

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

% **Reserved on : 9th January, 2023**
Pronounced on: 16th March, 2023

+ **O.M.P. (COMM) 6/2019 and I.A. No. 179/2019**
DELHI STATE INDUSTRIAL AND INFRASTRUCTURE
..... Petitioner
Through: Ms.Anusuya Salwan and
Ms.Nikita Salwan, Advocates

versus

M/S BAWANA INFRA DEVELOPMENT PVT. LTD.
..... Respondent
Through: Mr.Rajshekhar Rao, Senior
Advocate with Mr. Dheeraj P. Deo,
Mr.Yasuraj Samant and Mr. A.
Peter, Advocates

CORAM:
HON'BLE MR. JUSTICE CHANDRA DHARI SINGH

J U D G M E N T

CHANDRA DHARI SINGH, J.

1. The instant petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act") has been filed on behalf of petitioner seeking the following reliefs:

*"It is, therefore, most respectfully prayed that this Hon'ble Court may graciously be pleased to set-aside award with respect to Claim No.1, 2, 5, 9 and 12.
Any other order or relief as this Hon'ble Court deems fit and proper may be passed in the facts and circumstances of the present case."*

FACTUAL MATRIX

2. The petition is filed against the impugned Award dated 12th September 2018 passed by Justice R.C. Jain (Retd.), the learned Sole Arbitrator. The Arbitration proceeding in the current matter arose out of Concessionaire Agreement dated 20.07.2011 with respect to the re-development, operation, and maintenance of the 'Bawana Industrial Area' (hereinafter referred to as the 'Project Area') situated in Delhi.
3. The facts necessary for the disposal of this instant petition are that the petitioner is DSIIDC, a Government Company incorporated under the Companies Act, 1956. The petitioner circulated a tender inviting bid from interested parties on a Public Private Partnership modality. After rejecting multiple bids, Abhudaya Housing and Constructions Pvt. Ltd. and Jyoti Buildtech Pvt. Limited (hereinafter collectively referred to as the 'Selected Bidder') were awarded the Contract. The Respondent Company was established as a special-purpose vehicle for the furtherance of the same.
4. According to the Agreement, the respondent (Concessionaire) was required to re-develop, construct, operate and maintain the Project Area for fifteen years. The first two years of this period were earmarked for the construction of mandatory capital projects, whereas the remaining thirteen years were reserved for maintaining and operating the Project Area. The date set for the completion of Material Project Facilities was 15th December 2013.
5. On 14th December 2013, there was a request by the respondent for the completion certificate. However, the third party issued a provisional certificate to the respondent instead of the petitioner. The petitioner

further did not issue it to the respondent claiming their incomplete work. It is alleged by the petitioner that the respondent tried to obtain the completion certificate from the third party without completing the consignment. They further alleged that it was a mischievous act on the part of the respondent to possess a provisional certificate that was not issued by the third-party engineer to the respondent.

6. On the contrary, the respondent vehemently denied the allegations of the petitioner, and claimed that the work was complete, and they had received the certificate legitimately from the third-party engineer.

7. The respondent raised claims for payment due to them, the onus of the payment of which was on the respondent, as alleged by the petitioner.

8. The dispute reached to this Court requesting the appointment of an Arbitrator. This Court appointed Justice R.C. Jain (Retd.) as the learned Sole Arbitrator to adjudicate upon the matter *vide* order dated 24th August 2016 passed in Arbitration Petition No. 420/2016 titled “Bawana Infra Development Pvt. Ltd. V/s DSIIDC”.

9. The learned Arbitral Tribunal was pleased to make and publish the impugned Award on 12th September 2018. The petitioner being aggrieved of the impugned Award filed the instant petition.

SUBMISSIONS

(On behalf of the petitioner)

10. Learned counsel appearing on behalf of the petitioner, in support of the instant petition has submitted that the impugned Award dated 12th September 2018 is patently illegal, arbitrary, and contrary to the Contract executed between the parties, and the provisions of law and public policy.

11. Learned counsel for the petitioner submitted that various deficiencies in the Project Area such as maintenance of the Parks/green belts at many places were not taken care of, and that the respondent had failed to fulfil the obligations under and as per the Agreement and cannot be allowed to raise any claims against the petitioner.

