

**HIGH COURT OF TRIPURA
AGARTALA**

ARB. A. No.14 of 2022

1. The State of Tripura,
represented by the Secretary
cum Commissioner Public Works Department(Rig Division),
PN Complex, Gurkhabasti, Agartala, West Tripura.

2. The Executive Engineer, PWD(Rig Division),
PN Complex, Gurkhabasti, Agartala, West Tripura.

.....Appellant(s)

Versus

Sri Ratan Datta, Contractor
Ramnagar Road No.8,
PO: Ramnagar, West Tripura, 799002.

..... Contractor-Respondent(s)

For the applicant-appellant(s)	:	Mr. K. De, Addl. G.A.
For the contractor- respondent (s)	:	Mr. A. Sengupta, Advocate
Date of hearing and delivery of Judgment & Order	:	03-04-2024
Whether fit for reporting	:	Yes

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

JUDGMENT & ORDER(ORAL)

(Arindam Lodh, J)

This is an appeal filed under Section 37(1)(c) of Arbitration and Conciliation Act, 1996 read with Section 13(1A) of the Commercial Courts Act, 2015 against the impugned judgment and order dated 05.04.2022, passed by the Ld. District Commercial Court, West Tripura, Agartala in Civil Misc.(Arbitration) 16 of 2018 along with Arbitral award dated 20.04.2018 passed by the Ld. Arbitral Tribunal in Arbitral Case No. ARB/SC/RD/DWS-RIG/01/2016, whereby and whereunder the learned District Commercial Court has upheld the Arbitral award passed by the Arbitrator and dismissed

the application filed under Section 34 of the Arbitration and Conciliation Act, 1996.

2. FACTUAL MATRIX:

2.1. The factual background of the controversy between the parties that is necessary for the adjudication of the disputes before this Court is delineated hereunder:

The contractor-respondent had entered into an agreement bearing No. 11/ACE/EE/RIG/2012-13, dated 30.07.2012 with the Executive Engineer, PWD (Rig Division) Agartala for drilling and development of 25(twenty five) numbers of Small Bore Deep Tube-wells(SBDTW) with Departmental direct Rotary (hydraulically operated) MINI rig & other machineries and equipments in different locations of West Tripura District during the year 2011-2012 under NRDWP Scheme in Tripura. The value of the work was Rs.80,82,294/-. The contractor-respondent started the work with due diligence and performed the contract for an amount of Rs.23,58,055/- out of the total contract amount of Rs.80,82,294/- and the amount was paid to the contractor- respondent as per bill prepared by the appellants/State. The Assistant Engineer under the appellants/State handed over the site in such a place where suitable water bearing strata was not available and in the process, the boring of pilot hole became unsuccessful and the contractor-respondent abandoned all such works awarded by the appellant due to non-availability of suitable water bearing strata. The contractor-respondent suffered enormous financial loss and it became impossible on the part of them to go ahead with further drilling work. At this juncture, the contractor- respondent by letter dated 21.03.2013, requested the

appellants to close the contract and take back the departmental plants and machineries supplied to execute the work. After a series of actions, including extension of time for the completion of work, ultimately contract was rescinded and the appellants had imposed levy of compensation under Clause 2 of the agreement for an amount of Rs.3,74,180/- stating that extension of time for the completion of the work was granted by the Engineer-in-Charge upto 31-05-2014 without prejudice to the right of the Government to recover liquidated damages in accordance with the provision of Clause 2 of the agreement.

2.2. The learned Arbitrator after considering the pleadings and documents of the parties had framed the following issues:

“i. Whether the Clause 2 of the conditions of contract agreement as per details of the PWD Works Manual, 2007 has vested any power to show cause notice intending to take action against the petitioner in imposing levy of compensation and whether the said Clauses has vested any power on the Superintendent Engineer of the concerned circle to impose levy of compensation on the show cause notice issued by the Engineer-in-charge (Respondent)?

ii. Whether the Clause 3 of the conditions of Contract agreement as per details of PWD Work Manual, 2007 has vested any power on the Engineer-in-Charge to rescind the contract?

