

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

+ O.M.P. (COMM) 32/2020 & I.A. 773/2020

BRIGHT SIMONS

..... Petitioner

Through: Mr. Antony R. Julian, Advocate
(Through VC)

versus

SPROXIL,INC & ANR.

..... Respondents

Through: Mr. Rachit Batra and Mr. Nimish
Chandra, Advocates for R-1
Mr. Ashok Kumar and Ms. Chhavi
Arora, Advocates for R-2/NIXI

CORAM:

HON'BLE MR. JUSTICE CHANDRA DHARI SINGH

ORDER

CHANDRA DHARI SINGH, J (Oral)

I.A. 774/2020 (Delay)

1. The instant application under Section 151 of the Code of Civil Procedure, 1908 has been filed on behalf of the petitioner seeking condonation of delay in filing the petition.
2. For the reasons stated in the application, the same is allowed and the delay of 70 days in filing the petition is condoned.
3. The application stands disposed of.

O.M.P. (COMM) 32/2020

1. The instant petition under Section 34 of the Arbitration and Conciliation Act, 1996 has been filed on behalf of the petitioner seeking the following reliefs:

(a) set aside the Award dated 9 September 2019;

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(b) direct Respondent No.2 to re-commence the arbitration proceedings by appointing a new arbitrator and supervise such proceedings to ensure that they are conducted in compliance with law;

(c) direct the Respondents to bear the costs of the present Petition;

(d) pass such other and further orders that this Hon'ble Court may deem appropriate in the facts and circumstances of this case;

FACTUAL MATRIX

2. The facts necessary for the disposal of the present petition are that the Petitioner is the president of mPedigree Network which is involved in the development of a range of software products and services in various industries across several countries. Respondent No.1 is a company incorporated under the laws of Delaware, USA, providing brand protection services in certain African countries as well as in India. The Petitioner registered the Disputed Domain Name, 'sproxil', on 23rd October 2013 and on 6th November 2014, the Respondent No.1 sent a cease and desist notice to the Petitioner alleging that mPedigree as well as the Petitioner have been making unlawful use of Respondent No.1's trademarks and web domains, which Respondent No.1 claims to have been in use and occupation since 2011, i.e., two years prior to the date of registration by the Petitioner.

3. Subsequent to this, on 3rd February 2015, Respondent No.1 filed a complaint before National Internet Exchange of India (hereinafter referred to as 'NIXI') in respect of the disputed domain name. Arbitration proceedings were conducted pursuant to the First Complaint and an arbitral award was passed. This arbitral award was set aside by the Delhi High

Court by its judgment dated 9th May 2018 on the grounds that the impugned arbitral award was passed without complying with the principles of natural justice.

4. On 28th June 2019, another complaint was filed by Respondent No.1 in respect of the same disputed domain name with NIXI alleging *inter alia* that the Petitioner had registered the Disputed Domain Name by making false representations of knowledge under paragraph 3 of the .IN Domain Name Dispute Resolution Policy (hereinafter referred to as '**INDRP Policy**'). Subsequent to this complaint, Respondent no.2 appointed a sole arbitrator to adjudicate upon the disputes set out in the complaint. On 9th September 2019, the learned sole arbitrator passed the impugned award finding that:

(i) the Petitioner had no rights or legitimate interests in the Disputed Domain Name.

(ii) the Disputed Domain Name was registered by the Petitioner in bad faith, and directing that the Disputed Domain Name be transferred from the Petitioner to Respondent No. 1, with a request to Respondent No. 2 to monitor the transfer.

5. Aggrieved with the findings recorded in the impugned arbitral award, the Petitioner has approached this Court under Section 34 of the Arbitration Act.

SUBMISSIONS

6. Learned counsel appearing on behalf of the Petitioner in support of the instant petition has submitted that the impugned award suffers from patent illegality, it is contrary to the fundamental principles of Indian Law

and also contrary to the public policy. To substantiate his arguments, the learned counsel has submitted that the arbitrator has not only erroneously excluded relevant evidence on record but has also taken into consideration extraneous and irrelevant material to come to the conclusion that the Disputed Domain Name registered by the Petitioner is identical or confusingly similar to a trademark to which Respondent No.1 has rights.

