

**HIGH COURT OF TRIPURA
AGARTALA**

Commercial Appeal No. 04 of 2023

1. The State of Tripura,
represented by the Secretary to the
Government of Tripura,
Public Works Department,
New Secretariat Building,
Capital Complex, Agartala, West Tripura.

2. The Executive Engineer,
Kailashahar Division, PWD (R&B).

.....Appellant(s)

Versus

Sri Binode Behari Das, Contractor.
S/o Lt. Gajendra Kr. Das,
Mother Teresa Road,
Kailashahar, Unakoti Tripura.

..... Respondent(s)

For the appellant(s)	:	Mr. S.M. Chakraborty, Sr. Advocate Mr. K. Dey, Addl. G.A. Ms. M. Chakraborty, Advocate
For the respondent(s)	:	Mr. Somik Deb, Sr. Advocate Mr. H. Sarkar, Advocate Mr. P. Chakraborty, Advocate
Date of hearing	:	13.03.2024
Date of delivery of Judgment & Order:	:	24.04.2024
Whether fit for reporting	:	YES/NO

**HON'BLE THE CHIEF JUSTICE MR. APARESH KUMAR SINGH
HON'BLE MR. JUSTICE ARINDAM LODH**

J U D G M E N T & O R D E R

(Arindam Lodh, J.)

The issue falls under consideration in this commercial appeal is in respect of the Agreement bearing No. 07/CE/EE/KLSD/2011-2012 for construction of Kailashahar Girls' H.S. School, Kailashahar, Tripura North/ Ground Floor(except Auditorium) and 1st Floor(Front Block only)/SH Building portion including water supply and sanitary installation (Phase I), to be completed within the stipulated period of 24 months and the work would

be reckoned from the 15th day after the issuance of work order and as such, the stipulated date of commencement of work was 14-02-2012 and the date of completion was 14-02-2014, the dispute arose between the parties which led to appointment of an arbitrator. Accordingly, dispute cropped up between the parties and the dispute was referred to Arbitration by Memorandum vide No. F.7(17)/CE/PWD(Buildings)/2018-19/974-76 dated 24-06-2019 and arbitration proceeding was commenced on 05-05-2020.

2. Heard Mr. S.M. Chakraborty, learned senior counsel assisted by Mr. K. De, learned Addl. G.A. and Ms. M. Chakraborty, learned counsel for the appellants. Also heard Mr. Somik Deb, learned senior counsel assisted by Mr. P. Chakraborty, learned counsel for the respondent.

3. This appeal filed under Section 37(1)(c) of Arbitration and Conciliation Act, 1996 read with Section 13(1A) of the Commercial Courts Act, 2015 is directed against the impugned judgment and order dated 20.04.2023, passed under Section 34 of the Arbitration and Conciliation Act in Title Suit No.02 (Arbitration) of 2022 passed by the learned District Judge, Unakoti Judicial District, Kailashahar and the Arbitral award dated 06.03.2022 passed by the learned Sole Arbitrator in Arbitral Proceeding No. DKB/ARB P.04 of 2019, whereby and whereunder the learned District Judge by the impugned judgment dated 20.04.2023 upheld the Arbitral Award passed by the learned Sole Arbitrator and dismissed the application filed under Section 34 of the Arbitration and Conciliation Act.

4. The relevant factual details of the case of the parties as culled out from the pleadings on record are narrated hereunder:

4.1. On 12.08.2011, a Notice Inviting Tender vide No.10/EE/KLSD/2011-12 came to be published at the instance of the Executive

Engineer, PWD(R&B), Kailashahar Division, Kailashahar, North Tripura for construction of Kailashahar Girl's H.S. School Ground Floor(Fr. Block only)/SH. Building portion including internal water supply and sanitary installation(Phase-1). As the respondent-contractor being found the lowest bidder, work order No.F.25(16)/EE/KLSD/5469-5488 dated 30.01.2012 was issued to him and the agreement bearing No.07/CE/ EE/KLSD/2011-12 was executed between the parties. As per work order, the stipulated time for completion of work is 24 (twenty four) months and the work shall be reckoned from the 15th(fifteenth) day after the issuance of work order. Thus, the stipulated date of commencement of work is 14.02.2012 and date of completion is 14.02.2014.

4.2. The work was completed, but went beyond the stipulated period. Extension of time was granted upto 30.10.2106, whereas the work completed on 22.05.2017. No fine or compensation was levied from the contractor at any point of time. It is alleged that final bill has already been prepared and submitted but payment of the bill was not yet made to the contractor in spite of repeated requests. As a result, disputes arose between the parties, which resulted into appointment of a sole arbitrator vide Memorandum No.F.7(17)/CE/PWD(Buildings)/2018-19/974-76 dated 24.06.2019 and accordingly arbitration proceeding was commenced on 05.05.2020.

4.3. The respondent contested the claims by filing a counter statement of fact. Documents submitted by the parties before the arbitral tribunal, are not disputed by either of the parties to the proceeding.

4.4. Considering the controversies transpired from the respective statement of claims and defense and the documents filed by the parties, the learned Arbitrator framed the following issues:

“i. Whether withholding of Rs. 1,70,000 on account of extension of time is proper?”

ii. Who, the claimant or respondent, is responsible for extension of time in executing the work?”

iii. Whether the claimant is entitled to the amount claimed under price escalation and overhead?”

4.5. On going through the documentary evidence furnished by both the parties with their respective statement of claims and defense and having heard the learned counsel of the parties, the learned Arbitrator on 06.03.2022 declared the award in the following manner:

“i. Whether withholding of Rs. 1,70,000 on account of extension of time is proper?”