iii. Whether the petitioner is entitled to get damages for loss on account of loss of profit on the balance contract amount of Rs. 57,24,213/- @ 10% due to breach of contract committed by the Respondent (Engineer-in- Charge) by illegally rescinding the contract in wrongful exercise of power under a non-existing Clause?

iv. Whether the petitioner is entitled to get refund of the security deposit illegally forfeited in wrongful exercise of power by the Engineer-in-Charge under a non- existing Clause?

v. Whether the petitioner is entitled to get interest @ 18% per annum on the demanded sum with effect from 10/09/2015?

vi. Whether the Petitioner is entitled to get the cost of arbitration proceedings and incidental thereto and if so up to what extent?

vii. Whether the Petitioner caused damage to the Respondent for which the Respondent had to suffer a loss of amount of Rs. 3,74,180/-.”

2.3. On going through the documentary evidence furnished by both the parties with their respective statement of claims, defence and having

heard the learned counsel of the parties, the learned Arbitrator by the Judgment dated 20.04.2018, declared the award in the following manner:

“In view of the findings and decisions arrived at Issue-wise in the preceding paragraphs of the Award it is hereby declare that the Petitioner is entitled to get in total Rs 8,98,226/-(Rupees eight lakhs ninety eight thousand two hundred and twenty six) only from the Respondent. In addition to the aforesaid amount he is also entitled to get interest at the rate of 9% per annum over the awarded amount with effect from the date of Prayer before the Respondent for settling the dispute, i.e.10-09-2015 within three months from today failing which the Respondent shall have to pay at the rate of 12% per annum with effect from 10-09-2015 till the date of payment. Interest over the awarded amount under Issue No 'F' will not carry interest.

The Stamp duty is charged Rs.75/- only in respect of this award have been borne by the Petitioner. As the Stamp paper of Rs.75/- is not available the Petitioner filed Stamp Paper of Rs. 100/-only.”

3. Being aggrieved by and dissatisfied with the award of Arbitrator, the appellants herein, had preferred an appeal under Section 34 of the Arbitration and Conciliation Act,1996 before the District Commercial Court, West Tripura, Agartala, for setting aside the arbitral award passed by the Arbitrator dated 20.04.2018.

3.1. Accordingly, the learned District Commercial Court (District Judge), West Tripura, Agartala, after consideration of the pleadings and submissions of the parties by an order dated 05.04.2022, in Civil Misc (Arbitration) 16 of 2018 upheld the arbitral award passed by the learned Arbitrator and dismissed the application filed under Section 34 of the Arbitration and Conciliation Act, 1996.

3.2 Feeling aggrieved, the appellants filed the instant appeal under Section 37(1)(c) of the Arbitration and Conciliation Act, 1996 read with Section 13(1A) of the Commercial Courts Act, 2015 *inter alia* praying for the following relief(s):

*“i. Admit this application
 ii. Issue notice upon the respondent;
 iii. Call for the LC records;
 iv. After hearing the parties, set aside the judgment and order dated 05.04.2022 passed in Civil Misc (Arbitration) 16 of 2018 by the Ld District Commercial Court, Agartala, West Tripura, along with arbitral Award passed by the Ld. Arbitral Tribunal on 20.04.2018 in Arbitration ARB/SC/RD/DWS-RIG/01/2016; Case No.ARB/SC/RD/DWS-RIG/01/2016;*

Any other order/order(s) may pass as Your Lordship may deem fit and proper.

AND

For this act of kindness the Appellant as in duty bound shall ever pray.”

4. On the above factual background, we have heard Mr. K. De, learned Addl. GA appearing for the appellants as well as Mr. Abhijit Sengupta, learned counsel appearing for the contractor-respondent.

5. Submissions on behalf of the appellants:

5.1 At the outset, Mr. De, learned Addl. G.A. appearing for the appellants contended that the judgment and order dated 05.04.2022, passed by the learned District Commercial Court, West Tripura, Agartala, suffers from perversity as the learned District Commercial Court, as well as the learned Arbitrator have failed to consider the Hindrance Register, the Schedules of work programmes and the Site-Order book. Learned Court below also has not considered the entries in the measurement book to find out as to who was responsible for delay of the completion of the work as per Clause 2 and Clause 3 of the agreement.