7. It has been vehemently argued that the arbitrator has turned a blind eye to the fact that the registration of the Disputed Domain Name was applied by Respondent No. 1 only in 2016, i.e. 3 years after the Disputed Domain Name was registered by the Petitioner. The Arbitrator has also failed to give any basis for his finding that Respondent No. 1 had trademark registrations and statutory rights in the "sproxil" mark, at the time the Disputed Domain Name was registered by the Petitioner.

8. It is further submitted that the Award also fails to consider that Respondent No. 1 has not produced any credible evidence in support of its argument that it had been using the "sproxil" mark since 2011, and such a finding is only based on vague assertions not supported by any documentary evidence to this effect. On this assertion, learned counsel has submitted that the Respondent No.1 has failed to discharge its burden of proving the very first element set out in paragraph 4(i) of the INDRP Policy. It is also argued that even though the arbitrator has in his preliminary observations specifically taken note of the fact that the Respondent No.1 has inadvertently provided incorrect information to the Panel and the trademark application referred to and relied upon by the Respondent No.1 in the complaints was marked as abandoned by the Registrar of Trademarks, but

the arbitrator has grossly erred in coming to the conclusion that the Respondent No.1 had a valid trademark registration in respect of the 'sproxil' mark.

9. It is further submitted that in terms of the INDRP Rules and Policy, the arbitrator was required to confine his findings in the award to the submissions made and documents provided by the parties in the arbitration, but the arbitrator has done 'independent research' and has travelled beyond the submissions advanced by the parties to reach an erroneous conclusion which is beyond the powers conferred on law upon the arbitrator. It is also submitted that the Hon'ble Supreme Court of India has, in numerous judicial pronouncements, observed that where materials are taken behind the back of the parties by the arbitral tribunal, on which the parties have had no opportunity to comment, a ground for an arbitral award rendered by the tribunal to be set aside under Section 34(2)(a)(iii) would be made out. It is accordingly, submitted that in the present case the arbitrator did not give the Petitioner any notice that he was considering a trademark registration application made by Respondent No.1 other than the one produced by the Respondent No.1 as a part of the Complaint and hence, the impugned arbitral award cannot be sustained in law and deserves to be quashed and set aside.

10. It is submitted that the learned Arbitrator has arbitrarily arrived at the conclusion that the Petitioner did not have rights or legitimate interests in the Disputed Domain Name, by applying incorrect principles of standard and burden of proof, and without considering relevant evidence on the record to the contrary. It is submitted that to this extent, the Award discloses

non-application of mind by the Arbitrator and is patently illegal, contrary to fundamental principles of Indian law and Public policy, and is liable to be set aside under Section 34 of the Arbitration Act. It is further submitted that the learned Arbitrator has failed to apply the correct burden of proof for Respondent No. 1 to satisfy paragraph 4(ii) of the INDRP Policy, which is in contravention of substantive provisions of the INDRP Policy and the fundamental policy of Indian Law. The learned Arbitrator has failed to consider that Respondent No. 1 has not produced any evidence to make out a *prima facie* case that the Petitioner did not have legitimate rights or interests in the Disputed Domain Name. The Complaint only discloses vague allegations in respect of the Petitioner being a competitor of Respondent No. 1 and the Petitioner being allegedly interested in harming the business prospects of Respondent No. 1 in India.

11. It is vehemently argued that the arbitrator while considering whether the Petitioner in accordance with paragraph 7(iii) of the INDRP Policy is making non-commercial use of the Disputed Domain Name, the learned Arbitrator has observed that the Petitioner has not established this "beyond doubt". Accordingly, it is submitted that the standard of proof imposed by the Arbitrator in evaluating the evidence adduced by the Petitioner in this regard is "*beyond doubt*" which on the face of it, is an incorrect standard of proof to apply on the Petitioner in the Arbitration which was a civil proceedings. It is submitted that as per fundamental principle of Indian law for the administration of justice in civil proceedings, the standard of proof applicable is 'preponderance of evidence' and not 'beyond reasonable doubt'.

