HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR
(COMMERCIAL DIVISION SRINAGAR WING)

Reserved on: 05.06.2025
Pronounced on:04.07.2025

Arb. P. No.15/2024

UT OF J&K AND OTHERS ...PETITIONER(S)

Through: - Mr. Faheem Nissar Shah, GA.
Mr. Ilyas Nazir Laway, GA.

Vs.

MRS. RAJINDER OBEROI ...RESPONDENT(S)

Through: - Mr. Mir Suhail, Advocate, with
Mr. Raja Jaffar, Advocate.

CORAM: HON'BLE MR. JUSTICE SANJAY DHAR, JUDGE

JUDGMENT

1) The petitioners have filed the instant petition under Section 34 of the Jammu and Kashmir Arbitration and Conciliation Act, 1996 (hereinafter for short "the Act of 1996") for setting aside award dated 28.02.2024 passed by the learned Arbitral Tribunal presided over by Hon'ble Mr. Justice M. K. Hanjura, former judge of the High Court of Jammu & Kashmir and Ladakh.

2) Before coming to the grounds of challenge, it would be apt to give a brief background of the facts leading to the filing of the present petition.

3) As per case of the respondent/claimant, lease in respect of a building situated at site No.221-A Gulmarg was granted in her favour for a period of 15 years by the

petitioners herein by virtue of a lease deed dated 17th May, 1989 read with supplementary lease deed 16th July, 1989. The building was leased out to the respondent for carrying on the business of hotel/restaurant and bar for promotion of tourism initially for a period of 15 years renewable for a further period of 15 years. A clause was incorporated in the lease deed whereby the respondent was given right to mortgage the lease hold rights for the purpose of raising loan in connection with construction and commissioning of the project during the currency of the lease.

4) According to the respondent, after taking over possession of the demised premises, she obtained loan of Rs.40.00 lacs from the State Financial Corporation for the purpose of completion of construction work at the site but due to onset of militancy in the year 1990, she had to migrate outside Kashmir Valley, as such, she could not undertake further construction activities in the demised premises.

5) It is being claimed by the respondent that when Kashmir valley limped back to normalcy, she returned to the Valley and started completing the balance construction work but due to political affiliations of her husband, the petitioners started interfering in completion of the construction work on the demised premises.

6) The respondent filed a writ petition bearing No.08/2004, challenging the aforesaid action of the petitioners herein. However, in the objections filed by the petitioners herein to the said writ petition, they claimed that the lease of the demised premises in favour of the respondent stands cancelled in terms of communication dated 2nd October, 2002. The respondent, upon coming to know about the aforesaid position, withdrew the writ petition and filed the another petition bearing OWP No.518/2004 challenging the communication dated 02.10.2002 and subsequent lease in respect of demised premises in favour of one Mr. Ghulam Qadir Palla in terms of communication dated 11.06.2004 read with corrigendum dated 23.06.2004.

7) The respondent in her writ petition took a stand that the lease in respect of the demised premises has been cancelled during the currency of initial lease period of 15 years in violation of covenants of the lease deed. It was further contended by the respondent that she has raised huge loans by mortgaging the leasehold rights in terms of the covenants of the lease deed and because of cancellation of the lease deed, she has been put to loss. According to the respondent, her lease in respect of the demised property has been terminated without serving any notice upon her

and that the lease could not have been terminated on the grounds other than those incorporated in the said lease deed. Thus, according to the respondent, the action of the petitioners herein was without sanction of law.

8) The petitioners herein contested the writ petition and raised a preliminary objection to the maintainability of the writ petition on the ground that the subject matter of the writ petition is covered by the Arbitration clause contained in the lease deed and, as such, the matter is required to be referred to Arbitrator in view of the provisions contained in Section 8(1) of the Arbitration and Conciliation Act. The petitioners further claimed that the respondent failed to put the demised premises to the desired use and she did not complete the construction within a reasonable time. It was further claimed by the petitioners that the respondent left the construction incomplete and did not start any hotel business in the premises thereby depriving the petitioner Municipal Committee of the rental income. It was also claimed that the respondent did not maintain the demised premises in accordance with the terms of the agreement thereby causing huge losses to the valuable asset belonging to the Municipal Committee. Regarding service of notices, the petitioners claimed that the notices were duly served upon the respondent and one of the notices was also

published in the newspaper on 17.02.1999 but the respondent did not respond to these notices which compelled the petitioners to cancel the lease deed.

9) Subsequent allottee of the lease, Shri Ghulam Qadir Palla, who had been impleaded as a party to the writ petition, did not choose to contest the writ petition and he was set exparte.

10) This Court vide order dated 17.08.2022, after noticing Arbitration Clause (24) of the lease deed executed between the parties, referred the disputes arising between the parties to the arbitration and Hon'ble Mr. Justice M. K. Hanjura, former Judge of this Court was appointed as the sole Arbitrator for determination of the disputes.