5.2 The next argument advanced by learned Addl. GA was that the learned Commercial Court has failed to consider that the final contract period was provisionally extended firstly upto 31.01.2014 and secondly upto 31.05.2014. Since the contractor accepted the extension of time and carried out the work beyond the stipulated period without any protest, as such, the extension became final by mutual consent. The learned District Commercial

Court has failed to consider that the learned Arbitrator had failed to explain as to whether the PWD Form No.7 is a part of the agreement or not. Having not relied upon the evidence led by the appellants in support of the pleadings, the learned Arbitrator had misconstrued the evidence on record in passing the impugned award and, therefore, the impugned award is liable to be set aside and quashed.

5.3 In addition, Mr. De, learned Addl. G.A. argued that the learned District Commercial Court as well as the learned Arbitrator have failed to consider that awarding of contract by inviting tender is a technical process depending on the nature, speciality and technicality of work to be performed by the contractor. For this purpose, different set of forms containing different conditions have been worked out in CPWD Manual or Tripura PWD Manual, 2007. The learned District Commercial Court also failed to consider that even after making of full payment for value of the work done in time and during extended period of time on two occasions, the contractor had completed only 7 (seven) productive and 1 (one) non-productive deep tube-wells out of 25 deep tube-wells scheduled to be completed as per agreement.

5.4 Proceeding further, it was submitted that learned District Commercial Court failed to consider one of the important factors that levy of compensation can be imposed in the extended period of contract when the contractor failed to achieve milestone as stipulated in Clause 2 of PWD Form No.7 and performance of work was delayed due to the fault attributable to the contractor. It was reiterated that before levying compensation by the Superintending Engineer, show-cause notice was served, extension of time was granted without prejudice to the right of the Government to recover

liquidated damage under Clause 2. The contractor had accepted the time extension granted by the appellants unconditionally and also carried out the work. The learned District Commercial Court has failed to consider that the Superintending Engineer had imposed levy of compensation for an amount of Rs. 3,74,180/- in exercise of his power under clause 2 of Tripura PWD Form No.7 which was a part of the agreement. The contractor failed to achieve the milestone. The work was delayed due to the fault of the contractor as would be evident from the hindrance register and correspondence on record. Show-cause notice was issued by the Executive Engineer after getting approval from the higher authority. So, every action was impliedly taken on behalf of the Government or the Governor as head of the State. Therefore, according to Mr. De, learned Addl. GA, the observation of the learned Arbitrator that the order of imposition of levy of compensation by the Superintending Engineer was not a valid legal order and is totally wrong, misinterpreted and a result of non-application of judicious mind and thus cannot sustain in law.

6. Submissions on behalf of the contractor-respondent:

6.1 On the other hand, Mr. Sengupta, learned counsel appearing for the contractor-respondent submitted that the appellant-Department issued Work Order for Drilling of 25 Nos. small bore deep tube-wells to the contractor-respondent without conducting any survey at sites as to the availability of suitable water bearing strata underneath the soil. Allegedly, the contractor was asked to install small bore deep tube-wells in the site. The respondent started the work with great zeal, but most of the sites, selected by the Department, after being bored found that the water was not available.

Owing to that a good number of bore holes were abandoned due to non-availability of suitable water bearing strata. In such situation, the delay was occurred beyond the power and control of the contractor. The contractor suffered huge losses for such unsuccessful drilling as the bore holes are abandoned due to non-availability of suitable water and for this, the Contractor cannot claim bill from the Department.

6.2 Moreover, Mr. Sengupta, learned counsel appearing for the contractor submitted that the learned Arbitrator interpreting the declaration of the Agreement rightly came to the conclusion that PWD Works Manual, 2007, adopted by the Government of Tripura, which are in complete form, would be applicable to the contract between the parties.

6.3 Mr. Sengupta, learned counsel in support of his claim has relied upon the decision in the case of *A.T. Brij Paul Singh vs State of Gujarat, (1984) 4 SCC 59* wherein the Apex Court held that “*Ordinarily, when a contractor submits his tender in response to an invitation to tender for a works contract, a reasonable expectation of profit is implicit in it and its loss has to be compensated by way of damages if the other party to the contract is guilty of breach of contract. Where, therefore, the party entrusting the work commits breach of the contract, the contractor would be entitled to claim damages for loss of profit which he expected to earn by undertaking the works contract. What would be the measure of profit would, however, depend upon facts and circumstances of each case. While estimating the loss of profit for the breach of contract it would be unnecessary to go into the minutest details of the work executed in relation to the value of the works contract. A broad evaluation would be sufficient*”.