12. It is further submitted that the learned Arbitrator has arbitrarily arrived at the conclusion that the Petitioner had registered the Disputed Domain Name in bad faith, without considering material evidence on the record to the contrary, and by relying erroneously on external evidence not produced by either party. It is also submitted that the Respondent No. 1 has not disclosed any evidence in the Complaint to support the position that the Petitioner had registered the Disputed Domain Name with the intent of selling it at a profit to either Respondent No. 1 or its competitors. It is in fact not even the case of Respondent No. 1 in the Complaint that the Petitioner was indulging in cyber-squatting. Therefore, the learned Arbitrator's finding that Respondent No. 1 has made out a case of bad faith under paragraph 6(i) of the INDRP is entirely unsubstantiated in both pleadings and evidence, and is on the face of it untenable.

13. It is further submitted that the learned Arbitrator has failed to consider significant evidence produced by the Petitioner that on the face of it demonstrates that the Petitioner/mPedigree were not competitors of Respondent No. 1, including on the basis services offered by mPedigree and Respondent No. 1, their respective customer bases, their geographical reach and the mode of conducting business and documents produced. It is accordingly, submitted that these findings indicate that there was complete non-application of mind by the arbitrator.

14. Accordingly, it is humbly prayed that this Court may set aside the impugned arbitral award as being vitiated by patent illegality, being contrary to the fundamental policy of Indian laws as well as being contrary to the Public policy of India.

15. *Per Contra*, learned counsel appearing on behalf of Respondent No.1 has strenuously opposed the instant petition as devoid of any merit. It is submitted that the arbitration has been conducted in accordance with the procedure and within the four corners of law, and the arbitrator after appraising all the evidence on record has rightly come to the conclusion that the Petitioner had no rights or legitimate interests in the Disputed Domain Name.

16. It is submitted that the argument of the Petitioner that arbitrator has taken evidence on the back of the Petitioner is a frivolous averment as in the Trademark Registration Certificate, the application number provided by the Respondent was wrong and hence, the panel just fetched the correct application number from the certificate which the Respondent has placed on record. It is further submitted that the Respondent is in use of the Dispute Domain Name since 2011, which is prior to the date of Registration by the Petitioner and hence, the arbitrator has rightly come to the conclusion that the Petitioner has no right to the Disputed Domain Name.

17. Learned counsel appearing on behalf of the Respondent No. 2 has submitted that NIXI has a very limited role in the present petition as the only prayer sought against NIXI is to recommence the arbitration proceedings by appointing a new arbitrator and supervise the arbitral proceedings. In respect of the above prayer, it is submitted that such a prayer is unheard of and non-maintainable as even in the event of setting aside of the arbitral award, the finding of this Court on merits would act as *res-judicata* and a recommencement of the arbitral proceedings involving the same parties and same domain-name would be barred under law.

18. It is further submitted that the impugned arbitral award was communicated to the Petitioner and Respondent No.1 on 11th September 2019 and hence, the present petition being filed on 17th Jan 2020 is beyond the period of limitation and hence, is barred by law.

FINDINGS AND ANALYSIS

19. Heard learned counsel for the parties and perused the record. I have also perused the impugned arbitral award as well as the entire arbitral record brought on record. I have also given thoughtful considerations to the submissions advanced by the parties.

20. The challenge to the impugned arbitral award *inter alia* has been made on the ground that the learned Arbitrator has failed to consider relevant evidence on record in coming to the conclusion that Respondent No.1 has trademark rights in the mark ‘SPROXIL’ and that the Petitioner was using the Disputed Domain Name in bad faith. It is also submitted that such a finding is not supported by any material on record. Another ground which has been taken by the Petitioner is that learned Arbitrator has exceeded the powers vested in him by relying on a trademark application submitted by Respondent No.1 which was not provided to the Petitioner and hence, documentary evidence received at the back of the Petitioner was relied upon by the learned arbitrator in coming to its finding. It is appropriate to reproduce Rule 8(a) and Rule 12(a) of the INDRP Rules herein.

