Crores only) for breach of contract.

16. Petitioner filed defence statement denying the claim made by the respondents. The learned Arbitral Tribunal after considering the claim statement and defence statement of the petitioner and respondents and also after examining the oral and documentary evidence i.e. CWs.1 to CW.3 and Exs.C.1 to C.13 and RWs.1 to RW.3 and Exs.R.1 to R.29 and also after hearing parties passed the Award on 23-10-2021. Questioning the same, petitioner filed C.O.P. No.2 of 2022 by invoking the provisions of Section 34 of the Act to set aside the arbitral award passed by the learned Arbitral Tribunal. The Court below after considering the grounds raised by the petitioner, evidence on record and after hearing both the parties dismissed the COP No.2 of 2022 by its order dated 12-0-2022 and upheld the Award passed by the Arbitral Tribunal, holding that there

is no material irregularity, illegality or error in the impugned award passed by the Arbitral Tribunal.

17. The scope of consideration of appeal under Section 37 has been lucidly explained by the Hon'ble Supreme Court in the following decisions:

17.1. In **Delhi Development Authority**(supra) it is observed as under:

> **30.** The interpretation of Section 56 of the Contract Act came up for consideration in *Satyabrata Ghose* v. *MugneeramBangur& Co.* [*Satyabrata Ghose* v. *MugneeramBangur& Co.*, AIR 1954 SC 44: 1954 SCR 310] It was held by this Court that the word "impossible" used in Section 56 of the Contract Act has not been used in the sense of physical or literal impossibility. It ought to be interpreted as impracticable and useless from the point of view of the object and purpose that the parties had in view when they entered into the contract. This impracticability or uselessness could arise due to some intervening or supervening circumstance which the parties had not contemplated. However, if the intervening circumstance was contemplated by the parties, then the contract would stand despite the occurrence of such circumstance. In such an event, "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". This is what this Court had to say: (AIR pp. 46-49, paras 9-10 & 17)

17.2 In **State of Chhattisgarh and Another** (supra) wherein it is observed as under:

> **11.** Per contra, Mr Pranav Malhotra, learned counsel for the respondent Company argued that the appellant State having failed to raise any objection relating to deduction of "supervision charges" in its Section 34 petition, it must be assumed that it had

waived its right to take any such plea in the Section 37 petition filed in the High Court and for that matter, before this Court. He cited *State of Maharashtra* v. *Hindustan Construction Co. Ltd.* [*State of Maharashtra* v. *Hindustan Construction Co. Ltd.*, (2010) 4 SCC 518: (2010) 2 SCC (Civ) 207] to substantiate such an objection.

24. We are afraid, the plea of waiver taken against the appellant State on the ground that it did not raise such an objection in the grounds spelt out in the Section 34 petition and is, therefore, estopped from taking the same in the appeal preferred under Section 37 or before this Court, would also not be available to the respondent Company having regard to the language used in Section 34(2-A) of the 1996 Act that empowers the Court to set aside an award if it finds that the same is vitiated by patent illegality appearing on the face of the same. Once the appellant State had taken such a ground in the Section 37 petition and it was duly noted in the impugned judgment, the High Court ought to have interfered by resorting to Section 34(2-A) of the 1996 Act, a provision which would be equally available for application to an appealable order under Section 37 as it is to a petition filed under Section 34 of the 1996 Act. In other words, the respondent Company cannot be heard to state that the grounds available for setting aside an award under sub-section (2-A) of Section 34 of the 1996 Act could not have been invoked by the Court on its own, in exercise of the jurisdiction vested in it under Section 37 of the 1996 Act. Notably, the expression used in the sub-section is "*the Court finds that*". Therefore, it does not stand to reason that a provision that enables a Court acting on its own in deciding a petition under Section 34 for setting aside an award, would not be available in an appeal preferred under Section 37 of the 1996 Act.