6.4 Further, Mr. Sengupta, learned counsel placed reliance upon the judgment passed in *Dwaraka Das vs State of M.P., (1999) 3 SCC 500* wherein the Apex Court at para 9 held thus:

"9.....What would be the measure of profit would depend upon facts and circumstances of each case. But that there shall be a reasonable expectation of profit is implicit in a works contract and its loss has to be compensated by way of damages if the other party to the contract is guilty of breach of contract cannot be gainsaid. In this case we have the additional reason for rejecting the contention that for the same type of work, the work site being in the vicinity of each other and for identical type of work between the same parties, a Division Bench of the same High Court has accepted 15 per cent of the value of the balance of the works contract would not be an unreasonable measure of damages for loss of profit.

Now if it is well established that the respondent was guilty of breach of contract inasmuch as the rescission of contract by the respondent is held to be unjustified, and the plaintiff-contractor had executed a part of the works contract, the contractor would be entitled to damages by way of loss of profit. Adopting the measure accepted by the High Court in the facts and circumstances of the case between the same parties and for the same type of work at 15 per cent of the value of the remaining parts of the works contract, the damages for loss of profit can be measured....."

6.5 We may gainfully recapitulate hereunder the reasoning of the Arbitrator in favour of the award and the interpretation of Clause 2 and 3 which reads thus:

"34) Issue No-"A" -Whether the Clause-2 of the Conditions of Contract agreement as per details of the PWD Works Manual, 2007 has vested the any Power to show cause notice intending to take action against the Petitioner in imposing Levy of Compensation and whether the said Clause has vested any power on the Superintending Engineer of the Concerned Circle to impose Levy of Compensation based on the show cause notice issued by the Engineer-in-Charge (Respondent)?

It is an admitted fact that all power lies with the Governor of Tripura. His Excellency was / is the supreme authority of the work in question. He delegated his power to the Engineer in charge (Respondent). After such delegation of power the Respondent stepped into the shoe of the Governor. So in between the Governor and the Respondent there was / is none who can poke his nose to the affairs of the execution of the work in question.

Admittedly the Superintending Engineer of the concerning section of the PWD is the higher authority of the Respondent. He can direct the Respondent in every matter, if it is necessary for the better administration and smooth and effective administration, but he had no power to poke his nose to the affairs of instant execution of work. His Excellency the

Governor did never delegate his power to the Superintending Engineer. So it can safely be said that he crossed his limit and interfere with the works of the Respondent. His steps are not tenable according to law and thus it can be said his order of imposition of levy of compensation is illegal and void.

The counsel for the Petitioner R.N. Kanjilal raised other legal contentions also in support of his submission. The learned counsel for the Respondent S.R. Bhattacharjee did not speak anything regarding the power of the Superintending Engineer. He remained busy with the other allegations including the legal contentions relating to the agreement.

The legal aspect involved of decision under this issue is highlighted as follow:-

a) *Clause 2 of the agreement as applicable at the instant contract is not the clause empowering to impose liquidated damages by the Engineer- in- charge on behalf of the Governor of Tripura rather the clause incorporated in the PWD Works Manual, 2007 which shall be applicable in this agreement and it runs as follows:-*

b) *"Engineer-in-charge's Decision:-Except where otherwise specifically stated, the Engineer-in-charge will decide the contractual matters between the Department and the Contractor (Petitioner) in the role representing the Department."*

While implementing any provision of the agreement, the same must be for and on behalf of the Governor of Tripura. In this case also the Respondent while issuing show cause Notice' purportedly under clause 3, issued the same for and on behalf of the Governor of Tripura but while issuing the show cause 'Notice' on the basis of a non-existing Clause 2 the same was not issued for and on behalf of the Governor of Tripura and has, therefore, no legal value.