12. Learned counsel for the petitioner submitted that the impugned award has been passed without fully appreciating the facts and the relevant law and if the same is permitted to stand and not set aside, it would result in the miscarriage of justice. The learned Sole Arbitrator has not only overlooked the facts of the case but has also ignored the documents and evidence on record in the matter.

13. Learned counsel for the petitioner further submitted that the learned Arbitrator has completely ignored the law laid down by the Hon'ble Supreme Court of India by making an Award against specific terms of the Contract executed between the parties and the learned Arbitrator *vide* the impugned Award is seeking to re-write the terms of the Contract so as to substantiate his findings or reasonings.

14. It is further submitted by learned counsel for the petitioner that the impugned Award fails to take into account the several letters written to the Contractor with respect to poor performance and requests for joint inspection and also correspondence with respect to the completion of the mandatory capital projects.

15. Learned counsel for the petitioner further submitted that the impugned Award passed by the learned Arbitrator is contrary to the evidence on record and is hence liable to be set aside.

16. It is submitted that as per Claim no. 1 regarding the outstanding amount of annuity, the annuity became payable to the concessionaire/respondent by the petitioner, as per Section 12.1 of the Concessionaire Agreement. The relevant section regarding the annuity is reproduced below:

“Section 12.1 Annuity

In consideration of the Concessionaire accepting the Concession and undertaking to perform and discharge its obligations in accordance with the terms, conditions and covenants set forth in this Agreement, and subject to: (i) the provisions of this Agreement, and (ii) the Concessionaire achieving Annuity Commencement Date, DSIIDC agrees and undertakes to pay to the Concessionaire, on the Annuity Commencement Date and on each subsequent Annuity Payment Date as set forth in Schedule 13 (“Annuity Payment Schedule”), the sum of Rs. 7.48 Cr. (rupees Seven Crore and Forty Eight Lakhs Only) the “Annuity”) as set forth in its Bid.”

17. Learned counsel for the petitioner submitted that the said annuity was not paid, as the respondent failed to comply with Section 11.7 of the Agreement, as per which the respondent was to appoint its statutory auditors and establish and maintain a quarterly reporting system to provide storage and ready retrieval of data. The relevant Sections are reproduced below:

“Section 11.7 Audit and Account

Under the said provision, the concessionaire was to appoint its statutory auditors and to establish and maintain a quarterly reporting system to provide storage and ready retrieval of data. Reference is made to Section 11.7 (b) (ii) of the Agreement which is reproduced hereunder:

“Section 11.7 (b) (ii)

The Concessionaire shall establish and maintain a quarterly reporting system to provide storage and ready retrieval of data related to the construction and operation of the Project in a format to be mutually agreed between DSIIDC and the Concessionaire. The Concessionaire shall provide copies of such reports to OS// DC within 15 (fifteen) days of the end of each quarter."

18. Learned counsel for the petitioner further submitted that the impugned Award passed by the learned Arbitrator under Claim No.1 is contrary to the expressed provisions of the Concessionaire Agreement dated 20.07.2011. It is submitted that the learned Arbitrator has completely ignored that the respondent had failed to fulfil its obligations under the terms and conditions of the Concessionaire Agreement and was raising Claim of annuity despite not having completed the work.

19. Learned counsel for the petitioner submitted that the findings of the learned Arbitral Tribunal with respect to the provisional completion certificate and completion certificate are completely contrary to the Concessionaire Agreement entered into between the parties. She further submitted that, as per Section 9.6 of the Concessionaire Agreement, the third-party engineer at the request of the concessionaire was to issue a provisional certificate of completion to the concessionaire as pointed out in the CSF however, as the works remained incomplete, no such provisional completion certificate was issued to the respondent but was issued to the petitioner. It is also submitted that the respondent had wrongly obtained the completion certificate and the respondent's witness had admitted that the provisional completion certificate was never

communicated to the respondent as the mandatory capital works could not completed.

20. Learned counsel for the petitioner further submitted that the learned Arbitrator has allowed interest, pre-suit, *pendente-lite*, and future @ 2% higher than the current rate of interest prevalent on the date of the award. She submitted that no interest is payable and the award of interest is highly excessive.