17.3 In **Ssangyong Eng..& Construction Company Limited** (supra) it is held as under:

20. It is first necessary to survey the law insofar as it relates to the ground of setting aside an award if it is in conflict with the public policy of India, as it existed before the Amendment Act, 2015. In *Associate Builders* v. *DDA* [*Associate Builders* v. *DDA*, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] (*Associate Builders*), this Court referred to the judgment in *Renusagar Power Co. Ltd.* v. *General Electric Co.* [*Renusagar Power Co. Ltd.* v. *General Electric Co.*, 1994 Supp (1) SCC 644] (*Renusagar*), as follows : (*Associate Builders case* [*Associate Builders* v. *DDA*, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , SCC pp. 67-68, para 18)

24. Yet another expansion of the phrase "public policy of India" contained in Section 34 of the 1996 Act was by another judgment

of this Court in *Western Geco* [*ONGC* v. *Western Geco International Ltd.*, (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12] , which was explained in *Associate Builders* [*Associate Builders* v. *DDA*, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] as follows : (SCC pp. 73-77, paras 28-34)

"*28*. In a recent judgment, *ONGC* v. *Western Geco International Ltd.* [*ONGC* v. *Western Geco International Ltd.*, (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12] , this Court added three other distinct and fundamental juristic principles which must be understood as a part and parcel of the fundamental policy of Indian law. The Court held : (SCC pp. 278-80, paras 35 & 38-40)

'*35*. What then would constitute the "fundamental policy of Indian law" is the question. The decision in *ONGC* [*ONGC* v. *Saw Pipes Ltd.*, (2003) 5 SCC 705] does not elaborate that aspect. Even so, the expression must, in our opinion, include all such fundamental principles as providing a basis for administration of justice and enforcement of law in this country. 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 a "*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.

38. Equally important and indeed fundamental to the policy of Indian law is the principle that a court and so also a quasi-judicial authority must, while determining the rights and

obligations of parties before it, do so in accordance with the principles of natural justice. Besides the celebrated *audialteram partem* rule, one of the facets of the principles of natural justice is that the court/authority deciding the matter must apply its mind to the attendant facts and circumstances while taking a view one way or the other. Non-application of mind is a defect that is fatal to any adjudication. Application of mind is best demonstrated by disclosure of the mind and disclosure of mind is best done by recording reasons in support of the decision which the court or authority is taking. The requirement that an adjudicatory authority must apply its mind is, in that view, so deeply embedded in our jurisprudence that it can be described as a fundamental policy of Indian law.

39. No less important is the principle now recognised as a salutary juristic fundamental in administrative law that a decision which is perverse or so irrational that no reasonable person would have arrived at, the same will not be sustained in a court of law. Perversity or irrationality of decisions is tested on the touchstone of *Wednesbury* [*Associated Provincial Picture Houses Ltd.* v. *Wednesbury Corpn.*, (1948) 1 KB 223 (CA)] principle of reasonableness. Decisions that fall short of the standards of reasonableness are open to challenge in a court of law often in writ jurisdiction of the superior courts but no less in statutory processes wherever the same are available.

40. It is neither necessary nor proper for us to attempt an exhaustive enumeration of what would constitute the fundamental policy of Indian law nor is it possible to place the expression in the straitjacket of a definition. What is important in the context of the case at hand is that if on facts proved before them the arbitrators fail to draw an inference which ought to have been drawn or if they have drawn an inference which is on the face of it, untenable resulting in miscarriage of justice, the adjudication even when made by an Arbitral Tribunal that enjoys considerable latitude and play at the joints in making awards will be open to challenge and may be cast away or modified depending upon whether the offending part is or is not severable from the rest.'

29. It is clear that the juristic principle of a "judicial approach" demands that a decision be fair, reasonable and objective. On the obverse side, anything arbitrary and whimsical would obviously not be a determination which would either be fair, reasonable or objective.

30. The *audi alteram partem* principle which undoubtedly is a fundamental juristic principle in Indian law is also

contained in Sections 18 and 34(2)(*a*)(*iii*) of the Arbitration and Conciliation Act. These sections read as follows:

S.18. ***Equal treatment of parties***.The parties shall be treated with equality and each party shall be given a full opportunity to present his case.