c) *The counsel for the Petitioner Kanjilal submitted before the Tribunal that no show cause 'Notice' under Clause 2 of the agreement was issued for and on behalf of the Governor of Tripura before imposition of compensation by the Superintending Engineer on 03- 01-2014 (Exhibit-C / 8) was nether under Clause 2 nor was issued on behalf of the Governor of Tripura, which was which was / is legal requirement and thus it had no leg to stand upon. Moreover no actions, on the basis of, the said show cause 'Notice' had been taken by the Engineer-in-charge.*

d) *He further submitted that the action of imposition of levy of compensation by the Superintending Engineer on 31- 03-2014 (Exhibit C/14) stating that extension of time was granted on 31- 05-2014 was/is materially in correct as only provisional extension and not extension of time was granted, the extension had / has also no value in the eye of law as the first extension was granted on 03-01-2014 when the stipulated period of compensation elapsed on 08-08-2013,i.e. the contract already became dead and inoperative.*

e) *The counsel for the Petitioner Kanjilal also raised some other legal contentions for which the action taken by the Superintendant Engineer was not valid and legal one. The learned Counsel for the Respondent did not categorically denied the above mentioned legal contentions. He was of the view the Superintending Engineer being the superior authority of the Respondent had right to take step over the matter.*

As I opined in the preceding paragraphs of the judgment that the order of imposition of levy of compensation by the Superintending Engineer was not a valid legal order and it was exercised by the Superintending Engineer without any proper authority I do not like to discuss more about the Issue No- 1. But I do not reject the other legal

contentions of the counsel for the Petitioner for the rejection of the order of the Superintending Engineer for imposition of levy of fine as mentioned above.

Thus, from the discussion made above I am left with no other choice than to opine that the Issue No-1 is answered in favour of the Petitioner.

44). Issue No-(B) whether the Clause-3 of the Conditions of Contract agreement as per details of PWD Works Manual, 2007 has vested any power on the Engineer-in Charge to rescind the Contract?

49) On hearing the learned counsel for both the sides it appears to me that, according to the Petitioner, the Clause-3 of the Conditions of Contract agreement as per details of the PWD Works Manual, 2007 does not vest any power on the Engineer-in-charge to rescind the contract. The learned Counsel for the Respondent did not deny it specifically. According to him the bi-lateral agreement/declaration between the Engineer-in-charge and the Petitioner empowered the Respondent to rescind the work if the Petitioner failed to comply with the terms and conditions of the agreement.

50) On careful scrutiny of the Clause-3 of the Conditions of Contract of the PWD Works Manual, 2007 as applicable to this agreement does not provide for rescinding the contract rather speaks otherwise. So the action of rescission of the contract by the Respondent on 20-03-2015 under Clause-3 of the agreement is not tenable according to law. It has no legal footings.

51) I am satisfied with the submission of the counsel for the Petitioner R.N. Kanjilal in this respect. From the record it appears that the Respondent amalgamated the PWD Form No-7 and the PWD Works Manual, 2007 together and took action against the Petitioner according to their need and requirements.

52) For the arguments sake let us consider that the claim of the Respondent is genuine and applicable to the instant case. If we consider the action of the Respondent genuine how he would be escaped from the major wrong/fault of the Respondent's side. The following are the reasons for which the Respondent is crippled to take any action against the Petitioner.

The stipulated date of completion of the work was 08-08-2013 as per agreement and not on 07-08-2013. It was wrongly quoted. The extension was granted to keep the contract alive from 09-08-2013 and thereby the contract became dead and in operative on 08-08-2013.

The first extension was granted on 31-01-2014 vide letter dated 03-01-2014 (Exhibit C/8) was also not a valid extension in the eye of law as there is / was no bridge in between 09-08-2013 to 02-01-2014. The contract which already became dead and inoperative on expiry of the stipulated period on 08-08-2013 could not be legally revived by granting provisional extension almost after elapse of more than 4 (four) months. That apart the extension granted was/is a provisional one and not a regular extension. So the second extension granted on 30-01-2014 up to 31-05-2014 (Exhibit C /11) is unsustainable in law.

The show cause 'Notice' intending to rescind the contract was issued on 01-04-2014 (Exhibit C /17) on the allegation of the failure of the Petitioner to complete the work within the stipulated period and the same was duly replied by the Petitioner On 16-04-2014 (Exhibit C/18) explaining as to why no action was warranted against the Petitioner.