5.1 Under this issue the contractor claimed Re. 1,70,000 as balance payment for the work done. Contractor stated that he completed the work under the agreement satisfactory, respondents prepared the final bill, yet payment was not made inspite of several requests. The respondent by filling reply admitted the contractor's claim under this issue saying that the contractor will get Rs. 1,69,474 (not Rs. 1,70,000). The respondent also pleaded that the prayer for granting extension of time has not yet been finalized, hence payment of final Bill could not be released.

5.2 By filing written argument the respondent denied the claim of contractor under this issue. In the written argument the respondent stated that while preparing final bill the department did not deduct the cost of 8.672 MT Governmental Tor steel by mistake. According to the respondent the contractor will not get any amount under this issue.

5.3 After completion of pleadings the respondent submitted one supplementary defence statement on 13-02-2021, but it was rejected by the tribunal. However at the time of preparing the award the respondent's supplementary statement of fact has been examined.

5.4 On perusal of the said supplementary statement of fact it is found that in the supplementary statement of fact the respondent simply stated that for convenience, the department allowed the contractor to utilize Governmental Tor-steel of 8.672 MT by transferring from another contract and this transfer entry has been recorded in the MB. The respondent has not stated anywhere in the pleadings (including the supplementary statement) that cost of the above mentioned Tor steel yet to be recovered from the contractor. But in the written argument the

respondent stated that while preparing final bill the price of said 8.672 MT Tor steel was not deducted by mistake. The respondent has not taken the plea of said mistake in the pleadings i.e. in the counter statement of fact or even in the supplementary statement of fact. At the outset it is pointed out that in the pleadings the respondent admitted the contractor's claim under this issue, but in the argument the respondent stated that the cost of above mentioned Tor steel was not deducted by mistake. Even in the supplementary statement of fact the respondent did not take the plea of the said mistake as stated in the written-argument. However the respondent did not offer any explanation as to how the alleged mistake took place.

5.5 *The respondent stated in their reply that the final bill had already been prepared. But the respondent did not produce before the Tribunal the final bill (or its authenticated copy) to substantiate the alleged mistake with regard to recovery of the cost of Tor steel. Besides this, the respondent could refer to arbitration the alleged 'mistake' i.e. the claim for recovery of the cost of Tor steel. The claim for recovery of cost of the Tot steel was not referred to arbitration.*

5.6 *For proper adjudication of the issue the Tribunal, after conclusion of argument at the time of preparing the award, by order dated 01-02-2022 requested the Respondent to produce the original/authenticated copy of final bill, and which the respondent did. On scrutiny of the final bill it is found that the alleged transfer entry of the Tor steel has been considered while preparing the final bill. It became clear to the Tribunal that the subsequent plea of the Respondent in the argument that while preparing final bill the cost of Tor steel was not deducted by mistake is unfounded.*

5.7 *In the written argument the respondent submitted that "due to non submission of application for formal extension of time and in absence of regularisation of the extended period, the final bill could not be settled and the payment was withheld under clause 25.2 of the agreement". I have perused Clause 25.2 of the agreement and found that above quoted argument is misconceived.*

5.8 *It is pertinent to mention here that as per agreement the work was required to be completed within 14-02-2014, but completed on 22-5-2017. Yet no action was taken against the contractor for the delayed execution of work.*

5.9 *After lapse of the period of contract on 14-02-2014 the contractor continued the work for 28 months beyond the stipulated period, yet no action has been taken against the contractor. Meaning thereby the contractor was not at fault and the respondent had implied consent to the*

extension of time. From the date of completion of work on 22-5-2017 till the contractor's prayer dated 28-5-2019 for referring the dispute to arbitration, a long period of 2 years elapsed yet final payment was not given to the contractor. Clause.30.2 of the CPWD manual stipulates that final payment for works costing more than Rs.15 Lakhs should be made within 6 months of the completion of work, and for other works within 3 months. Therefore the plea of respondent that the prayer for grating extension of time has not yet been finalised cannot be accepted and also the argument of respondent that the price of Tor steel was not deducted by mistake while preparing final bill appear to be baseless.

From the above it is well established that withholding of Rs. 1,70,000 on account of extension of time is not proper. Hence the issue is decided in favour of the contractor.

ISSUE No. ii: Who, the claimant or the respondent, is responsible for extension of time in executing the work?

6.1 The claimant in support of the claim under this issue relied, among others, on the Ext.C/12, 12A, 14, 15 16, 17, 19, 20, 21, 22, 23, 24 & 25 documents.

6.2 Ext.C/12 document was addressed with reference to the respondent's letter dated 15-02-2012, which shows that on 28-4-2012 the contractor got work site and revised drawing for one of the three buildings. As per drawing some deviated work was required to be done by the contractor.

6.3 Ext.C/12A document shows that the contractor got a part of the work site and for lack of space he could not prepare adequate accommodations for the workers.

6.4 Ext.C/14 document shows that prior to ground development work till 01-6-2012 some dismantling work and work for removal of existing structures were required to be done by the school authority.

6.5 Ext.C/15 document shows that Electric pole was existed on the work site till 26-6-2012 and also the school authority could not complete dismantling work.

6.6 Ext.C/17 document shows that the respondent changed the nature of construction, as a result of which huge deviation occurred in foundation work and a long period was consumed for settling the rate of deviated work. Thereafter a part of work site in low area was handed over in rainy season in the middle of July, 2012, wherein rain water accumulates; hence the contractor could not commence the work immediately. Ultimately the work was commenced in the middle of

November, 2012. In this document the contractor explained that bona-fide hindrances existed in the work site. Hence, initially there was delay of 15 months occurred to start the work. Thus the contractor requested the department to treat this 15 months period as valid hindrance.

6.7 Ext.C/19 document shows that due to ongoing Annual examination, the school management committee requested the Executive Engineer to take up the dismantling work by December, 2013. From the minutes of meeting it is found that decision was taken for requesting the School Education Department for placing necessary fund so that after shifting of different materials vacant class rooms can be handed over to the PWD within 15-12-2013.