11) Pursuant to the aforesaid order passed by this Court, the learned Arbitrator entered upon the reference and issued notices to both the parties. The respondent filed her statement of claims whereas the petitioners herein filed their statement of defence before the learned Arbitrator. The respondent in her statement of claims, besides seeking a declaration that cancellation of her lease by the petitioners is unlawful and illegal, as such, liable to be set aside, also sought an amount of Rs.25,86,07,059/ on account of the amount invested by her upon construction of the demised

premises together with interest accruing thereon. She also sought compensation. The respondent/claimant further claimed an amount of Rs.30,58,36,000/ on account of loss of business besides claiming Rs.50.00 lacs on account of litigation expenses. The respondent/claimant further incorporated the residuary clause in the relief para of her statement of claims.

12) The learned Arbitral Tribunal, after recording the evidence led by the parties and after admission/denial of the documents produced by the parties and on the basis of the record and the submissions made by the parties, came to be conclusion that there is substance in the contention of the respondent/claimant as regards cancellation of the lease and, accordingly, the order of cancellation of lease was set aside by the learned Arbitrator. However, the claim of the respondent/claimant regarding payment of Rs.25,86,07,059 on account of amount stated to have been invested by her upon construction together with interest thereon as also the her claim of Rs.30,58,36,000/ on account of loss of business was found to be without any substance. The learned Arbitrator has, however, come to the conclusion that there is substance in the submission of respondent/claimant that she has incurred expenditure of Rs.40.00 lacs on construction work and there is an

outstanding amount of Rs.1,37,57,009/ inclusive of the aforesaid amount against her which she has to pay to the State Financial Corporation.

13) On the basis of the aforesaid findings, the learned Arbitral Tribunal in para (34) of the impugned award held the claimant entitled to the following reliefs:

> *(a) The Order of Cancellation of the lease vis-à-vis the property in question is set-aside.*
>
> *(b) As a consequence of the setting-aside of the Order of the Cancellation:*
>
> *(i) the respondents shall hand over the possession of the property in question, viz. Extension Part of Yemberzal Hotel at Gulmarg, to the claimant;*
>
> *OR*
>
> *(ii) the respondents shall pay an amount of Rs. 1,37,57,009/- (One Crore Thirty Seven Lakhs Fifty Seven Thousand and Nine) along with interest@6% per annum from the date of reference and 12% from the date of issuance of this Award till its final realization; and shall give/allot to the claimant an alternate land equivalent in area to the earlier one including the permission to raise the constructions on it, as also the mortgage and other allied rights as she had in the demised premises during the subsistence of the earlier lease as stipulated in the lease deed itself.*
>
> *(c) The respondents shall also pay an amount of Rs.20.00 Lakhs as litigation charges to the claimant to which an amount of Rs. 1.35 lakhs shall be added that was due to be paid by the respondents to the Arbitrator and has now been paid by the claimant under the heads, 'miscellaneous expenses', 'travel expenditure', 'reading charges' and for 'framing the Award'.*

14) The petitioners have challenged the impugned award on the grounds that the learned Arbitrator has granted the

reliefs which were not prayed by the claimant and that the reliefs granted are beyond the terms of the reference as well as the lease agreement.

15) It has been further contended that the lease in favour of the respondent had already expired, as such, the relief relating to setting aside of the cancellation of lease had become infructuous. Besides this, third party interest stands already created in favour of one Shri Ghulam Qadir Palla, who was not a party to the arbitration proceedings. Thus, the arbitration award cannot be executed against him being not a party to the proceedings. It has been further contended that the learned Arbitral Tribunal has failed to appreciate that the respondent/claimant did not fulfil her obligations and commitments in terms of the covenants of the lease deed and that she was given reasonable opportunity by issuing notices but despite this, she failed to honour her commitments. It has been contended that the respondent/claimant had left the demised premises unattended for years together which caused huge damage to the said property thereby resulting in great financial loss to the Municipal Committee. It has been further contended that the award passed by the learned Arbitrator is against the public policy, inasmuch as, as per own showing of the learned Arbitrator, the respondent/claimant has failed to

prove any losses but in spite of this, the learned Arbitral Tribunal has proceeded to award an amount of Rs.1,37,57,009/ in favour of the respondent/claimant.

16) I have heard learned counsel appearing for the parties, perused the impugned award rendered by the learned Arbitrator, examined the record of the Arbitration, and considered the arguments advanced by the learned counsel for the parties.

17) Before proceeding to determine merits of the grounds of challenge urged by the petitioners against the impugned award, it would be apt to consider the legal position as regards the scope and power of this Court under Section 34 of the Act of 1996 to interfere with an award of an Arbitral Tribunal.