21. Learned counsel for the petitioner submitted that the learned Arbitral Tribunal has completely ignored the evidence on record that the petitioner had issued notices, put banners and gave public notices to the unit holders to make the payments. The relevant portion of the Award which directed the petitioner to take the subsequent actions within a period of 60 days, is reproduced below:

*"(i) To issue requisite notices, notification and delegation of power as provided under Clauses (b), (c) and (cc) and all other enabling provisions of Section 11 of the CA;
(ii) To issue Special Order I Notification as envisaged under Section 28 of Delhi Industrial Development, Operation and Maintenance Act, 2010; and
(iii) Initiate action for recovery or the pending dues towards different charges in terms of the provisions of CA and 2010 Act."*

22. Learned counsel for the petitioner further submitted that the learned Arbitrator has completely ignored that no powers can be given to the Concessionaire under Section 28 of the Delhi Industrial Development Operation and Maintenance Act, 2010 (hereinafter referred to as "the DIDOM Act") and the petitioner has been helping the Concessionaire to

make recoveries towards maintenance and other charges. The relevant section is reproduced herein:

"28. Authority for Prosecution:

Unless otherwise expressly provided, no Court shall take cognizance of any offence relating to property belonging to, or vested by or under this Act in, the Corporation, punishable under this Act, except on the complaint of, or upon information received from, the Corporation or some person authorized by the Corporation by general or special order in this behalf. "

(On behalf of the respondent)

23. *Per contra*, learned senior counsel appearing on behalf of the respondent vehemently opposed the instant petition and submitted that each and every averment and allegation levelled by the petitioner in the present petition is wrong and incorrect, hence denied.

24. Learned senior counsel for the respondent submitted that in so far as challenge to Claim Nos. 2, 5, and 9 are concerned, a bare perusal of the impugned Award demonstrates that the learned Tribunal has not allowed any claim but has merely directed the petitioner to take necessary action against the defaulting industrial units, and hence, no objection in this regard would be maintainable.

25. Learned senior counsel for the respondent submitted that the provisional completion certificate was issued by third-party engineer with effect from 15th December 2013 and admittedly there was no dispute ever raised by the petitioner in this regard.

28. Learned senior counsel for the respondent further submitted that it is an admitted position that the project was complete in terms of the Contract on 15th December 2013, that is within the stipulated completion

period and hence, there can be no dispute in so far as completion of the work and payment of annuities are concerned. He further submitted that the respondent itself issued the completion certificate *vide* forwarding letter dated 21st April 2014 thereby certifying that the work was complete in all respect and there was no grievance raised as alleged for the first time before the learned Arbitrator.

29. Learned senior counsel for the respondent submitted that a bare perusal of letter dated 5th May 2014 issued by the petitioner demonstrates the clear admission of the petitioner that the project was put to commercial use on 15th December 2013 itself, which was also endorsed by the third-party engineer and hence, there could be no dispute in so far as successful completion of project in question was concerned.

30. Learned senior counsel for the respondent further submitted that the Concessionaire Agreement dated 19th July, 2011 is of such a nature whereby the entire funding for the redevelopment of the Bawana Industrial Area was arranged by the respondent itself and that the petitioner did not invest at all. He submitted that the frivolous objection raised by the petitioner alleging non-compliance with Clause 11.7 is of no consequence and that the respondent fully complied with.

31. Learned senior counsel for the respondent submitted that a bare perusal of the petitioner's auditor report dated 22nd August 2017 would negate the contention of the petitioner that there was any violation of Clause 11.7 of the Contract.

32. Learned senior counsel for the respondent submitted that the rate of interest has been challenged by the respondent in O.M.P. (COMM.) 24 of 2019. It is submitted that the Arbitral Tribunal awarded a rate of interest

in accordance with Section 31 (7) (a) of the Act, when there is an express provision on the rate of interest in the Concessionaire Agreement.

33. Learned senior counsel for the respondent submitted that the respondent had submitted a certificate of the cost incurred towards the entire litigation which is also recorded by the learned Arbitral Tribunal in paragraph 145 of the impugned Arbitral Award and hence, it is incorrect to suggest that no such certificate was submitted by the respondent. Besides the respondent is also incurring further costs while defending the present petition before this Court and hence, it cannot be said in any manner that the Award of cost is highly excessive or is liable to be set aside.