“Rule 8(a)- An Arbitrator shall conduct the arbitration proceeding in such manner as it considers appropriate in accordance with the Arbitration and Conciliation Act 1996,

Dispute Resolution Policy, the Rules of Procedure and any bye-laws, rules and guidelines framed thereunder.

Rule 12(a) – An Arbitrator shall decide a Complaint on the basis of the statements and documents submitted to it and in accordance with the Arbitration and Conciliation Act, 1996, Dispute Resolution Policy, the Rules of Procedure and any bye-laws, rules and guidelines framed thereunder and any law that the Arbitrator deems to be applicable."

21. Another ground which has been relied by the learned counsel for the Petitioner is that there is complete non-application of mind by the learned Arbitrator inasmuch as the wrong standard of burden of proof has been placed on the Petitioner, requiring him to prove his case beyond reasonable doubt and not on the basis of preponderance of probabilities. It has also been argued that the complaint filed by the Respondent No.1 before the Respondent No.2 was required to make out a *prima facie* case before the burden could have been shifted on the Petitioner herein.

22. It has been further pointed out that the learned Arbitrator has conducted a "*limited but independent search of its own*" by reviewing the description of business set out in the website of the Petitioner and of Respondent No. 1, to find that similarities exist between the services offered by both companies, and that for the purposes of this Policy, the Respondent's company can be considered a competitor to the Complainant. It is in this background that it is posited that the award suffers from multiple infirmity.

23. The main ground taken by the Petitioner while assailing the arbitral award is that the arbitral award is patently illegal and contrary to the

fundamental policy of Indian laws due to the grounds as recorded above. The law regarding patent illegality and public policy of India in no more *res integra* and has been authoritatively clarified by the Hon'ble Supreme Court in a number of judicial pronouncements. Before delving into the judicial decisions, it is pertinent to reproduce the relevant portion of Section 34 of the Arbitration Act.

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 subsection (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 reappraisal of evidence.]

24. In ***Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCC 644***, the Hon'ble Supreme Court dealt with a challenge to a foreign award under Section 7 of the Foreign Awards (Recognition and

Enforcement) Act, 1961. Though, the Arbitration Act has repealed the Foreign Awards Act but the said judgment is of great importance in understanding the parameters of judicial review when it comes to either foreign awards or international commercial arbitration seated in India as Section 7 of the Foreign Awards Act contained grounds that 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 Arbitration Act. After referring to the New York Convention, the Hon'ble Supreme Court delineated the scope of enquiry of grounds under Sections 34/48 (equivalent to the grounds under Section 7 of the Foreign Awards Act, which was considered by the Court), and held:

34. Under the Geneva Convention of 1927, in order to obtain recognition or enforcement of a foreign arbitral award, the requirements of clauses (a) to (e) of Article I had to be fulfilled and in Article II, it was prescribed that even if the conditions laid down in Article I were fulfilled recognition and enforcement of the award would be refused if the Court was satisfied in respect of matters mentioned in clauses (a), (b) and (c). The principles which apply to recognition and enforcement of foreign awards are in substance, similar to those adopted by the English courts at common law. (See: Dicey & Morris, The Conflict of Laws, 11th Edn., Vol. I, p. 578). It was, however, felt that the Geneva Convention suffered from certain defects which hampered the speedy settlement of disputes through arbitration. The New York Convention seeks to remedy the said defects by providing for a much more simple and effective method of obtaining recognition and enforcement of foreign awards. Under the New York Convention the party against whom the award is sought to be enforced can object to recognition and enforcement of the foreign award on grounds

set out in sub-clauses (a) to (e) of clause (1) of Article V and the court can, on its own motion, refuse recognition and enforcement of a foreign award for two additional reasons set out in sub-clauses (a) and (b) of clause (2) of Article V. None of the grounds set out in sub-clauses (a) to (e) of clause (1) and sub- clauses (a) and (b) of clause (2) of Article V postulates a challenge to the award on merits.

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37. In our opinion, therefore, in proceedings for enforcement of a foreign award under the Foreign Awards Act, 1961, the scope of enquiry before the court in which award is sought to be enforced is limited to grounds mentioned in Section 7 of the Act and does not enable a party to the said proceedings to impeach the award on merits.