18) Section 34 of the Act of 1996, which is relevant to the context, reads as under:

> ***34. Application for setting aside arbitral award**.—(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).*
> *(2) An arbitral award may be set aside by the Court only if—*
> *(a) the party making the application establishes on the basis of the record of the arbitral tribunal that—*
> *(i) a party was under some incapacity, or*
> *(ii) the arbitration agreement is not valid under the law to which the parties have*

subjected it or, failing any indication thereon, under the law for the time being in force; or

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

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

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

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

(b) the Court finds that—

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

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

Explanation 1.—For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,—

(i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or

(ii) it is in contravention with the fundamental policy of Indian law; or

(iii) it is in conflict with the most basic notions of morality or justice.

Explanation 2.—For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.

(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 reappreciation of evidence.

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

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

(4) On receipt of an application under sub-section (1), the Court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award.

(5) An application under this section shall be filed by a party only after issuing a prior notice to the other party and such application shall be accompanied by an affidavit by the applicant endorsing compliance with the said requirement.

(6) An application under this section shall be disposed of expeditiously, and in any event, within a period of one year from the date on which the notice referred to in sub-section (5) is served upon the other party.

19) In the present case, having regard to the nature of grounds of challenge projected by the petitioners, we are concerned with sub-clause (iv) of clause (a) of sub-section

(2) quoted above and also with sub-clause (ii) of clause (b) of sub-section (2) of Section 34 of the Act of 1996. As per sub-clause (iv) of clause (a) of sub-section (2) quoted above, if the arbitral award deals with a dispute not contemplated by or not falling within the terms of reference or if it contains decisions on matters beyond the scope of the submission to the arbitration, the arbitral award is liable to be set aside to this extent and as per sub-clause (ii) of clause (b) of sub-section (2) quoted above, the arbitral award is liable to be set aside if the same is in conflict with the public policy of India.

20) It is to be borne in mind that the power of this Court to interfere with an award of the Arbitrator is extremely limited and it is only on the grounds as mentioned in Section 34 of the Act of 1996 that this Court would be justified in interfering with the award of an Arbitrator. When a Court is considering a challenge to an arbitral award, it has not to act as a Court of appeal. An award based on limited evidence or an interpretation given by an arbitrator to the terms of the agreement, which is plausible cannot be interfered with by a Court while considering a challenge to the award. The Court cannot re-appreciate the evidence with a view to hold that the award suffers from patent illegality, nor can it interpret the terms of the

agreement so as to undo the interpretation given by the arbitrator, provided the interpretation given by an Arbitrator to the terms of the agreement is plausible and reasonable. It is also clear that every error of law committed by the Arbitral Tribunal would not constitute a patent illegality. Thus, the Courts have to follow the principle of 'minimal intervention' while testing the validity of an arbitral award. Nonetheless, if the grounds set out for setting aside an arbitral award as contained in Section 34 of the Act are made out, the legislature has vested the power with the Court to step in and set aside such an award.

21) With the aforesaid legal position in mind, let us now proceed to determine the merits of the grounds urged by the petitioners for assailing the impugned award. The first ground that has been urged by learned counsel for the petitioners is that the reliefs claimed by the respondent/ claimant before the learned Arbitral Tribunal were beyond the terms of reference and it was not open to the learned Arbitrator to grant such reliefs in view of the clear interdiction contained in sub-clause (iv) of clause (a) of sub-section (2) of Section 34 of the Act of 1996. In this regard, learned counsel for the petitioners has submitted that a perusal of the prayer clauses made in the writ petition and the claim petition would reveal that the reliefs claimed

before the learned Arbitral Tribunal were entirely different from the reliefs claimed before the Writ Court. It has been contended that the Writ Court has referred only those disputes which were arising in the writ petition and not any other disputes and, therefore, it was not open to the learned Arbitral Tribunal to award reliefs in favour of the claimant which were beyond the terms of reference. Reliance in this regard has been placed upon the judgment of the Supreme Court in the case of **M/S MSK Projects(I)(JV) Ltd. v. State of Rajasthan & Anr.** (2011) 10 SCC 573.

22) The aforesaid issue has been dealt with and deliberated upon by the learned Arbitrator in paras (19), (20) and (21) of the impugned award. While dealing with this issue, the learned Arbitrator has rejected the contention of the petitioners and held that the reliefs prayed by the respondent/claimant in the statement of claims are to be considered by the Arbitral Tribunal at the end and not at the threshold after it is seen and ascertained as to whether the claimant is able to make out a case or not. The view taken by the learned Arbitral Tribunal is plausible and permissible and cannot be found fault with by this Court while exercising its powers under Section 34 of the Act of 1996. Even otherwise, if we have a look at the writ petition that was filed by the respondent/claimant before this

Court, in the said writ petition even though the respondent/claimant did not seek any compensation from the petitioners and had only sought setting aside of cancellation of the lease with a further prayer to allow her to commission the project, yet the respondent/claimant had specifically pleaded that she had availed a huge loan of Rs.40.00 lacs by mortgaging the leasehold rights in respect of the demised premises, which amount she has to recover from the petitioners against the rent payable by her to them after commissioning of the project. So, it is not a case where the respondent/claimant had not projected the losses in her writ petition which, according to her, she had incurred on account of cancellation of the lease. Therefore, the contention of the petitioners that the respondent/claimant could not have sought the relief of compensation from them by way of her statement of claims being beyond the terms of reference, is without any substance.