Ext.C/20 document shows that old structures were lying on the work site of the proposed building till 17-12-2013.

Ext.C/22 document shows that on 9-6-2014 contractor was requested to execute some extra item.

6.8 Ext.C/23, 24, 25 & 26 would show that extension of time was granted upto 30-10-2016 in four different spells.

6.9 Ext.C/26 document shows that the work was completed on 22-5-2017. But extension was granted upto 30-10-2015. Extension was not granted for the period 7 months with effect from 31-10-2016 till the date of completion of work on 22-5-2017.

6.10 The respondent relied on some documents which it has annexed in the reply at page 15 to 35. But no pleadings are there in support of these documents. Out of which some documents have been annexed with the claim statement. Perused all the documents and found that some documents are not relevant; hence detailed discussions of all the documents have been avoided.

6.11 The document available at page 16 & 17 of the reply would show that three nos. of drawings were handed over to the contractor on 13-5-2013 and subsequently again three nos. of drawings were also handed over to the contractor. Document available at page 19, 20, 21 would show that initially the respondent requested the contractor to receive the work site and work site was handed over on 24-4-2012. Document available at page 22 shows that the contractor started the preliminary work on 5-8-2012. The document available at page 23 of the reply shows that the respondent denied to accept the delay occurred at the time execution of ground improvement work saying that the rate relating to work for ground improvement could have been finalised keeping the work in progress. By the documents mentioned at page 24, 25, 26, 27, 28 of the reply the respondent mentioned that on several occasions the contractor

kept the work under suspension, the work was started with inadequate strength of labourers and the contractor was requested to continue with the progress of work etc. By documents mentioned at page 29, 30 & 31 of the reply are all show cause notice to the contractor.

6.12 On perusal of all the documents produced by the parties to the proceeding it is found that the parties have blamed each other for the delay in execution of the work. In such a situation reliance can be placed on the Hindrance Register to reveal the truth regarding the actual reasons of delay. Accordingly on the prayer of claimant the tribunal by order dated 4-4-2021 directed the respondent to produce the hindrance register. Later on, the respondent by application dated 22-8-2021 stated that the department did not maintain any Hindrance Register because no occasion for registering any hindrance arose during execution of the work. However, the respondent subsequently produced a blank hindrance register.

6.13 In the above mentioned documents the respondent stated that on several occasions the contractor suspended the work and on **three occasions show cause notice was issued to the contractor. Whether these show cause notices were replied or not, has not been stated by any parties.** Even no material has been produced on record with regard to reply against the show cause notices. Clause 26 of the agreement provides that if the contractor suspends the work without sanction of the department or fails to maintain the schedule rate of progress or continues to default or repeats such default the department shall take action against the contractor. Record shows that no action has been taken against the contractor for the alleged unauthorised suspension of work by the contractor. The respondent again stated that no hindrance arose during the execution of work. Admittedly delay is there in execution of the work, yet the respondent did not take any action against the contractor. **This situation clearly indicates that the contractor is not at fault for the delay in execution of the work under the agreement.**

6.14 On the other hand the documents which the contractor submitted would clearly show that several hindrances existed in the work site during execution of the work. The contractor stated that due to fault on the part of respondent the hindrances were not removed from the work site in time, hence the delay occurred. **On the other hand the respondent stated that no occasion for registering any hindrance arose during the execution of work, hence the respondent did not maintain Hindrance register.** The Annexure-12, 12A, 14, 15, 17 & 19 documents would show that hindrances were there in the work site and these documents have not

been disputed by the respondent. From the above it can safely be held that the respondent did not maintain hindrance register just to cover its own fault. In view of the above it is clear that the respondent is responsible for the delayed execution of work under the agreement and hence the issue is decided in favour of the contractor.

ISSUE No. iii: Whether the claimant is entitled to the amount claimed under price escalation and overhead?

7.1 The Respondent in its argument denied the claim of price escalation on the following grounds:

(i) *That the contractor did not raise his claim for price escalation during the execution of work and submitted the price escalation bill after lapse of one year from the date of completion of the work, hence the claim is barred by limitation.*

(ii) *That as per clause 23.9 of the agreement the contractor did not make any communication intimating the Department that "he shall not execute the work unless the approval for price adjustment is made in his favour, rather continued the work accepting that he was not entitled for any price escalation for the delay."*

(iii) *That "the contractor while submitting the tender has furnished a certificate in the tender I/We hereby declare that I/We will not claim any escalation if the estimated cost for the work is less than Rs. 1.00 crore & time for completion is less than or equal to twenty four months.....*

Thus the doctrine of 'promissory estoppels' prevents the claimant from withdrawing his promise made to the respondent.....

7.2 Against the claim of price escalation the respondent in its argument as mentioned in Sl. (i) above has failed to show any provisions of law, clause of agreement or any other material by virtue of which the contractor's claim for price escalation is time barred. Hence the argument has no force.

7.3 Secondly, referring the clause 23.9 of the agreement as mentioned in the above mentioned ground in Sl. No. (ii) the respondent submitted that for making a claim for price escalation prior approval of the Department is required. On scrutiny of clause 23.9 of the agreement it is revealed that this clause is related to delay and extension of time. It says that if the department fails to issue necessary instructions and thereby caused delay and hindrance to the contractor, the contractor has to make a claim to the department seeking extension for such delay and hindrance within a period of 14 days, otherwise no extension of time will be allowed. Thus it is clear that in the absence of any claim for extension of time, the

claim of compensation alone for such delay and hindrance is not maintainable. This clause is ancillary to the claim for extension of time, which the respondent misunderstood. Hence the argument of the Respondent is irrelevant; extension of time has been wrongly related to escalation. There being no ground the respondent's plea is rejected and the claim of the contractor is accepted.