A bare perusal of the Petitioner's letter dated 16-04-2014 would reveal the truth that he had also referred his earlier correspondences dated 24-01-2014 (Exhibit C/9) and 05-02-2014 (Exhibit C/12) and apprising the Respondent the impossibility to execute the work due to abnormal price rise for no fault on the part of the Petitioner requested the Respondent to

drop the show cause 'Notice' instead of taking any action against the Petitioner.

That on receipt of the reply of show cause 'Notice' on 16-04-2014 the Respondent did not take any action against the Petitioner for a considerable period of time of more than 13 months. It appears to me when the Petitioner was expecting a reasonable decision from the Respondent, all of a sudden the Respondent on 20-05-2015 issued the rescission order, which is also after 13 months 20 days from the date of issuing the show cause 'Notice' and after 13 months of the reply furnished by the Petitioner. But he did not explain as to why he could not consider the claim/submission of the Petitioner in his any letters.

The learned counsel for the Respondent failed to explain the aforementioned legal contentions and other questions raised by the Tribunal at the time of hearing case. He took time verbally but ultimately failed give proper explanation.

It also appears from the case record that the Respondent blew hot and cold at the same breadth by exercising the provisions of the PWD Form No-7 and the PWD Works Manual, 2007 in the instant case and it is not tenable according to law.

Thus from the discussion made above I am of the opinion that the Clause-3 of the Conditions of Contract agreement as per details of PWD Works Manual, 2007 has not vested any power on the Engineer-in Charge to rescind the Contract.

Hence the Issue No 'B' is answered in favour of the petitioner."

7. Analysis and Conclusions:

Now, the core question before us is whether the award passed by the learned Arbitrator, which was upheld by the learned District Commercial Court, can be interfered in an appeal under Section 37 of the Arbitration & Conciliation Act, 1996 in the facts and circumstances of the case on hand.

7.1. The scope of interference in an appeal under Section 37 of the Act of 1996 has been delineated in the several decisions rendered by the Apex Court. We are inclined to refer to the latest decision of the Apex Court in this regard rendered in the case of **S.V. Samudram vs State of Karnataka and Anr.** reported in **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 therefore. 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.”

7.2 In view of the aforesaid enunciation of law, there cannot be any quarrel that the learned Arbitrator is the sole judge for construction of the terms and conditions of the agreement. But, what we find in the instant case is that the learned Commercial Court has not made any reference to the grounds of challenge relating to Clause-2 or Clause-3 of the Agreement. Moreover, the learned Judge, District Commercial Court as well as the learned Arbitrator have failed to consider whether the contractor-respondent is entitled to get payment relating to all the issues raised in the Arbitral proceedings.

8. We may profitably recapitulate hereunder the findings of the District Commercial Court, which reads thus:

“...The award sought to be set aside mainly on the ground that the Arbitrator has traveled beyond the jurisdiction and passed the award without proper appreciation of the materials placed before him. The grounds as enumerated in the application for setting aside

the award require appreciation of the evidence/materials placed before the Arbitrator which is not at all permissible. In this connection we are supported by the view taken by the Hon'ble Supreme Court in the judgments as referred to above and also the provision of section 34(2-A) of the Arbitration Act.

6. The scheme and scope of the provisions of Section 34 of Arbitration Act aims at keeping the supervisory roles of the court at minimum level, therefore, we cannot correct the errors so done by the arbitrator by sitting as a Appellate Court, it can only be quashed leaving the parties to begin the arbitration again if it is desired. Since the case at hand, as stated earlier above, the grounds put forward for setting aside the award require appreciation of materials placed before the Arbitrator, the application under consideration merits rejection....”

The findings of the learned District Commercial Court extracted here-in-above would unambiguously show that there has been a complete non-consideration of the reasons assigned in the Award.

9. The learned Commercial Court also has 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 Commercial Court unsustainable.

10. 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. 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.