23) In fact, it is at the instance of the petitioners, who invoked the provisions of Section 8 of the Act of 1996 while submitting their response to the writ petition before the Writ Court, that the disputes came to be referred to the Arbitral Tribunal. The petitioners cannot now turn around and submit that the disputes raised by the respondent in the statement of claims fall beyond the scope of terms of

arbitration. The argument raised by the petitioners is, therefore, contradictory and self-defeating. The same has rightly been rejected by the learned Arbitral Tribunal.

24) It is a settled position of law that after the parties are referred to arbitration by a 'Judicial Authority' on account of exercise of power as available under Section 8, the pending proceedings come to an end and the arbitration proceedings are commenced *de novo*. In fact, a new claim is necessarily to be filed and entire proceedings as contemplated under the Arbitration Act are commenced afresh. The contention of the petitioners that after the reference the same proceedings would continue and the respondent would be bound by the prayer made by her in the writ petition, is utterly misconceived hence liable to be rejected.

25) Another argument that has been raised by learned counsel for the petitioners for impugning the award is that the dispute between the parties could not have been referred to the arbitration because, admittedly, the respondent/ claimant is a registered migrant and, as such, the only remedy available to her was in terms of the machinery available under the Jammu and Kashmir Migrant Immovable Property (Protection, Preservation and

Restraint on Distress Sale) Act, 1997 (hereinafter for short "the Act of 1997"). In this regard reliance has been placed by learned counsel for the petitioners upon the judgments of the Supreme Court in the cases of **Vidya Drolia vs. Durga Trading Corporation,** (2021) 2 SCC 1, and **A. Ayyasamy vs. A. Paramasivam,** (2016) 10 SCC 386.

26) The aforesaid aspect of the matter has also been dealt with by the learned Arbitral Tribunal in para (22) of the impugned award and it has been held that the Arbitral Tribunal would be well within its jurisdiction to deal with any kind of case(s) of the claimant under the background of Act of 1997 simultaneously.

27) If we have a look at the claim petition filed by the respondent/claimant before the learned Arbitral Tribunal, in the said claim petition, the respondent/claimant has pleaded that because of the turmoil in Kashmir Valley and being a member of the minority community, she had left Srinagar as she had a credible security threat from militants as her husband was a political worker besides being a member of the minority community. In her rejoinder to the statement of defence filed by the petitioners, the respondent/claimant has further explained that she is a Kashmiri Hindu migrant who, in the year 1990 owing to the threat to life of her husband for being a political worker,

had to leave Kashmir Valley along with her family. She has also placed on record a copy of the certificate issued by the Relief and Rehabilitation Commissioner, Jammu, according to which she stands registered as a migrant.

28) The respondent/claimant has nowhere and at no stage sought protection of her household rights which qualifies to be a "migrant property" as defined under the Act of 1997 in terms of the machinery provided under the said Act. What the respondent/claimant has conveyed in her pleadings is that because of the threat to her life and because of migration from Kashmir Valley, she was unable to commission the project. The submission of respondent/ claimant is twofold, one that the commissioning of the project could not take place for the reasons beyond her control, and second that notice prior to termination of the lease was never served upon her because she was living outside the Valley and had left her address in Srinagar. Therefore, the claim of the petitioners that the respondent/claimant should have resorted to the remedy available under the Act of 1997 instead of going for arbitration, is without any substance. In fact, as already stated, it is at the instance of the petitioners herein that the matter was referred to arbitration and they cannot now turn

around and try to wriggle out of the arbitration award by taking contradictory stands.

29) Another contention that has been raised by learned counsel for the petitioners is with regard to executability of the impugned award, so far as it provides for handing over possession of the demised premises to the respondent/ claimant. It has been contended that, admittedly, the demised premises has been allotted to one Shri Ghulam Qadir Palla who is not a party to the arbitration proceedings and, as such, not a party to the award. It has been further contended that even if the award is upheld by this Court, the same cannot be executed as against Shri Ghulam Qadir Palla.