ANALYSIS

34. Heard learned counsel for the parties and perused the record. This Court has also perused the impugned Award as well as the entire Arbitral record brought on record and has given thoughtful consideration to the submissions advanced by the parties.

35. The challenge to the impugned Arbitral Award *inter alia* has been made on the ground that the learned Arbitrator passed the Impugned Award without fully appreciating facts and the relevant law and if the same is permitted to stand and not set aside, it would result in the miscarriage of justice. The learned counsel for the petitioner further submitted that the learned Sole Arbitrator has not only overlooked the facts of the case but has also ignored the documents and evidence on record in the matter.

36. Another ground that has been raised by learned counsel for the petitioner is that the learned Arbitrator has completely ignored the law

laid down by the Hon'ble Supreme Court of India by making an Award against specific terms of the Contract executed between the parties and the learned Arbitrator *vide* the Impugned award is seeking to re-write the terms of the Contract so as to substantiate his findings or reasonings.

37. A key ground taken by the learned counsel for the petitioner is that the rate of interest given in the award is in accordance with Section 31 (7) (a) of the Act, and not as per the terms specified in the Concessionaire Agreement, as it ought to have been.

Claim no. 2, 5 and 9

38. The petitioner has raised objections against the impugned Award on the basis of Claims 1,2,5,9 and 12. In order to properly adjudicate upon the validity of the Impugned Award, and properly scrutinise if the Impugned Award is liable to be set aside as per the provisions given in Section 34 of the Act, it is integral to examine each Claim in their own capacity and apply the test of perversity on them.

39. The Arbitral Tribunal, while adjudicating upon Claim no. 2, 5, and 9, gave similar reasoning for its decision. Claim no. 2 was regarding the **“amount due arising on account of wilful delay in issuance of completion (with 18% simple interest p.a. calculated till 31st October 2016)”**, and Claim no. 9 was regarding the **“Commercial Units Defaulters in payment of dues (18% simple interest p.a. till 31st October 2016)”**. The petitioner has alleged that the learned Arbitrator has completely ignored the evidence on record while adjudicating upon these Claims. Section 11.4 of the Concessionaire Agreement is reproduced herein:

Section 11.4 Maintenance Charges and Other Charges

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- (a) (i) *The Concessionaire shall with effect from the Annuity Commencement Date have the right to collect, and deposit into the Designated Account, and enforce the Maintenance Charges as per charges notified by DSIIDC for the Industrial Estate.*
- (ii) *The Concessionaire shall have the right and full freedom from the Appointed Date to charge, collect, and deposit into the Designated Account, and enforce charges for water supplied from sources other than DJB by it in the Industrial Estate, at rates determined by the Concessionaire on a cost plus basis, which have been approved and notified by DSIIDC. The Concessionaire shall charge for water supplied by it from DJB sources, at rates specified by the DJB. The Concessionaire shall coordinate with the Existing Unites and New Units to ensure that they all have installed functional meters at their cost, and that reading in the meter is recorded periodically before an invoice is raised for collecting charges in relation to supply of water in the Industrial Estate.*
- (iii) *The Concessionaire shall with effect from the Appointed Date have the right to charge, collect, and deposit into the Designated Account, and enforce charges for sewerage charges, CETP as per charges notified by DSIIDC.*
- (b) *Payment of Revenue to Concessionaire*
DSIIDC shall within fifteen (15) days from the end of each month, transfer into the Escrow Account maintained by the Concessionaire the total amount of money deposited by the Concessionaire into the Designated Account from collection of Maintenance Charges and Other Charges.
- (c) *Recovery of dues*
Any default by an Existing Unit and New Unit, in the payment of ground rent, Maintenance Charge, and/or Other: Charges to the Concessionaire; shall be governed by this Section 11.4(c).