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65. This would imply that the defence of public policy which is permissible under Section 7(1)(b)(ii) should be construed narrowly. In this context, it would also be of relevance to mention that under Article I(e) of the Geneva Convention Act of 1927, it is permissible to raise objection to the enforcement of arbitral award on the ground that the recognition or enforcement of the award is contrary to the public policy or to the principles of the law of the country in which it is sought to be relied upon. To the same effect is the provision in Section 7(1) of the Protocol & Convention Act of 1837 which requires that the enforcement of the foreign award must not be contrary to the public policy or the law of India. Since the expression “public policy” covers the field not covered by the words “and the law of India” which follow the said expression, contravention of law alone will not attract the bar of public policy and something more than contravention of law is required.

66. Article V(2)(b) of the New York Convention of 1958 and Section 7(1)(b)(ii) of the Foreign Awards Act do not postulate refusal of recognition and enforcement of a foreign award on the ground that it is contrary to the law of the country of

enforcement and the ground of challenge is confined to the recognition and enforcement

25. **Alan Redfern & Martin Hunter** in *Law and Practice of International Commercial Arbitration*, 2nd Edn., p. 461 have made a similar observation:

“The New York Convention does not permit any review on the merits of an award to which the Convention applies and, in this respect, therefore, differs from the provisions of some systems of national law governing the challenge of an award, where an appeal to the courts on points of law may be permitted.”

26. **Albert Jan van den Berg** in his treatise *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation*, has expressed the following view:

“It is a generally accepted interpretation of the Convention that the court before which the enforcement of the foreign award is sought may not review the merits of the award. The main reason is that the exhaustive list of grounds for refusal of enforcement enumerated in Article V does not include a mistake in fact or law by the arbitrator. Furthermore, under the Convention the task of the enforcement judge is a limited one. The control exercised by him is limited to verifying whether an objection of a respondent on the basis of the grounds for refusal of Article V(1) is justified and whether the enforcement of the award would violate the public policy of the law of his country. This limitation must be seen in the light of the principle of international commercial arbitration that a national court should not interfere with the substance of the arbitration.”

27. In *International Commercial Arbitration* by **Gary B. Born (Wolters Kluwer, Second Ed., 2014)** [**“Gary Born”**], the learned author deals with the proposition in the following manner:

“[12] No Judicial Review of Merits of Foreign or Non Domestic Awards in Recognition Actions

It is an almost sacrosanct principle of international arbitration that courts will not review the substance of arbitrators’ decisions contained in foreign or nondomestic arbitral awards in recognition proceedings. Virtually every authority acknowledges this rule and virtually nobody suggests that this principle should be abandoned. When national courts do review the merits of awards, they labour to categorize their action as an application of public policy, excess of authority, or some other Article V exception, rather than purporting to justify a review of the merits.

[a] No Judicial Review of Awards Under New York and Inter-American Conventions

Neither the New York Convention nor the Inter American Convention contains any exception permitting non-enforcement of an award simply because the arbitrators got their decision on the substance of the parties’ dispute wrong, or even badly wrong. This is reasonably clear from the language of the Convention, which makes no reference to the possibility of a review of the merits in Article V’s exhaustive list of the exclusive grounds for denying recognition of foreign and nondomestic awards. There is also no hint in the New York Convention’s drafting history of any authority to reconsider the merits of an arbitral award in recognition proceedings.

Likewise, the prohibition against review of the merits of the arbitrator’s decision is one of the most fundamental pillars of national court authority interpreting the Convention. This prohibition has repeatedly and uniformly been affirmed by national courts, in both common law and civil law jurisdictions. Simply put: “the court may not refuse to enforce an arbitral award solely on the ground that the arbitrator may have made a mistake of law or fact” [Karahra Bodas Co. LLC

v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 364 F.3d 274, 287-88 (5th Cir. 2004)]. Thus, in the words of the Luxembourg Supreme Court [Judgment of 24 November 1993, XXI Y.B. Comm. Arb. 617, 623 (Luxembourg Cour Supérieure de Justice) (1996)]:

“The New York Convention does not provide for any control on the manner in which the arbitrators decide on the merits, with as the only reservation, the respect of international public policy. Even if blatant, a mistake of fact or law, if made by the arbitral tribunal, is not a ground for refusal of enforcement of the tribunal’s award.”