30) The learned Arbitrator has dealt with the aforesaid aspect of the matter in para (26) of the impugned award. It has been held by the learned Arbitrator that the claim petition is maintainable and is not hit by non-joinder or mis-joinder of parties. While holding so, the learned Arbitrator has observed that the expression "claiming through or under" appearing in Sections 8 and 45 of the Act of 1996 is intended to provide a derivative right and it does not enable a non-signatory to become a party to the arbitration agreement. The learned Arbitrator, while coming

to the aforesaid conclusion, has relied upon the ratio laid down by the Supreme Court in the case of **Cox and Kings Ltd. v. SAP India Pvt. Ltd. & Anr.** 2023 SCC Online SC 1634, wherein the Supreme Court has held that an arbitration agreement can be binding on non-signatory firms under the Group of Companies doctrine. It was also held by the Supreme Court that the court or tribunal may look into the surrounding circumstances, such as nature and object of the contract and the conduct of parties during the formation, performance and discharge of the contract and that while interpreting and constructing the contract, courts or tribunal may adopt well-established principles, which aid and assist proper adjudication and determination.

31) If we consider the facts and circumstances of the present case, Shri Ghulam Qadir Palla was a party to the writ petition and he chose not to contest the writ petition. The dispute between the parties was ultimately referred to the arbitration without contest from said Shri Ghulam Qadir Palla who happened to be respondent No.7 to the writ petition. Shri Ghulam Qadir Palla derives his interest and title to the demised premises through petitioners and he has no independent right to the demised property. If the action of the petitioners in cancelling the lease of the

respondent/claimant is upheld, the rights of Shri Ghulam Qadir Palla would flow out of the said lease but in case it is held that the cancellation of lease of the demised premises qua the respondent/claimant is illegal and unlawful and, as such, liable to be set aside, the action of subsequent allotment of the demised premises in his favour would be rendered illegal. The fact that Shri Ghulam Qadir Palla did not choose to contest the writ petition, shows that he has left it to the petitioners herein to watch his interests and if the petitioners do not succeed in defending their impugned actions, Shri Ghulam Qadir Palla has to face the consequences, even though he may not be a signatory to the arbitration agreement.

32) Thus, in the aforesaid facts and circumstances of the case, in terms of GOC doctrine, even if Shri Ghulam Qadir Palla is a non-signatory to the arbitration agreement, the benefits and duties arising from the arbitration agreement would stand extended to him by operation of general rules of private law, principally on assignment, agency and succession. This Court while exercising its powers under Section 34 of the Act of 1996 does not find any cogent and convincing ground to interfere with the finding of the Arbitral Tribunal on this aspect of the matter. The

contention of the petitioners is, therefore, found to be without any merit.

33) That takes us to the grounds of challenge urged by the petitioners on merits of the impugned award. It has been contended that the impugned award is against the public policy of India, inasmuch as the findings recorded by the learned Arbitral Tribunal are perverse based upon no evidence. In this regard, it has been contended that the learned Arbitral Tribunal has committed a patent illegality by awarding an amount of Rs.1,37,57,009/ along with interest in favour of the respondent/claimant, though there was ample material on record to show that the respondent/claimant had committed breach of terms of lease and that there was no evidence on record to show that the claimant had incurred any expenses on the construction of the demised premises.

34) Before proceeding to determine the merits of the aforesaid contention of learned counsel for the petitioners, it is necessary to understand as to what is meant by the expression "public policy of India" as it appears in sub-clause (ii) of clause (b) of sub-section (2) of Section 34 of the Act of 1996. This aspect of the matter has been a subject matter of deliberation and deliberation before the Supreme

Court in a large number of cases. In **Oil and Natural Gas Corporation vs. Saw Pipes Ltd.** (2003) 5 SCC 705, the Supreme Court has held that an award could be set aside if it is against the public policy of India, that is to say, if it is contrary to:-

(a) fundamental policy of Indian law;

(b) the interest of India;

(c) justice or morality,

(d) if it is patently illegal.

35) It is pertinent to mention that at the time when the Supreme Court delivered the judgment in **Saw Pipes Ltd's** case (supra), Explanation-1 to sub-clause (ii) of clause (b) of sub-section (2) of Section 34 of the Act of 1996 had not been incorporated. The same was done only vide Act 3 of 2016 with effect from 23.10.2015. The question as to what is meant by the expressions "fundamental policy of Indian law", "the interest of India", "justice or morality", or "patent illegality", which came to be incorporated by virtue of Act 3 of 2016, came up for discussion and deliberation before the Supreme Court in the case of **Associate Builders vs. Delhi Development Authority,** (2015) 3 SCC 49**.**

36) The matter was again considered by the Supreme Court in the case of **OPG Power Generation Private Ltd vs. Enexio Power Cooling Solutions India Private**

Limited and another, 2024 SCC Online SC 2600. In the said case the Supreme Court held that, for an award to be to be against the policy of India, a mere infraction of the municipal laws of India is not enough. It was held that there must be, *inter-alia,* infraction of fundamental policy of Indian law, including a law meant to serve public interest or public good. As to what is meant by the expression 'fundamental policy of Indian law', the Supreme Court observed that the said expression has to be accorded a restricted meaning in terms of *Explanation-1* which was incorporated vide amendment made in the year 2015. Paras 55 and 56 of the said judgment are relevant to the context and the same is reproduced as under:

> *55. The legal position which emerges from the aforesaid discussion is that after the '2015 amendments' in Section 34(2)(b)(ii) and Section 48(2)(b) of the 1996 Act, the phrase "in conflict with the public policy of India" must be accorded a restricted meaning in terms of Explanation-1 The expression "in contravention with the fundamental policy of Indian law" by use of the word 'fundamental' before the phrase 'policy of Indian law' makes the expression narrower in its application than the phrase "in contravention with the policy of Indian law", which means mere contravention of law is not enough to make an award vulnerable. To bring the contravention within the fold of fundamental policy of Indian law, the award must contravene all or any of such fundamental principles that provide a basis for administration of justice and enforcement of law in this country.*
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> *56.Without intending to exhaustively enumerate instances of such contravention, by way of*

illustration, it could be said that

(a) violation of the principles of natural justice;

(b) disregarding orders of superior courts in India or the binding effect of the judgment of a superior court; and

(c) violating law of India linked to public good or public interest, are considered contravention of the fundamental policy of Indian law.

However, while assessing whether there has been a contravention of the fundamental policy of Indian law, the extent of judicial scrutiny must not exceed the limit as set out in Explanation 2 to Section 34(2)(b)(ii). Most basic notions of morality and justice"

37) In the aforesaid judgment, the Supreme Court, while explaining the connotation of the expression 'most basic notions of morality and justice' observed as under:

"58. In the light of the discussion above, in our view, when we talk about justice being done, it is about rendering, in accord with law, what is right and equitable to one who has suffered a wrong. Justice is the virtue by which the society/ court / tribunal gives a man his due, opposed to injury or wrong. Dispensation of justice in its quality may vary, dependent on person who dispenses it. A trained judicial mind may dispense justice in a manner different from what a person of ordinary prudence would do. This is so, because a trained judicial mind is likely to figure out even minor infractions of law/ norms which may escape the attention of a person with ordinary prudence. Therefore, the placement of words "most basic notions" before "of justice" in Explanation 1 has its significance. Notably, at the time when the 2015 Amendment was brought, the existing law with regard to grounds for setting aside an arbitral award, as interpreted by this See paragraph 76 of the judgment in Ssyanyong (supra) Court, was that an arbitral award would be in conflict with public policy of India, if it is contrary to:

(a) the fundamental policy of Indian law; (b) the interest of India;(c) justice or morality; and /or is (d) patently illegal. As we have already noticed, the object of inserting Explanations 1 and 2 in place of earlier

> *explanation to Section 34(2)(b)(ii) was to limit the scope of interference with an arbitral award, therefore the amendment consciously qualified the term 'justice' with 'most basic notions' of it. In such circumstances, giving a broad dimension to this category would be deviating from the legislative intent. In our view, therefore, considering that the concept of justice is open- textured, and notions of justice could evolve with changing needs of the society, it would not be prudent to cull out "the most basic notions of justice". Suffice it to observe, they ought to be such elementary principles of justice that their violation could be figured out by a prudent member of the public who may, or may not, be judicially trained, which means, that their violation would shock the conscience of a legally trained mind. In other words, this ground would be available to set aside an arbitral award, if the award conflicts with such elementary/ fundamental principles of justice that it shocks the conscience of the Court in conflict with most basic notions of morality or justice most basic notions of justice Morality*
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> *59. The other ground is of morality. On the question of morality, in Associate Builders (supra), this Court, after referring to the provisions of Section 23 of the Contract Act, 1872; earlier decision of this Court in Gherulal (supra); and Indian Contract Act by Pollock and Mulla, held that judicial precedents have confined morality to sexual morality. And if 'morality' were to go beyond sexual morality, it would cover such agreements as are not illegal but would not be enforced given the prevailing mores of the day. The court also clarified that interference on this ground would be only if something shocks the court's conscience."*

38) While explaining as to what is meant by the expression 'patent illegality' the Supreme Court, in the aforesaid judgment, clarified that it refers to such an illegality as goes to the root of the matter and does not amount to mere erroneous application of law.

39) In the light of the aforesaid position of law, let us now deal with the contention raised by learned counsel for the

petitioners. It has been contended by learned counsel for the petitioners that the respondent/claimant has all along been in default in maintaining the demised premises and commissioning the project thereon in accordance with the terms of the lease and despite service of notice upon her, she has not taken steps to commission the project which resulted in huge financial losses to the petitioners as the property could not be put to use for earning income by the petitioners. The second limb of argument of learned counsel for the petitioners is that there is no evidence on record to show that the respondent/claimant had incurred any expenses on commissioning of the project or raising construction on the demised premises in accordance with the terms of the lease, therefore, the learned Tribunal could not have awarded compensation in her favour.