7.4 *Thirdly against the claim of price escalation the respondent indirectly referring the **clause 44 of the agreement** argued that the doctrine of promissory estoppel prevents the contractor from claiming any price adjustment. On examination of the agreement it is found that the **clause 44 and 44.1 of the agreement relates to the price adjustment/price escalation claim. Clause 44 provides that claim for price adjustment is not applicable to the works for which estimated cost put to tender is less than Rs. 1 (one) crore and stipulated time for completion is less than or equal to 24 months. Clause 44.1 provides that price adjustment shall be granted for the works estimated at more than Rs. 1 (one) crore and having completion period of more than 24 months and this should be applicable owing to departmental fault.** The estimated cost of work under the agreement is more than 1 (one) crore and stipulated period is 24 months. Therefore clause 44 is not applicable in this case. But the claim of contractor is covered by clause 44.1 of the agreement. It has already been decided while deciding the issue No.ii that the respondent is responsible for the delay in execution of the work. **Thus the contractor's claim for price adjustment is maintainable.***

7.5 *On examination of the price escalation bills and the method of calculation, it is found that the calculation has been done following the method provided in the agreement (page 30 to 77, Claim statement). **Hence the contractor is entitled to the amount claimed under the issue.***

7.6 *Under dispute No.4 the contractor claimed damages on of overhead expenses, which the respondent disputed saying that-*

- i. due to insufficient men and materials the contractor failed to maintain the progress rate of work;*
- ii. the contractor did not furnish the construction programme and suspended the work repeatedly;*
- iii. the contractor did not submit monthly progress report of the work as per agreement, failed to achieve the desired progress of the work and could not fulfil the milestone as per clause 46.3 of the agreement.*

7.7 *Clause 24 of the agreement deals with construction programme, clause 25 deals with speed of work and clause 26 deals with*

suspension of work by the contractor. Clause 24.1 of the agreement provides that the contractor shall furnish within one month of the work order a programme showing arrangement and monthly programme he expected to achieve. **Pleadings of the parties are silent about the compliance of clause 24.1.** However no penal provision has been provided in the agreement for non compliance of clause 24.1.

7.8 Clause 25.1 provides, among others, that the contractor would follow the instruction of the department regarding the speed of work, for whatever reason, it may be to reduce the speed of work; for which the contractor will not be entitled to claim compensation. However, at the instance of the department if the speed of work is to be reduced the same shall be taken into consideration at the time of granting extension of time. Clause 25.2 provides that if inspite of the departmental instruction the contractor fails or denies to maintain the "rate of progress" as mentioned in the agreement within 7 days of said departmental instruction, it shall be lawful for the department to take appropriate action as per agreement. Record shows that the department has not yet taken any action against the contractor; meaning thereby the contractor was not at fault in maintaining the above mentioned "rate of progress".

7.9 Clause 26 of the agreement provides that if the contractor suspends the work without sanction of the department or fails to maintain the schedule rate of progress or continues to default or repeats such default the department shall take action in accordance with the agreement and the contract will be terminated. But the department did not take any action against the contractor as provided in the agreement nor terminated the contract. On the contrary, the department granted extension of time on 4 different spells. That apart, while deciding the issue No.ii it has already been held that the department is responsible for the delayed execution of the work. In view of the above the claim of contractor for damages on account of overhead expenses cannot be denied.

7.10 As per agreement the stipulated period of contract comes to an end on 14-02-2014, but the work was completed on 22-5-2017. Beyond stipulated period the contractor continued the work for 27 months. Contractor demanded salary of one site Engineer @ 9,400 per month and salary of one guard @ 6,000 per month, which he spent excess and suffered loss due to fault on the part of respondent. The amount of salary/wages of both the employees of the contractor is supported by documents produced before the Tribunal by a separate Firisti dated 9-1-2021. Thus applying the law relating to Building & Engineering Contracts in India and also as per Emden formula the loss on overhead expenses

comes to Rs.51,96,366 taking the delay by 115 weeks which the contractor wrongly calculated as 165 weeks in the claim statement, but the contractor demanded only Rs.6,30,000. Therefore the contractor's claim for damages on account of overhead expenses for Rs. 6,30,000 is allowed.

8. *The contractor's claim for an amount of Rs.4,50,000 under the head dispute No.ii has not been denied by the respondent, hence the claim is allowed.*

9. *On the basis of the above findings total relief granted to the claimant are as follows:*

i) Under the head dispute No.1 Rs.01,70,000.

ii) Under the head dispute No.2 Rs.04,50,000.

iii) Under the head dispute No.3 Rs.76,37,504

iv) Under the head dispute No..... ..Rs.06,30,000

Rs.88,87,504”

4.6. Being aggrieved by the award dated 06.03.2022, the appellants filed a petition before the Court of learned District Judge, Unakoti District, Kailashahar under Section 34 of the Arbitration and Conciliation Act, 1996 for setting aside the arbitral award passed by the learned Arbitrator in Arbitration Proceeding No.DKB/ARB P.04 of 2019 which was registered as Title Suit(ARBITRATION) No.02 of 2022. The learned District Judge by the impugned judgment dated 20.04.2023 upheld the arbitral award passed by the learned Arbitrator and dismissed the petition filed by the appellants. Hence, the instant appeal.

5. Mr. Chakraborty, learned senior counsel appearing for the appellants submitted that the judgment dated 20.04.2023 passed in Title Suit (Arbitration) No.02 of 2022 by the learned District Judge, Kailashahar, Unakoti District, suffers from misinterpretation of law. Moreover, the judgment passed by the learned District Judge as well as Arbitral Award passed by the learned Sole Arbitrator are bad in law, unwarranted as beyond the contractual agreement arrived at between the parties and thus the learned

District Judge has failed to consider that the learned Arbitral Tribunal had completely ignored the fact that the respondent-contractor is not entitled to any price escalation as per Clause 44 of the Agreement as the completion period of the work was 24 months.