***

S.34. ***Application for setting aside arbitral award***. —

(1) * * *

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

(*a*) the party making the application furnishes proof that—

***

(*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;'

31. 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:

(*i*) a finding is based on no evidence, or

(*ii*) an Arbitral Tribunal takes into account something irrelevant to the decision which it arrives at; or

(*iii*) ignores vital evidence in arriving at its decision,

such decision would necessarily be perverse.

32. A good working test of perversity is contained in two judgments. In *Excise and Taxation Officer-cum-Assessing Authority* v. *Gopi Nath & Sons* [*Excise and Taxation Officer-cum-Assessing Authority* v. *Gopi Nath & Sons*, 1992 Supp (2) SCC 312] , it was held : (SCC p. 317, para 7)

'*7*. ... It is, no doubt, true that if a finding of fact is arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant material or if the finding so outrageously defies logic as to suffer from the vice of irrationality incurring the blame of being perverse, then, the finding is rendered infirm in law.'

In *Kuldeep Singh* v. *Commr. of Police* [*Kuldeep Singh* v. *Commr. of Police*, (1999) 2 SCC 10 : 1999 SCC (L&S) 429] , it was held : (SCC p. 14, para 10)

'*10*. 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.'

33. 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. Once it is found that the arbitrator's approach is not arbitrary or capricious, then he is the last word on facts. In *P.R. Shah Shares & Stock Brokers (P) Ltd.* v. *BHH Securities (P) Ltd.* [*P.R. Shah Shares & Stock Brokers (P) Ltd.* v. *BHH Securities (P) Ltd.*, (2012) 1 SCC 594 : (2012) 1 SCC (Civ) 342] , this Court held : (SCC pp. 601-02, para 21)

'*21.* A court does not sit in appeal over the award of an Arbitral Tribunal by reassessing or reappreciating the evidence. An award can be challenged only under the grounds mentioned in Section 34(2) of the Act. The Arbitral Tribunal has examined the facts and held that both the second respondent and the appellant are liable. The case as put forward by the first respondent has been accepted. Even the minority view was that the second respondent was liable as claimed by the first respondent, but the appellant was not liable only on the ground that the arbitrators appointed by the Stock Exchange under Bye-law 248, in a claim against a non-member, had no jurisdiction to decide a claim against another member. The finding of the majority is that the appellant did the transaction in the name of the second respondent and is therefore, liable along with the second respondent. Therefore, in the absence of any ground under Section 34(2) of the Act, it is not possible to re-examine the facts to find out whether a different decision can be arrived at.'

34. It is with this very important caveat that the two fundamental principles which form part of the fundamental policy of Indian law (that the arbitrator must have a judicial approach and that he must not act perversely) are to be understood."

34. What is clear, therefore, is that the expression "public policy of India", whether contained in Section 34 or in Section 48, would now mean the "fundamental policy of Indian law" as explained in paras 18 and 27 of *Associate*

Builders [*Associate Builders* v. *DDA*, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] i.e. the fundamental policy of Indian law would be relegated to "Renusagar" understanding of this expression. This would necessarily mean that *Western Geco* [*ONGC* v. *Western Geco International Ltd.*, (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12] expansion has been done away with. In short, *Western Geco* [*ONGC* v. *Western Geco International Ltd.*, (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12] , as explained in paras 28 and 29 of *Associate Builders* [*Associate Builders* v. *DDA*, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , would no longer obtain, as under the guise of interfering with an award on the ground that the arbitrator has not adopted a judicial approach, the Court's intervention would be on the merits of the award, which cannot be permitted post amendment. However, insofar as principles of natural justice are concerned, as contained in Sections 18 and 34(2)(*a*)(*iii*) of the 1996 Act, these continue to be grounds of challenge of an award, as is contained in para 30 of *Associate Builders* [*Associate Builders* v. *DDA*, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] .