Or, as a Brazilian recognition decision under the Convention held [Judgment of 19 August 2009, Atecs Mannesmann GmbH v. Rodrimar S/A Transportes Equipamentos Industriais e Armazes Gerais, XXXV Y.B. Comm. Arb. 330, 331 (Brazilian Tribunal de Justiça) (2010)]:

“these questions pertain to the merits of the arbitral award that, according to precedents from the Federal Supreme Court and of this Superior Court of Justice, cannot be reviewed by this Court since recognition and enforcement of a foreign award is limited to an analysis of the formal requirements of the award.”

Commentators have uniformly adopted the same view of the Convention [See, for e.g., K.-H. Böckstiegel, S. Kröll & P. Nacimiento, Arbitration in Germany 452 (2007)].”

28. In ***Ssangyong Enginerring & Construction Co. Ltd vs. National Highway Authority of India***, (2019) 15 SCC 131, the Hon’ble Supreme Court while explaining the scope of the expression ‘Public Policy of India’ made the following pertinent observations:

“23. 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 paragraphs 18 and 27 of Associate Builders (supra), i.e., the fundamental policy of Indian law would be

relegated to the “Renusagar” understanding of this expression. This would necessarily mean that the Western Geco (supra) expansion has been done away with. In short, Western Geco (supra), as explained in paragraphs 28 and 29 of Associate Builders (supra), 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 paragraph 30 of Associate Builders (supra).

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25. Thus, it is clear that public policy of India is now constricted to mean firstly, that a domestic award is contrary to the fundamental policy of Indian law, as understood in paragraphs 18 and 27 of Associate Builders (supra), or secondly, that such award is against basic notions of justice or morality as understood in paragraphs 36 to 39 of Associate Builders (supra). Explanation 2 to Section 34(2)(b)(ii) and Explanation 2 to Section 48(2)(b)(ii) was added by the Amendment Act only so that Western Geco (supra), as understood in Associate Builders (supra), and paragraphs 28 and 29 in particular, is now done away with.

26. Insofar as domestic awards made in India are concerned, an additional ground is now available under sub-section (2A), 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.

27. Secondly, it is also made clear that re-appreciation of evidence, which is what an appellate court is permitted to do, cannot be permitted under the ground of patent illegality appearing on the face of the award.

28. To elucidate, paragraph 42.1 of Associate Builders (supra), namely, a mere contravention of the substantive law of India, by itself, is no longer a ground available to set aside an arbitral award. Paragraph 42.2 of Associate Builders (supra), 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.

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30. What is important to note is that a decision which is perverse, as understood in paragraphs 31 and 32 of Associate Builders (supra), 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.

31. Given the fact that the amended Act will now apply, and that the “patent illegality” ground for setting aside arbitral awards in international commercial arbitrations will not apply.....”

29. Here, it is pertinent to elaborate the meaning of the ‘Fundamental Policy of Indian Law’, as the Petitioner has taken a plea that the impugned arbitral award is contrary to the fundamental policy of Indian Law and hence, being opposed to the Public Policy of India.

30. In *Associate Builders vs. Delhi Development Authority*, (2015) 3 SCC 49, the Hon'ble Supreme Court clarified the meaning and scope of 'Fundamental Policy of Indian Law' in the context of Section 34 of the Arbitration Act in the following manner:

“28. In a recent judgment, ONGC Ltd. v. Western Geco International Ltd., 2014 (9) SCC 263, 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-

“35. What then would constitute the “fundamental policy of Indian law” is the question. The decision in ONGC [ONGC Ltd. 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.

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38. Equally important and indeed fundamental to the policy of Indian law is the principle that a court and so also a quasijudicial 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 audi alteram 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 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.”

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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:

- 1. a finding is based on no evidence, or*
- 2. an arbitral tribunal takes into account something irrelevant to the decision which it arrives at; or*
- 3. ignores vital evidence in arriving at its decision,*

such decision would necessarily be perverse.