5.1. Mr. Chakraborty, learned senior counsel further submitted that the learned District Judge has failed to consider that as per provision of the Arbitration and Conciliation Act, 1996 proper reasons have to be assigned for the amount awarded, but in the instant case, the learned Sole Arbitrator has not given any reason for Rs. 76,37,504.00 as price escalation.

6. In the instant appeal, the appellants have *inter alia* made the following prayers:

“(i) Admit this application;
(ii) Issue notice upon the respondent;
(iii) Call for the LC records;
(iv) After hearing the parties, set aside Judgment dated 20.04.2023 passed in Title Suit (Arbitration) 02 of 2022 passed by the Ld. District Judge, Kailashahar, Unakoti District, and set aside the Arbitral Award dated 06.03.2022 passed by the Sole Arbitrator in Arbitration Proceeding No. DKB/ARB.P.04 of 2019.
Any other order/order(s) ma pass as Your Lordship may de fit and proper.
AND
For this act of kindness the Appellant as in duty bound shall ever pray.”

7. On the other hand, Mr. Deb, learned senior counsel appearing for the respondent-contractor submitted that the learned District Judge has rightly passed the judgment in Title Suit(Arbitration) No.02 of 2022 and the same does not merit any interference by this court. In regard to question of maintainability, it is stated by the respondent-contractor that the scope of interference by courts in regard to arbitral award is limited. The courts do not sit in appeal over the findings and decision of the arbitrator nor can it reassess or re-appreciate evidence or examine the sufficiency or otherwise of

the evidence. The Arbitrator is a judge of choice of the parties and court cannot set aside the award unless it suffers from errors apparent on the face of the record and it cannot be said that the instant award is perverse and suffers from patent illegality. When the parties agreed to refer their dispute to an Arbitrator, they ought not to be allowed to resile from the position which they took up at the time of reference.

7.1. Learned senior counsel has placed reliance upon the decision of the Apex Court in the case of ***Welspun Specialty Solutions Ltd. vs. ONGC*** reported in (2022) 2 SCC 382 wherein the Apex Court relying on its earlier decision rendered in the case of ***Dyna Technologies (P) Ltd. v. Crompton Greaves Ltd.*** reported in (2019) 20 SCC 1 held in para 28 thus:

“28. In Dyna Technologies (P) Ltd. v. Crompton Greaves Ltd. (2019) 20 SCC 1, this Court held : (SCC p. 12, paras 24-25)

“24. There is no dispute that Section 34 of the Arbitration Act limits a challenge to an award only on the grounds provided therein or as interpreted by various Courts. We need to be cognizant of the fact that arbitral awards should not be interfered with in a casual and cavalier manner, unless the Court comes to a conclusion that the perversity of the award goes to the root of the matter without there being a possibility of alternative interpretation which may sustain the arbitral award. Section 34 is different in its approach and cannot be equated with a normal appellate jurisdiction. The mandate under Section 34 is to respect the finality of the arbitral award and the party autonomy to get their dispute adjudicated by an alternative forum as provided under the law. If the Courts were to interfere with the arbitral award in the usual course on factual aspects, then the commercial wisdom behind opting for alternate dispute resolution would stand frustrated.

25. Moreover, umpteen number of judgments of this Court have categorically held that the Courts should not interfere with an award merely because an alternative view on facts and interpretation of contract exists. The Courts need to be cautious and should defer to the view taken by the Arbitral Tribunal even if the reasoning provided in the award is implied unless such award portrays perversity unpardonable under Section 34 of the Arbitration Act.”

8. We have considered the rival submissions of learned counsel appearing for the parties and gone through the relevant materials placed on record. We have also gone through the award returned by the learned Arbitrator as well as the judgment and order passed by learned District Judge, Kailashahar by which the arbitral award passed by the learned Arbitrator has been upheld.

8.1. The scope of interference in an appeal under Section 37 of the Act of 1996 has been delineated in decision rendered by the Apex Court in case of *S.V. Samudram v. State of Karnataka and Anr.* 2024 SCC Online SC 19. Paragraphs 62 to 73 are extracted here-under:

“62. Moving further, we now consider the judgment impugned before us, i.e., the order of the High Court upholding such modification, under the jurisdiction of Section 37 of the A&C Act.

63. It has been observed by this Court in MMTC Ltd. v. Vedanta Ltd.

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

(Emphasis Supplied)

64. This view has been referred to with approval by a bench of three learned Judges in UHL Power Company Ltd v. State of Himachal Pradesh. In respect of Section 37, this court observed:—

“16. As it is, the jurisdiction conferred on courts under Section 34 of the Arbitration Act is fairly narrow, when it comes to the scope of an appeal under Section 37 of the Arbitration Act, the jurisdiction of an appellate court in examining an order, setting aside or refusing to set aside an award, is all the more circumscribed.”

65. This Court has not lost sight of the fact that, as a consequence to our discussion as aforesaid, holding that the judgment and order under Section

34 of the A&C Act does not stand judicial scrutiny, an independent evaluation of the impugned judgment may not be required in view of the holding referred to supra in MMTC Ltd. However, we proceed to examine the same.

66. We may also notice that the circumscribed nature of the exercise of power under Sections 34 and 37 i.e., interference with an arbitral award, is clearly demonstrated by legislative intent. The Arbitration Act of 1940 had a provision (Section 15) which allowed for a court to interfere in awards, however, under the current legislation, that provision has been omitted.