40) So far as the first argument of learned counsel for the petitioners is concerned, this aspect of the matter has been dealt with extensively by the learned Arbitral Tribunal in paras (24), (25), (27), (28), (29) and (30) of the impugned award. The learned Tribunal, while dealing with this aspect of the matter, has held that the actions of the petitioners are impregnated with *mala fides*, arbitrariness and reflects breach of principles of natural justice. It has been further held that the petitioners herein have failed to establish that

the respondent/claimant did not comply with the terms and conditions of the lease deed. The learned Arbitral Tribunal has gone on to hold that the act of the petitioners herein in allotting the property in question in favour of third person is illegal and even if they could have done so, they were duty bound to provide alternate property with compensation to the respondent/claimant.

41) For determining the merits of the contention raised by learned counsel for the petitioners on this aspect of the matter, it would be apt to refer to the terms of the lease deed dated 17th May, 1989, executed between the parties, which is an admitted document. As per the terms of the lease, the respondent lessee had to complete the remaining 50% of construction work, such as electric fittings, sanitary fittings, painting of complete building, construction of kitchen block/servant quarters and part, window panes, fitting of geysers, completion of one bathroom and other building work etc. to be specified separately by N.A.C and lessee jointly. The expenditure had to be borne by the lessee, which was to be adjusted towards the fixed rent after the submission of bills and the amount so spent by lessee was to bear interest @14% annually to be adjusted against the rent fixed. It was further provided that the lease deed was for a period of 15 years at the first instance, which had

to be renewed after expiry for another term of 15 years with escalation of 10% of the annual fixed rent after the first five years of the first term and subsequently every five years thereafter. The annual rent was fixed at Rs.1,50,000/ and in the event of poor sales, the rent was to be reduced to the extent of 15% of the original rent. It was also provided that rent was to be effective/in operation from the date the hotel will be actually started and the construction completed by the lessee. The demised premises was to be used only for the aforesaid business and not for any other purpose. Clause (20) of the lease deed gave a liberty to the lessor to cancel the lease during the currency of the lease period in case the demised premises is needed for public purpose and in that event, the lessee was to be allotted an alternate accommodation on the same terms and conditions. The lessee was also given a right to mortgage the leasehold rights for raising loan for completion and commissioning of the project from a recognized financial institution during the currency of lease.

42) From the above it is clear that the lease in respect of the demised premises was in effect for a period of 30 years as it contained a compulsory renewal clause after the expiry of term of first 15 years. The contention of the petitioners is that the respondent/claimant failed to commission the

project for more than fourteen years which compelled them to cancel the lease and allot the demised premises in favour of Shri Ghulam Qadir Palla so as to prevent loss to the State exchequer.

43) It has been the consistent case of the respondent/ claimant that with the onset of militancy in the year 1990, she had to migrate out of Kashmir Valley and she was registered as a migrant. It is a fact of common knowledge that after the onset of militancy in the year 1990, a number of persons including the people from the minority community and political workers had to leave their homes and hearths on account of precarious security situation in the Valley. Most of commercial activities, particularly the activities pertaining to tourism came to a grinding halt. In fact, most of the tourist destinations were infested with foreign and local militants making it next to impossible for any tourist to visit these places. This, in turn, made the hoteliers and the people associated with tourism business to shut down their businesses. In these circumstances, asking the respondent/claimant to setup a new hotel business at Gulmarg by adhering to the terms and conditions of the lease deed would be asking for the moon. The petitioners, who are functionaries of the State, are very well in knowledge of the situation that was prevailing at the

relevant time in Kashmir. Therefore, they cannot shut their eyes to the ground situation that was prevailing at the relevant time. Their claim that there was failure on the part of the respondent/claimant to commission the project on the demised premises is, therefore, misconceived. The petitioners are well aware of the fact that even the established hotels in Kashmir Valley came to the verge of closure and most of the hotels were occupied by the Security Forces and protected persons for running the show in Kashmir Valley, for which the Government of India was paying rentals out of the security related expenses. The stand taken by the petitioners in blaming the respondent/claimant in not commissioning the project, in the facts and circumstances of the case, deserves to be rejected outrightly.

44) As already stated, it is an admitted fact that the respondent/claimant was not residing in Kashmir Valley at the relevant time as she had migrated out of Kashmir Valley, therefore, the claim of the petitioners that they had served notice upon her at her address in Srinagar is not tenable. The petitioners have not placed on record any receipt executed by the respondent/claimant in respect of any notice nor have they even claimed that they had addressed any notice to the abode of respondent/claimant

outside Kashmir Valley. Merely publishing notices in local daily newspapers like Greater Kashmir and Srinagar Times, which have hardly any circulation outside Kashmir Valley would not lead to an inference that the respondent/ claimant was having knowledge of the said notices. It is not the case of the petitioners that they had published these notices in any newspaper having circulation in Jammu or any other part of the country. Therefore, it cannot be stated that prior to cancellation of the lease deed, the petitioners had served any notice upon the respondent/claimant.