47. Interference with an arbitral award cannot frustrate the ‘commercial wisdom behind opting for alternate dispute resolution’, merely because an alternate view exists.²⁹ However, the interpretation of a contract cannot be unreasonable, such that no person of ordinary prudence would take it. The contract, which is a culmination of the parties’ agency, should be given full effect. If the interpretation of the terms of the contract as adopted by the tribunal was not even a possible view, the award is perverse.³⁰

48. Clause 29.5.1(i) entitles the concessionaire to terminate the agreement if DMRC “failed to cure such breach or take effective steps for curing such breach” within the cure period. Pertinently, the clause uses two separate phrases, “cure” and “effective steps to cure”. The clause reads as follows:

“29.5.1 The Concessionaire may after giving 90 (ninety) days’ notice in writing to DMRC terminate this Agreement upon the occurrence and continuation of any of the following events (each a “DMRC Event of Default”), unless any such DMRC Event of Default has occurred as a result of Concessionaire Event of Default or due to a Force Majeure Event.

- (i) DMRC is in breach of this Agreement and such breach has a Material Adverse Effect on the Concessionaire and DMRC has failed to cure such breach or take effective steps for curing such breach within 90 (ninety) days of receipt of notice in this behalf from the Concessionaire.”*

11. Keeping in view the aforesaid enunciation of law, we have scanned the relevant clauses of the agreement entered into between the appellant and the contractor-respondent as well as the tender document and Form No.7.

12. PWD Form No.7 lays down “General Rules and Directions for the guidance of the contractors” (for short, “General Rules”), which consists of various sub-heads on different subjects as regards the execution of the

contract work. “Brief Technical Specifications and Terms & Conditions” is one of those sub-heads under Form No.-7.

Under Clause 5 of “Brief technical specifications and terms and conditions” it is stipulated that *“the successful tenderer will have to enter into an agreement in PWD Form No.7(seven) with the Executive Engineer, Rig Division, Agartala. It is also stipulated therein that, “where the conditions of PWD Form No-7(seven) are repugnant to the special conditions given in this tender document, the latter shall prevail and will form a part of said agreement.”*

13. In the instant case, the respondent-contractor was requested by the Executive Engineer to execute the formal agreement in PWD Form No.7 vide letter dated 25.07.2012.

14. On conjoint reading of clause nos. 8, 9, 11, 12, 16, 17, 20, 21, etc. of the General Conditions, it comes to fore that the Contractor is under obligation to execute the works at the direction of the Engineer-in-charge. Clause 40 stipulates that an order book shall be kept at the site of the work and as far as practicable, all orders regarding the work are to be entered in the said order book which are necessary to be signed by Department officer who is in direct charge of the work and by the contractor or by his representative. It is further stipulated that in important cases the Executive Engineer or the Superintendant Engineer will countersign the entries. Under clause 8 and 11 ample power has been given to the Engineer-in-charge and it is clearly stated that Contractor has to execute the work as per direction of the Engineer-in-Charge.

15. There is another important sub-head dealing with “**Settlement of Disputes**”. Clause 1.b. under the said sub-head of “Settlement of disputes”, stipulates that *“if the Engineer-in-Charge fails to give notice of his decision in writing within a period of twenty days after being requested or if the Contractor is dissatisfied with the notice of the decision of the Engineer-in-Charge, the Contractor may within fifteen days after receiving the notice of decision appeal to the concerned Superintending Engineer of Department who shall after affording opportunity of being heard shall give notice of his decision within a period of thirty days. After Superintending Engineer has given written notice of his decision to the Contractor and no claim to arbitration, has been communicated to him by the Contractor within a period of fifteen days from receipt of such notice the said decision shall remain final and binding on both side.*

Thus, conditionality under the “Settlement of disputes” clarifies that Superintending Engineer has ample power to take any decision subject to issuance of a notice of his decision. So, views of the Arbitrator that the Superintending Engineer has illegally poked his nose and interfered with the affairs and crossed his limits and violated the clause of agreement in levying compensation was not valid and illegal are not the one possible views.

16. Moreso, the contractor in his declaration embodied in PWD Form No.-6A of the tender document stated that *“he had gone through the details of both the latest pamphlets as well as the details mentioned in PWD Works Manual, 2007 adopted by the Government of Tripura which are in complete form will be applicable to this contract. It was further declared that calculation in respect of rates of all statement about*

Extra/Deviated/Substitute items will be worked out as per relevant Clause(s) of PWD Form No.7(seven) for this contract which will be final and binding”.