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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 score¹. Once it is found that the arbitrators approach

is not arbitrary or capricious, then he is the last word on facts.....”

31. Therefore, what really transpires herein is that *first*, the learned arbitrator must have taken a judicial approach; *secondly*, the principles of natural justice must have been adhered; *thirdly*, the decision must not been perverse.

32. In ***R vs. Northumberland Compensation Appeal Tribunal. Ex Parte Shaw, 1952 1 All ER 122***, Lord Denning made the following pertinent observations:

“Leaving now the statutory tribunals, I turn to the awards of the arbitrators. The Court of King's Bench never interfered by certiorari with the award of an arbitrator, because it was a private tribunal and not subject to the prerogative writs. If the award was not made a rule of court, the only course available to an aggrieved party was to resist an action on the award or to file a bill in equity. If the award was made a rule of court, a motion could be made to the court to set it aside for misconduct of the arbitrator on the ground that it was procured by corruption or other undue means: see the statute 9 and 10 Will. III, c. 15. At one time an award could not be upset on the ground of error of law by the arbitrator because that could not be said to be misconduct or undue means, but ultimately it was held in Kent v. Elstob, (1802) 3 East 18, that an award could be set aside for error of law on the face of it. This was regretted by Williams, J., in Hodgkinson v. Fernie, (1857) 3 C.B.N.S. 189, but is now well established.”

33. The Privy Council in ***Champsey Bhara Company vs. The Jivraj Balloo Spinning and Weaving Company Ltd., AIR 1923 PC 66***, held as follows:

“The law on the subject has never been more clearly stated than by Williams, J. in the case of Hodgkinson v. Fernie (1857) 3 C.B.N.S. 189.

“The law has for many years been settled, and remains so at this day, that, where a cause or matters in difference are referred to an arbitrator a lawyer or a layman, he is constituted the sole and final judge of all questions both of law and of fact The only exceptions to that rule are cases where the award is the result of corruption or fraud, and one other, which though it is to be regretted, is now, I think firmly established viz., where the question of law necessarily arises on the face of the award or upon some paper accompanying and forming part of the award. Though the propriety of this latter may very well be doubted, I think it may be considered as established.

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Now the regret expressed by Williams, J. in Hodgkinson v. Fernie has been repeated by more than one learned Judge, and it is certainly not to be desired that the exception should be in any way extended. An error in law on the face of the award means, in their Lordships' view, that you can find in the award or a document actually incorporated thereto, as for instance, a note appended by the arbitrator stating the reasons for his judgment, some legal proposition which is the basis of the award and which you can then say is erroneous. It does not mean that if in a narrative a reference is made to a contention of one party that opens the door to seeing first what that contention is, and then going to the contract on which the parties' rights depend to see if that contention is sound. Here it is impossible to say, from what is shown on the face of the award, what mistake the arbitrators made. The only way that the learned judges have arrived at finding what the mistake was is by saying: “Inasmuch as the Arbitrators awarded so and so, and inasmuch as the letter shows that then buyer rejected the cotton, the arbitrators can only have arrived at that result by totally misinterpreting Cl.52.” But they were entitled to give their own interpretation to Cl. 52 or any other article, and the

award will stand unless, on the face of it they have tied themselves down to some special legal proposition which then, when examined, appears to be unsound. Upon this point, therefore, their Lordships think that the judgment of Pratt, J was right and the conclusion of the learned Judges of the Court of Appeal erroneous.”

34. The Hon’ble Supreme Court in ***Associate Builders vs. Delhi Development Authority (supra)***, while explaining the meaning and scope of Patent Illegality held as follows:

“42. In the 1996 Act, this principle is substituted by the ‘patent illegality’ principle which, in turn, contains three sub heads – 42.1 (a) a contravention of the substantive law of India would result in the death knell of an arbitral award. This must be understood in the sense that such illegality must go to the root of the matter and cannot be of a trivial nature. This again is a really a contravention of Section 28(1)(a) of the Act, which reads as under:

“28. Rules applicable to substance of dispute.—(1) Where the place of arbitration is situated in India,— (a) in an arbitration other than an international commercial arbitration, the arbitral tribunal shall decide the dispute submitted to arbitration in accordance with the substantive law for the time being in force in India;”

42.2 (b) a contravention of the Arbitration Act itself would be regarded as a patent illegality- for example if an arbitrator gives no reasons for an award in contravention of section 31(3) of the Act, such award will be liable to be set aside.