45) Even otherwise, the petitioners had no right in terms of the covenants of the lease deed to terminate the lease during the currency of the lease period except if the demised premises was needed for public purpose and even in that eventuality, they were obliged to allot alternative accommodation to the respondent/lessee on same terms and conditions. The petitioners have cancelled the lease of the respondent/claimant and thereafter allotted the premises in question in favour of Shri Ghulam Qadir Palla without holding any auction and without inviting applications from the interested persons. This arbitrary act on the part of the petitioners smacks of *mala fides* and favouritism. The same cannot be given the colour of public purpose in any circumstances whatsoever. The learned

Arbitral Tribunal is right in holding such action of the petitioners as *mala fide* and arbitrary in nature. The contention of the petitioners in this regard is, therefore, without any merit as it is clearly discernible from the records that action of the petitioners in cancelling the lease of the demised premises qua the respondent/claimant is illegal and unlawful and even the action of allotting the demised premises in favour of Shri Ghulam Qadir Palla is a *mala fide* and arbitrary exercise of power on their part.

46) So far as contention of the petitioners that award of compensation in the amount of Rs.1,37,57,009/ in favour of the respondent/claimant is based upon no evidence and, as such, the same is perverse, is concerned, in this regard it is to be noted that the learned Arbitral Tribunal has refused to grant claim of the respondent/claimant for amount of Rs.25,86,07,059/ which amount, according to the respondent/claimant, she had invested upon construction, together with the interest thereon. The learned Arbitral Tribunal has also declined the claim of the respondent/claimant to the extent of Rs.30,58,36,000/ on account of loss of business as, according to the learned Tribunal, both these claims have no substance. So, it is not a case where the learned Arbitrator, has, with his eyes shut, accepted the claims of the respondent/claimant. While

declining the aforesaid two claims, the learned Arbitrator has taken into account the fact that the respondent/ claimant has not succeeded in substantiating these two claims with any cogent and convincing evidence.

47) However, once it was held by the learned Tribunal that there was breach of terms of the agreement on the part of the petitioners in cancelling the lease deed prematurely without any notice to the respondent/claimant, she becomes entitled to damages in accordance with the provisions contained in Section 73 of the Contract Act. As per the said provision, the party who suffers by breach of contract is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach or which the parties knew when they made the contract to be likely to result of breach from it. Of course, such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

48) In the present case, it has been established that in terms of the covenants of the lease deed, the respondent/ claimant was entitled to raise loan against the security of leasehold rights from a recognized financial institution.

There is material on record to show that the respondent/ claimant had raised loan of Rs.17.78 lacs from J&K State Financial Corporation. This loan was to be repaid by the respondent/claimant in 14 instalments of Rs.1,27,000/ each and was to carry interest at a minimum rate of 16½%. There is also material on record to show that because the respondent/claimant could not operate the hotel business on account of cancellation of lease deed by the petitioners, she could not repay the loan amount and ultimately her liability swelled upto Rs.1,37,57,009/, which is evident from communication dated 28th August, 2003, issued by the J&K State Financial Corporation. The illegal and unlawful termination of the lease of the demised premises by the petitioners, which, otherwise in normal course, would have come to an end in the year 2017 because there was an option of renewal for another fifteen years term, has resulted in loss/damage to the respondent/claimant, at least to the extent of Rs.1,37,57,009/ as she had to liquidate this amount without actually making use of this money for the purpose of commissioning the project which she could not do because of the illegal actions of the petitioners. Therefore, the learned Arbitral Tribunal is justified in assessing the aforesaid amount as compensation in favour of the respondent/claimant.

49) Learned counsel for the petitioners has argued that in the claim petition, the respondent/claimant has prayed for an amount of Rs.25,86,07,059/ on account of amount invested on construction and compensation and once the said claim has been declined by the learned Tribunal, the amount of Rs.1,37,57,009/ could not have been awarded in favour of the respondent/claimant.

50) In the above context, it is to be noted that the respondent/claimant has not only prayed for an amount of Rs.25,86,07,059/ on account of amount invested on construction together with interest thereon but she has also prayed for compensation. The compensation part has not been declined by the learned Tribunal in clause (d) of paragraph (33.3) of the impugned award. Only the part of claim relating to expenses incurred on construction together with interest and loss of profits has been declined by the learned Arbitral Tribunal. The compensation part has not been declined. The contention of the learned counsel for the petitioners is, therefore, without any merit.

51) For the foregoing reasons, I do not find that either the impugned award has decided matters which were beyond the terms of reference or that the impugned award is in conflict with the public policy of India. None of the grounds enumerated in Section 34 of the Act of 1996 is made out in

the present case so as to persuade this Court to interfere in the impugned award passed by the learned Arbitrator. The petition lacks merit and is dismissed accordingly.

(Sanjay Dhar)
Judge

Srinagar,
04.07.2025
"Bhat Altaf"

Whether the **judgment** is reportable: **YES/NO**