67. The learned Single Judge, similar to the learned Civil Judge under Section 34, appears to have not concerned themselves with the contours of Section 37 of the A&C Act. The impugned judgment reads like a judgment rendered by an appellate court, for whom re-examination of merits is open to be taken as the course of action.

68. We find the Court to have held the award to be perverse and contrary to public policy. The basis for such a finding being the delay on the part of the contractor in completion of the work which “could have been avoided”. Significantly, as we have observed earlier such a finding is not backed by any material on record.

69. What appears to have weighed with the court is that the factoring of the cost escalation between the years 1989-1990 and 1992 by 100% was exaggerated. But then equally, there is no justification in granting lump sum escalation by 25% of the contract value. Well, this cannot be a reason to modify the award for the parties are governed by the terms and conditions and the price escalation stood justified by the petitioner based on cogent and reliable material as was so counted by the Arbitrator in partly accepting and/or rejecting the claims.

70. In our considered opinion, the court while confirming the modification of the award committed the very same mistake which the Court under Section 34 of the A&C Act, made.

71. The Court under Section 37 had only three options:—

- (a) Confirming the award of the Arbitrator;
- (b) Setting aside the award as modified under Section 34; and
- (c) Rejecting the application(s) under Section 34 and 37.

72. The learned single Judge has examined the reasoning adopted by the learned Arbitrator in respect of certain claims (claims 3 and 7, particularly) and held that allowing a claim for escalation of cost, was without satisfactory material having been placed on record and is “perverse and contrary to the public policy”. However, it appears that such a holding on part of the Judge is without giving reasons therefor. It has not been discussed as to what the

evidence was before the learned single Judge to arrive at such conclusion. This is of course, entirely without reference to the scope delineated by various judgments of this Court as also, the statutory scheme of the A & C Act.

73. Having referred to J.G Engineers (P) Ltd. v. UOI and more particularly para 27 thereof, it has been held that the award passed by the learned Arbitrator is “patently illegal, unreasonable, contrary to public policy.” There is no reason forthcoming as to how the holding of the learned Arbitrator flies in the face of public policy.”

9. In view of the aforesaid enunciation of law, there cannot be any quarrel that the Arbitrator is the sole judge for construction of the terms and conditions of the agreement. But, what has emerged in the instant case is that *the learned District Judge, Kailashahar has not even made any reference to grounds of challenge relating to price escalation and awarding the sum of Rs.76,37,504.00. It transpires from the order/award that learned Arbitrator has only mentioned the pages from the claim statement submitted by the respondent-contractor to substantiate the claim of the contractor out of price escalation. Learned Arbitrator has only observed in his order that on examination of the price escalation bills and the method of calculation, it is found that the calculation has been done following the method provided in the agreement (pages 30 to 77, Claim statement).*

(Emphasis Supplied)

9.1. On careful consideration of above observation, we cannot persuade ourselves to support the methodology adopted by the learned Arbitrator in awarding Rs.76,37,504.00 as price escalation. Learned Arbitrator has not discussed what are the terms provided in the agreement prescribing the methods of calculation as regards application of the price escalation clause. According to us, this approach of learned Arbitrator clearly suggests non-applicability of mind on the part of the learned Arbitrator which

rendered the award irrational and based on no evidence. In the opinion of this Court, an Arbitral Tribunal is duty bound to assign reasons to support or reject the award on a particular issue because the affected party who has to meet the award has the right to know the reasons what prompted the Arbitral Tribunal/Arbitrator to reach its decision. Furthermore, there is need to understand as to how Arbitral Tribunal has dealt the issue raised before him by the parties to the disputes.

9.2 In addition, non-assigning of reasons amounts to fundamental breach of the principles of natural justice which will lead to patent illegality and in this circumstance, Commercial Courts in exercise of its jurisdiction under Section 34 of the A&C Act, 1996 and the High Court under Section 37 of the said Act cannot be said to be powerless to interfere with such unreasoned award on any issue or issues raised before the Arbitral Tribunal.

10. Very recently, a three-Judge Bench of the Hon'ble Supreme Court (*Dr. D. Y. Chandrachud, CJI, B. R. Gavai, J. and Surya Kant, J.*) while entertaining a Curative Petition[*Ref: Curative Petition(C) Nos.108-109 of 2022 in Review Petition(C) Nos.1158-1159 of 2021* arising out of *Civil Appeal Nos.5627-5628 of 2021*] in *Delhi Metro Rail Corporation Ltd. Vs. Delhi Airport Metro Express Pvt. Ltd.* disposed on 10.04.2024 has summarized the law as regards the scope of interference of courts with Arbitral Awards in the manner as under:-

“II. Scope of interference of courts with arbitral awards

36. Section 34 of the Arbitration Act delineates the grounds for setting aside an arbitral award. The provision, as amended by the Arbitration and Conciliation (Amendment) Act, 2015 reads as follows:

"34. Application for setting aside arbitral award.-

.....

(2) An arbitral award may be set aside by the Court only if-

....

(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.

(2A) 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."

(emphasis supplied)

37. The contours of the power of the competent court to set aside an award under Section 34 has been explored in several decisions of this Court. In addition to the grounds on which an arbitral award can be assailed laid down in Section 34(2), there is another ground for challenge against domestic awards, such as the award in the present case. Under Section 34(2-A) of the Arbitration Act, a domestic award may be set aside if the Court finds that it is vitiated by 'patent illegality' appearing on the face of the award.