42.3 (c) Equally, the third sub-head of patent illegality is really a contravention of Section 28 (3) of the Arbitration Act, which reads as under:

“28. Rules applicable to substance of dispute.— (3) In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.”

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

35. This Court is conscious of the statutory injunction envisaged under Section 34(2A) read with Section 2(1)(f) of the Arbitration that the ground of ‘*patent illegality*’ in setting aside an arbitral award is not available in the case of international commercial arbitrations. It is important to reproduce Section 2(1)(f) of the Arbitration Act.

(f) “international commercial arbitration” means an arbitration relating to disputes arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India and where at least one of the parties is—

- (i) an individual who is a national of, or habitually resident in, any country other than India; or*
- (ii) a body corporate which is incorporated in any country other than India; or*
- (iii) [* * *] an association or a body of individuals whose central management and control is exercised in any country other than India; or*
- (iv) the Government of a foreign country;*

36. Accordingly, as the award in the present case arises out of International Commercial Arbitration seated in India, the Petitioner could not be said to have the benefit of the ‘*ground of patent illegality*’ to assail the impugned arbitral award under Section 34 of the Arbitration Act.

37. I am unable to subscribe to the submissions made by the learned counsel for the Petitioner. The Petitioner has failed to show that the arbitral award has been passed by not taking a judicial approach; or the award is based on no evidence. Merely, because an application of Trademark Registration has been given a passing reference by the Arbitrator cannot inevitably lead to the conclusion that the principles of natural justice have not been complied with and the award is rendered as perverse. This Court is satisfied that there has been no violation of Rules 8(a) and 12(a) of the INDRP Rules. This court is conscious that it is not sitting in appeal over the arbitral award and hence, do not find any merit on the argument of the Petitioner that the conclusion reached by the learned arbitrator to the effect that the Disputed Domain Name registered by the Petitioner is identical is perverse or contrary to the fundamental policy of Indian Law. This Court is also satisfied that the arbitrator has reached a right conclusion to the effect that the mark 'sproxil' has been in use by the Respondent No.1 since 2011, on the basis of materials on record. Another ground taken is that the arbitrator has placed wrong burden of proof on the Petitioner while appreciating evidence inasmuch as the arbitrator held that the Petitioner has not been able to prove beyond doubt that it was making a non-commercial use. The relevant portion of the award is reproduced below:

“This, the Respondent contends, establishes that no commercial gain was received by the Respondent through the domain name. However, a detailed review of the screenshot provided by the Complainant- and relied upon by the Respondent as well- does not reveal any evidence which could beyond doubt establish that the Respondent was/is making a non-commercial use of the domain name.”

38. I am unable to agree to the interpretation as has been provided by the Petitioner as the terminology used by the arbitrator cannot be equated with legal term '*beyond reasonable doubt*' as is used in the criminal trial. I am also unable to agree with the submission of the Petitioner that the arbitrator has wrongly applied paragraph 6(i) of the INDRP Policy as even if the submission of the Petitioner is accepted, then merely because there has been wrong application of law not leading to perversity cannot lead to the setting aside of the arbitral award.

CONCLUSION

39. The Petitioner has failed to corroborate with evidence how the learned arbitrator's finding regarding the similarity of the disputed domain name is contrary to the public policy of India. Even if the submissions of the Petitioner *qua* patent illegality in the award is accepted, then also no ground has been made out to set aside the award inasmuch as the threshold to interfere in an arbitral award has not been made out.

40. In view of the above discussion of facts and law, the present petition does not have any substance to warrant interference by this Court under Section 34 of the Arbitration Act.

41. Accordingly, the instant petition being bereft of any merit is dismissed along with pending applications, if any.

42. The order be uploaded on the website forthwith.

(CHANDRA DHARI SINGH)
JUDGE

JANUARY 5, 2023/gs/mg

Click here to check corrigendum, if any