35. It is important to notice that the ground for interference insofar as it concerns "interest of India" has since been deleted, and therefore, no longer obtains. Equally, the ground for interference on the basis that the award is in conflict with justice or morality is now to be understood as a conflict with the "most basic notions of morality or justice". This again would be in line with paras 36 to 39 of *Associate Builders* [*Associate Builders* v. *DDA*, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , as it is only such arbitral awards that shock the conscience of the court that can be set aside on this ground.

37. Insofar as domestic awards made in India are concerned, an additional ground is now available under sub-section (2-A), added by the Amendment Act, 2015, to Section 34. Here, there must be patent illegality appearing on the face of the award, which refers to such illegality as goes to the root of the matter but which does not amount to mere erroneous application of the law. In short, what is not subsumed within "the fundamental policy of Indian law", namely, the contravention of a statute not linked to public policy or public interest, cannot be brought in by the backdoor when it comes to setting aside an award on the ground of patent illegality".

39. To elucidate, para 42.1 of *Associate Builders* [*Associate Builders* v. *DDA*, (2015) 3 SCC 49: (2015) 2 SCC (Civ) 204] , namely, a mere contravention of the substantive law of India, by itself, is no longer a ground available to set aside an arbitral award. Para 42.2 of *Associate Builders* [*Associate Builders* v. *DDA*, (2015) 3 SCC 49: (2015) 2 SCC (Civ) 204], however, would remain, for if an arbitrator gives no reasons for an award and contravenes

Section 31(3) of the 1996 Act, that would certainly amount to a patent illegality on the face of the award.

40. The change made in Section 28(3) by the Amendment Act really follows what is stated in paras 42.3 to 45 in *Associate Builders* [*Associate Builders* v. *DDA*, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , namely, that the construction of the terms of a contract is primarily for an arbitrator to decide, unless the arbitrator construes the contract in a manner that no fair-minded or reasonable person would; in short, that the arbitrator's view is not even a possible view to take. Also, if the arbitrator wanders outside the contract and deals with matters not allotted to him, he commits an error of jurisdiction. This ground of challenge will now fall within the new ground added under Section 34(2-A).

41. What is important to note is that a decision which is perverse, as understood in paras 31 and 32 of *Associate Builders* [*Associate Builders* v. *DDA*, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , 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. Thus, 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. Additionally, a finding based on 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 characterised as perverse.

44. In *Renusagar* [*Renusagar Power Co. Ltd.* v. *General Electric Co.*, 1994 Supp (1) SCC 644] , this Court dealt with a challenge to a foreign award under Section 7 of the Foreign Awards (Recognition and Enforcement) Act, 1961 (the Foreign Awards Act). The Foreign Awards Act has since been repealed by the 1996 Act. However, considering that Section 7 of the Foreign Awards Act contained grounds which were borrowed from Article V of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (the New York Convention), which is almost in the same terms as Sections 34 and 48 of the 1996 Act, the said judgment is of great importance in understanding the parameters of judicial review when it comes to either foreign awards or international commercial arbitrations being held in India, the grounds for challenge/refusal of enforcement under Sections 34 and 48, respectively, being the same.

17.4 In **Associate Builders** (supra) it is observed as under:

> **"27.** Coming to each of the heads contained in *Saw Pipes* [(2003) 5 SCC 705 : AIR 2003 SC 2629] judgment, we will first deal with the head "fundamental policy of Indian law". It has already been seen from *Renusagar* [*Renusagar Power Co. Ltd.* v. *General Electric Co.*, 1994 Supp (1) SCC 644] judgment that violation of the Foreign Exchange Act and disregarding orders of superior courts in India would be regarded as being contrary to the fundamental policy of Indian law. To this it could be added that the binding effect of the judgment of a superior court being disregarded would be equally violative of the fundamental policy of Indian law".