38. In ***Associate Builders vs. Delhi Development Authority***, a two-judge Bench of this Court held that although the interpretation of a contract is exclusively within the domain of the arbitrator, construction of a contract in a manner that no fair-minded or reasonable person would take, is impermissible. A patent illegality arises where the arbitrator adopts a view which is not a possible

view. A view can be regarded as not even a possible view where no reasonable body of persons could possibly have taken it. This Court held with reference to Sections 28(1)(a) and 28(3), that the arbitrator must take into account the terms of the contract and the usages of trade applicable to the transaction. The decision or award should not be perverse or irrational. An award is rendered perverse or irrational where the findings are (i) based on no evidence; (ii) based on irrelevant material; or (iii) ignores vital evidence. Patent illegality may also arise where the award is in breach of the provisions of the arbitration statute, as when for instance the award contains no reasons at all, so as to be described as unreasoned. A fundamental breach of the principles of natural justice will result in a patent illegality, where for instance the arbitrator has let in evidence behind the back of a party. In the above decision, this Court observed:

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

- (i) a finding is based on no evidence, or
 - (ii) an Arbitral Tribunal takes into account something irrelevant to the decision which it arrives at; or
 - (iii) **ignores vital evidence in arriving at its decision,**
- such decision would necessarily be perverse.

....

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."**

(emphasis supplied)

39. In *Ssangyong Engineering & Construction Co. Ltd. vs. NHAI*, a two-judge bench of this Court endorsed the position in *Associate Builders* (supra), on the scope for interference with domestic awards, even after the 2015 Amendment:

"40. The change made in Section 28(3) by the Amendment Act really follows what is stated in paras 42.3 to 45 in *Associate Builders*, namely, that the construction of the terms of a contract is primarily for an arbitrator to decide, **unless the arbitrator construes the contract in a manner. that no fair-minded or reasonable person would; in short, that the arbitrator's view is not even a possible view to take.** Also, **if the arbitrator wanders outside the contract and deals with matters not allotted to him, he commits an error of jurisdiction. This ground of challenge will**

now fall within the new ground added under Section 34(2-A).

41.... 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."

(emphasis supplied)

40. In essence, the ground of patent illegality is available for setting aside a domestic award, if the decision of the arbitrator is found to be perverse, or so irrational that no reasonable person would have arrived at it; or the construction of the contract is such that no fair or reasonable person would take; or, that the view of the arbitrator is not even a possible view. 24 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 under the head of 'patent illegality'. An award without reasons would suffer from patent illegality. The arbitrator commits a patent illegality by deciding a matter not within his jurisdiction or violating a fundamental principle of natural justice.

41. A judgment setting aside or refusing to set aside an arbitral award under Section 34 is appealable in the exercise of the jurisdiction of the court under Section 37 of the Arbitration Act. It has been clarified by this Court, in a line of precedent, that the jurisdiction under Section 37 of the Arbitration Act is akin to the jurisdiction of the Court under Section 34 and restricted to the same grounds of challenge as Section 34.

42. In the statutory scheme of the Arbitration Act, a recourse to Section 37 is the only appellate remedy available against a decision under Section 34. The Constitution, however, provides the parties with a remedy under Article 136 against a decision rendered in appeal under Section 37. This is the discretionary and exceptional jurisdiction of this Court to grant Special Leave to Appeal. In fact, Section 37(3) of the Arbitration Act expressly clarifies that no second appeal shall lie from an order passed under Section 37, but nothing in the section takes away the constitutional right under Article 136. Therefore, in a sense, there is a third stage at which this court tests the exercise of jurisdiction by the courts acting under Section 34 and Section 37 of the Arbitration Act.

43. While adjudicating the merits of a Special Leave Petition and exercising its power under Article 136, this Court must interfere

sparingly and only when exceptional circumstances exist, justifying the exercise of this Court's discretion. The Court must apply settled principles of judicial review such as whether the findings of the High Court are borne out from the record or are based on a misappreciation of law and fact. In particular, this Court must be slow in interfering with a judgment delivered in exercise of powers under Section 37 unless there is an error in exercising of the jurisdiction by the Court under Section 37 as delineated above. Unlike the exercise of power under Section 37, which is akin to Section 34, this Court (under Article 136) must limit itself to testing whether the court acting under Section 37 exceeded its jurisdiction by failing to apply the correct tests to assail the award."

11. In the case, the findings of the learned District Judge extracted hereunder would unambiguously show that there has been a complete non-consideration of issue no.2 of the award:

"On perusal of the pleadings of the applicant it appears that he has brought the present application for setting aside the impugned award on the grounds that the learned sole Arbitrator passed the award of Rs.76,37,504/- towards price escalation and Rs.6,30,000/- towards overhead expenses. Learned counsel for the petitioner during hearing of case stated that as per clause 44 of the agreement, the doctrine of promissory estoppel prevents the contractor from claiming any amount for price escalation. On perusal of the agreement it is found that clause 44 and 44.1 of the agreement relate to the price adjustment/price escalation claim. Clause 44 provides that claim for price adjustment is not applicable to the works for which estimated cost put to tender is less than Rs.1(one) crore and stipulated time for completion is less than or equal to 24 months. Clause 44.1 provides that price adjustment shall be granted where administered prices are enforced and that too for works estimated at more than Rs.1 crore and having completion period of more than 24 (twenty four) months and this should be applicable owing to departmental fault.

In the present case, the estimated cost of work under the agreement is more than 1(one) crore and stipulated period is 24 months. Learned Arbitrator has rightly decided that clause 44 is not applicable in this case, but the claim of contractor is covered by clause 44.1 of the agreement."

12. The learned District Judge also failed to test the correctness of the award within the contours of the grounds available under Section 34(2) and 34(2-A) of the Arbitration and Conciliation Act, 1996 without referring to the relevant Clauses of the Agreement. Non-consideration of any of the

grounds raised under Section 34 of the Act makes the judgment of the learned District Judge otiose and unsustainable.