17. Now, on perusal of the award together with the relevant clauses in the agreement and the tender document, we find that the Arbitrator has not assigned any reasons before arriving at a finding that the Superintending Engineer had no power to poke his nose into the affairs of the performance of the contract work.

Again, the finding of the Arbitrator that the notice issued by the Engineer-in-Charge was illegal and arbitrary as because it was not issued for and on behalf of the Governor of Tripura and his finding that while implementing any provision of the agreement the same must be for and on behalf of the Governor of Tripura is perverse and patently illegal.

18. It is clearly stated under Clause 2 of the conditions of contract available in the tender document as well as in PWD Works Manual, 2007 that the Engineer-in-charge will decide the contractual matters between the Department and the Contractor in the role representing the Department except where such power of the Engineer-in-charge is specifically excluded. In view of the aforesaid clause 2(2.1), the view of the Arbitrator that under Clause 2(2.1) he is not empowered to rescind the contract, *is not a possible view and suffers from patent error of law*. Again, the view of the Arbitrator in interpreting the delegation clause under Clause 3 of the conditions of contract is also not a possible view. The Clause 3 stipulates that the Engineer-in-charge may delegate any of his duties and responsibilities to other officers and may cancel any delegation by an official order issued.

(emphasis supplied)

19. On plain reading of the aforesaid Clause 3, it becomes crystal clear that Engineer-in-Charge may delegate his power to any officers to act for and on his behalf. In no way it can be interpreted that the Engineer-in-Charge is curtailed or excluded from exercising any of the powers he is vested with under the conditions of the contract. Further, nowhere in the PWD Works Manual, 2007, it is stated that Engineer-in-Charge is a delegatee and he exercises his power as a delegatee of the Governor.

20. There is yet another important feature in the award passed by the Arbitrator is that the notification dated 30.05.2007 relating to “Adoption of Works Manual in PWD, Tripura” whereby it was notified that all conditions including general conditions of contract as incorporated in the **Model Standard Bid Document(SBD)** will be considered to be a part of the said notification and be in force in the Department for tenders costing above Rupees Fifty Lakhs or for any specialized works project. So, the adherence to different conditions in the SBD is also mandatory between the parties to the contract, which the Arbitrator should have taken into account while deciding the issues/claims.

21. In the light of the above, the award made by the Arbitrator is not sustainable in law as it is against the public policy doctrine and suffers from patent illegality. The learned Commercial Court in exercise of its power under Section 34 of the Arbitration and Conciliation Act, 1996 has not properly dealt with the finding and views expressed by the Arbitrator in his award.

22. Pertinently, it is noticed that the Arbitrator has decided the disputes/claims raised by the parties most mechanically without assigning any reasons.

23. It is settled proposition that recording of reasons is principle of natural justice and every judicial order must be supported by reasons recorded in writing. It ensures transparency and fairness in decision making. Opinion of the Court alone can explain the cause which led to passing of the final order. The person who is adversely affected may know, as to why his application has been rejected. The Court cannot lose sight of the fact that a losing litigant has a cause to plead and a right to challenge the order if it is adverse to him. Whether an argument was rejected validly or otherwise, reasoning of the order alone can show. To evaluate the submissions is an obligation of the authority and to know the reasons for rejection of its contention is a legitimate expectation on the part of the litigant. When reasons are announced and can be weighed, the public can have assurance that the correcting process is working. Announcing reasons can also provide public understanding of how the numerous decisions of the system are integrated.

24. Hence, non-assigning of reasons amounts to fundamental breach of natural justice under Section 34 of Arbitration and Conciliation Act, 1996, and 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 interpreted the

provisions relating to Clause-2 and Clause-3 of the PWD Work Manual, 2007.

25. The upshot of the aforesaid discussions and for the reasons recorded, according to us, the matter should be remitted back to the learned Arbitrator to decide all the issues and the claims raised by the parties afresh. Accordingly, it is remitted back to the Arbitrator for fresh decision by assigning reasons.

The arbitrator shall decide and settle the disputes raised by the parties within 6(six) months from the date he receives the copy of this judgment.

The appeal stands disposed with the aforesaid directions.

(ARINDAM LODH, J)

(APARESH KUMAR SINGH, CJ)



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