17.5. The Hon'ble Supreme Court in the case of **MMTC Ltd. v. Vedanta Ltd.,**[5] discussed the scope of interference of the Courts under Section 37 of Arbitration and Conciliation Act, 1996. Wherein the Hon'ble Apex Court held that Court under Section 37 cannot travel beyond the restrictions laid down by the Section 34. That the jurisdiction of the Section 37 Court is only limited to determining the legality of the order passed under Section 34 of the Act. The relevant portions of the judgment are extracted as under:

> **13.** It is relevant to note that after the 2015 amendments to Section 34, the above position stands somewhat modified. Pursuant to the insertion of Explanation 1 to Section 34(2), the scope of contravention of Indian public policy has been modified to the extent that it now means fraud or corruption in the making of the award, violation of Section 75 or Section 81 of the Act, contravention of the fundamental policy of Indian law, and conflict with the most basic notions of justice or morality. Additionally, sub-section (2A) has been inserted in Section 34, which provides that in case of domestic arbitrations, violation of Indian public policy also includes patent illegality appearing on the face of the award. The proviso to the same states 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.

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[5] (2019) 4 SCC 163

> **14**. As far as interference with an order made under Section 34, as per Section 37, is concerned, it cannot be disputed that such interference under Section 37 cannot travel beyond the restrictions laid down under Section 34. In other words, the Court cannot undertake an independent assessment of the merits of the award, and must only ascertain that the exercise of power by the Court under Section 34 has not exceeded the scope of the provision. Thus, it is evident that in case an arbitral award has been confirmed by the Court under Section 34 and by the Court in an appeal under Section 37, this Court must be extremely cautious and slow to disturb such concurrent findings.

18. From the precedent decisions it emerges that the scope of application under Section 37 of the Act is very limited and this Court cannot re-examine or re-assess the evidence. As per the provisions of Sec.37 of the Act, this Court has to examine whether the Court below while exercising the powers conferred under Section 34 of the Act, rightly considered the grounds raised by the petitioner and whether the Arbitral Tribunal committed any illegality, irregularity while passing the arbitral award.

19. In the instant case, the learned Arbitral Tribunal after considering the contentions of the parties, after examining the evidence on record and also after hearing both the parties passed the Award dated 23.10.2021 in AA No.40 of 2020 by giving cogent reasons holding that as per Ex.C5 DAGPA cannot be proceeded with unless '30 meter wide proposed Master Plan road' is realigned. The

parties to the Ex.C5 DAGPA are not in a position to get '30 meter wide proposed Master Plan road' realigned and in view of the same, the Ex.C5 DAGPA has become frustrated because the 30-meter wide proposed Master Plan road is passing through the subject property and hence the Ex.C5 DAGPA becomes void. The Arbitral Tribunal further held that the petitioner has to execute the deed of cancellation of the same and deliver the possession of property to the respondents/claimants and that since the petitioner has invested amounts for various works, the respondents/claimants have to pay an amount of Rs.2,39,73,579/-.

20. On due consideration of all aspects the Commercial Court rightly confirmed the award of the learned Arbitral Tribunal.

21. We see no illegality, irregularity, jurisdictional error in the impugned order passed by the Commercial Court upholding the Award passed by the Arbitral Tribunal and this Court finds no merit in the appeal filed by the petitioner and the same is liable to be dismissed. Both Point Nos.1 & 2 are answered against the petitioner and in favour of the respondents.

POINT NO.3

22. In view of the discussion on Point Nos. 1 & 2, the COMCA 35 of 2022 is accordingly dismissed without costs. As a sequel, miscellaneous applications pending if any, shall stand disposed of.

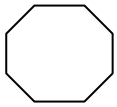
JUSTICE P. NAVEEN RAO

JUSTICE J. SREENIVAS RAO

10-02-2023

Skj

HONOURABLE SRI JUSTICE P. NAVEEN RAO
AND
HONOURABLE SRI JUSTICE J. SREENIVAS RAO



COMCA.NO.35 OF 2022

Date : 10-02-2023.

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