- (i) *DSI IDC, hereby appoints the Concessionaire as the duly authorized person on behalf of DSIDC to commence prosecution and other proceedings under the Act for recovery of dues, and shall within seven days of the execution of this Concession Agreement, issue a special order in this behalf pursuant to Section 28 of the Act.*
- (ii) *Upon the occurrence of a default in payment of ground rent, Maintenance Charge and/or Other Charges to the Concessionaire, the Concessionaire is authorized to undertake the following.*
 - (aa) suspend the provision of services being provided pursuant to this Agreement, to the defaulting Existing Unit, and New Unit;*
 - (bb) commence recovery proceedings pursuant to the special order in this regard issued by DSI IDC under Section 28 of the Act;*
 - (cc) for the recovery of any dues that cannot be undertaken under Section 28 of the Act if any DSI IDC shall initiate and pursue recovery proceedings upon an application in this regard made by the Concessionaire, and subject always to sufficient amounts having been received pursuant to such proceedings shall provide the Concessionaire only such amount from such total recovered amount which is equivalent to the unpaid dues for which recovery proceedings had been initiated. The Parties agree that immediately upon recovery of any dues by DSI IDC, DSI IDC shall specify to the Concessionaire the costs incurred by it in relation to the recovery proceedings, and the Concessionaire shall forthwith deposit such amount into an account specified by DSI IDC.*

40. The learned Arbitral Tribunal while adjudicating Claim no. 2 reiterated Section 11.4 (c) of the Concessionaire Agreement, which relates to the recovery of dues and provision for a provision in case of any default by existing unit and new unit holders, non-payment of ground rent, maintenance charges, and/or other charges. The learned Tribunal further went on to make the following observations, as reiterated for clarity:

“104. The Tribunal noticed and which is not in dispute between the parties that there is no provision in the CA under which the Concessionaire (Claimant) is entitled to Claim the reimbursement of various charges which remained unrecovered from willful defaulters/existing and new plot owners who had failed to remit such charges after it becomes due. Therefore, strictly speaking, the Claimant is not within its right to Claim any amount or huge amount of more than Rs 64 crores Claimed under this head from the Respondent merely on showing that such amount had accumulated due to non-payment of the said charges by the existing unit holders and new unit holders. At the same time the Claimant cannot be deprived of its legitimate Claims under this head for which the specific provision has been made under Clause (c) of Section 11 of CA (supra).

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106. The Claimant faced with this situation repeatedly requested the Respondent to issue requisite authorization/delegation of powers in favour of the Claimant to commence recovery proceedings, pursuant to the Special Order in that regard to be issued by DSIIDC under Section 28 of the Delhi Industrial Development Operation and Maintenance Act, 2010 but the Respondent failed to issue such a Special Order in favour of the Claimant for taking necessary action. Clause 3(c) supra, enjoins upon DSIIDC to initiate and pursue recovery proceedings, upon an application of the Concessionaire, which action has not been taken by DSIIDC/Respondent so far. During the

course of hearing, a senior representative of the Respondent DSIIDC informed the Tribunal that the process in that behalf has been initiated and may be completed within a short span of time. Without going into such representation, the tribunal is of the view that it is the obligation of the Respondent under the CA to ensure the recovery of the pending dues from the defaulting plot owners so that the due amount is collected and disbursed to the Claimant, else how the Claimant who is expected to maintain such a big project for 13 years would be able to carry out its obligations under the CA.

107. Attention of the Tribunal has also been drawn to a letter dated 7.12.2011 issued by the Chief Project Director of DSIIDC, wherein it is stated that in case of non-payment of maintenance charges by industrial plot owners, DSIIDC owe the responsibility for the same. The issuance of this letter is not denied by the Respondent but it is sought to be explained that the same was issued by a certain rogue officer of the Respondent in connivance with the Claimant and against whom disciplinary action has been taken by the Respondent/DSIIDC. In any case the said letter cannot alter or modify the CA and has not been incorporated by any modification in the CA. The Tribunal would not go into this aspect whether the said letter was issued without authority but the fact remains that such a stand of the Respondent has not been incorporated in the CA which is the only document from which the terms and conditions can be derived. The Tribunal accordingly discards the said letter and cannot fix the liability of the Respondent to reimburse the Claimant with the unrecovered outstanding dues.