13. Non-assigning of reasons under Section 34 of Arbitration and Conciliation Act, 1996 is contrary to basic notion of morality and justice which renders the award perverse and liable to be set aside on the ground of patent illegality. There is no vital evidence as to how the learned Arbitrator had computed the compensation as regards escalation of price while deciding the issue no.III.

(Emphasis Supplied)

14. *In our considered view, the Arbitral Tribunal or Arbitrator must assign some reason to arrive at a finding of any of the issues raised by the parties so that it can be understood by the Courts of Commercial Division that Arbitral Tribunal after proper application of mind has arrived at a view which is rational and plausible view and does not hit the conscience of the Court. It is settled proposition of law that reasons are the sole of any order, be it judicial or administrative. That apart, it is also apparent on the fact of the award that learned Arbitrator has not dealt with the scope of applicability or non-applicability of Clauses 44 and 44.1 of the agreement while deciding the issue no.III.*

(Emphasis Supplied)

15. In law, a judgment is a decision of a court regarding the rights and liabilities of parties in a legal action or proceeding. Judgments also generally provide the court's explanation of why it has chosen to make a particular order. The phrase "reasons for judgment" is often used interchangeably with "judgment," although the former refers to the court's justification of its judgment while the latter refers to the final court order regarding the rights and liabilities of the parties. As the main legal

systems of the world recognize either a common law, statutory, or constitutional duty to provide reasons for a judgment, drawing a distinction between "judgment" and "reasons for judgment" may be unnecessary in most circumstances. A judgment pronounced on the bench, regarded as an intellectual product, stands in a class by itself.

15.1. In *Halsbury's Laws of England* (4th Edition, Vol. 26, P. 260), it has been mentioned,

"A Judgment or order in its final shape usually contains in addition to formal parts:-

(i) A preliminary or introductory part, showing the form of the application upon which it was made, the manner in which and the place at which, the writ or other originating process was served, the parties appearing any consent, waivers, undertakings or admissions given or made, so placed as to indicate whether they relate to the whole judgment or order or only part of it, and a reference to the evidence upon which the judgment or order is based and

(ii) A substantive or mandatory part, containing the order made by the court."

15.2. The reasons for a judgment are of course of special importance to the parties to litigation. They are bound to abide by the decision pronounced by the Court & need to understand how the Court has dealt with their case & reached its decision. Sir Harry (Law Dinner Emmanuel College, University of Queensland, Australia) observed that in our society, it is important that the parties to litigation be convinced that justice has been done or at the least, that an honest, careful & conscientious effort has been made to do justice in their case. This is not to underestimate the importance of reasons for judgment to the wider public. Many judgments have an importance beyond the resolution of the dispute between the parties to the litigation.

15.3. It is the reasoning which ultimately culminates into final decision which may be subject to examination of the appellate or other higher Court. The reasoned order should be in accordance with the judgment rendered by the Hon'ble Supreme Court in case of *Cyril Lasrado (Dead) By L.Rs. & Ors vs. Juliana Maria Lasrado and Another, (2004) 7 SCC 431*:

“Even in respect of administrative orders **Lord Denning M.R.** in **Breen v. Amalgamated Engg. Union** (*All ER p. 115, 4th*) observed:

"The giving of reason is one of the fundamentals of good administration".

In **Alexander Machinery (Dudley) Ltd. v. Crabtree** it was observed:

"Failure to give reasons amount to denial of justice. Reasons are live links between the mind of the decision-taker to the controversy in question and the decision or conclusion arrived at".

15.4. Reasons are the link between the materials on which certain conclusions are based & the actual conclusions. They disclose how the mind is applied to the subject-matter for a decision whether it is purely administrative or quasi-judicial. They should reveal a rational nexus between the facts considered & the conclusions reached. Only in this way can opinions or decisions recorded be shown to be manifestly just and reasonable rendered (See *Uma Charan vs. State of M.P., AIR 1981 SC 1915*).

15.5. It is trite law that it is incumbent upon the authorities to pass a speaking & reasoned order even in administrative matters. A right to reason has been held to be an indispensable part of sound system of judicial review by Apex Court, in case of *State of W.B. vs. Atul Kishore Shaw* reported in *1991 Supp.(1) SCC 414* and in *State of Orissa vs. Dhaniram Luhar, (2004) 5 SCC 568*. Again, the necessity and purpose of recording reasons has been

reiterated and emphasized by Apex Court in case of *Ravi Yashwant Bhoir vs. Collector, Raigad & Ors.* reported in (2012) 4 SCC 407.

16. Once some reasons are assigned to arrive at a particular finding which is rational, logically correct and apparent manifestation of proper application of mind, true it is, then, it would not come within the scope of judicial review by the court in exercise of its power under Section 34 or Section 37 of the Arbitration and Conciliation Act, 1996 on the ground that the court can take an alternative view.

17. For the reasons stated and discussed here-in-above both on points of law and facts, we are persuaded to arrive at a finding that the entire award is vitiated by patent illegality, which needs to be re-appreciated by learned Arbitrator. Since the issue no.III is interlinked with other issues relevant to decide the disputes raised in the arbitration proceeding, according to us, the decision on other issues of the learned Arbitrator cannot be segregated or upheld independent of the finding on issue no.III which we find is vitiated on grounds of patent illegality. Therefore, the award dated 06.03.2022 passed by the learned Sole Arbitrator is unsustainable.

Learned Commercial Court below also failed to exercise its jurisdiction vested upon it under Section 34 of the A&C Act, 1996 and accordingly, the judgment and order dated 20.04.2023 passed by learned Commercial Court is set aside and quashed. The Arbitral award dated 06.03.2022 passed by the learned Sole Arbitrator also stands set aside and quashed. The matter is remitted to the learned Arbitrator for fresh decision on all the issues framed by him during the proceeding.

(ARINDAM LODH, J)

(APARESH KUMAR SINGH, CJ)

Rohit