108. With the above discussion, the Tribunal holds that the Claimant is not entitled to recover the Claimed amount from the Respondent but at the same time, the Claimant cannot be left in the position it is reeling presently due to the non-collection of the maintenance and other charges from the defaulting unit holders. The Tribunal, therefore, is of the view that Respondent should take all necessary actions which are enjoined upon them under the provisions of

Section 11 (c) and (cc) so as to ensure the recovery of the dues from the defaulting unit holders.

Therefore, the Tribunal directs the Respondent/DSI IDC to take following actions within a period of 60 days from the date of the Award:

- i. To issue requisite notices notification and delegation of powers as provided under Clauses (b),(c) and (cc) and all other enabling provisions of Section 11 of the CA;*
- ii. To issue Special Order / Notification as envisaged under Section 28 of Delhi Industrial Development, Operation and Maintenance Act, 2010; and*
- iii. Initiate action for recovery of the pending dues towards different charges in terms of the provisions of CA and 2010 Act.*

109. The Tribunal makes it clear that in case of failure of Respondent/DSI IDC to take the requisite action within the stipulated period, the Claim of the Claimant shall stand revived and it would be open to the Claimant to pursue the said Claim in accordance with law. Claim No.2 is answered accordingly.”

41. Upon a bare reading of the aforementioned Section and the reasoning given by the learned Sole Arbitrator in the Award, it is candid that the learned Sole Arbitrator had very well considered the Concessionaire Agreement and the evidence placed on record to adjudicate upon this specific Claim.

42. While adjudication of the issue regarding Claim no. 9, the learned Arbitral Tribunal held that this issue is also covered by the discussion held under Claim no. 2. The learned Tribunal held that it is the respondent's obligation to collect charges from the unit owners, and despite notices and orders issued by the petitioner to such entities, they failed to make the payment of maintenance and other charges. The petitioner was thus directed to further pursue the matter with such

defaulting entities so as to ensure that they make the payments in accordance with the terms of the Agreement or by use of the process of recovery as contemplated by Section 28 of the DIDOM Act, as quoted above.

43. Claim no. 5 was for the **“Reimbursement of unpaid CETP/ Sewerage Charges and water charges (18% simple interest p.a. calculated till 31st October 2016)”**. The petitioner submitted that learned Sole Arbitrator completely ignored the evidence on record while adjudicating upon these Claims. In this Claim, the Arbitral Tribunal directed that the order and direction as laid down in Claim no. 2 shall *mutatis mutandis* apply to the recovery of the unpaid CETP/Sewerage and Water charges.

44. The learned Arbitral Tribunal while adjudicating upon Claims 2, 5 and 9, issued directions to the petitioner to issue special orders/notification as envisaged under Section 28 of the DIDOM Act, for which the petitioner has raised an objection.

45. The learned Arbitral Tribunal re-directing the petitioner to issue Special Orders/Notifications is neither contrary to the Concessionaire Agreement nor illegal. The learned Arbitral Tribunal has the power to issue such directions to ensure that the interests of both parties are safeguarded. Even if the petitioner had previously issued the said notices, they can be asked to re-issue the notices to ensure that the dispute is settled in an amicable way, where both parties are protected from incurring huge losses.

46. The Impugned Award with respect to Claim 2 is well-reasoned and does not mandate the interference of this Court.

47. Since the reasoning for adjudicating Claim no. 9 and 5 is the same as that of Claim no. 2, the Impugned Award regarding the instant Claim does not warrant the interference of the Court, as per Section 34 of the Act.

48. The learned Arbitral Tribunal has carefully considered the provisions of the Concessionaire Agreement, along with the provisions of law as per this act, and the principles of jurisprudence to adjudicate upon these Claims.

49. When ample emphasis is given to the Agreement and provisions of law, then there is no scope for the interference of the Court in such an Award. In this instant matter, the direction of the learned Arbitrator after considering the Concessionaire Agreement and giving due prominence to the fact that issuing notices so as to ensure that the defaulters make the payments in accordance with the terms of the Agreement or by use of the process of recovery as contemplated by Section 28 of the DIDOM Act, is not perverse.

50. The learned Sole Arbitrator has clearly resorted to a judicial approach while adjudicating upon such an issue. The Arbitral Tribunal is a creature of Contract, and the Contract is the only basis on which the learned Tribunal should adjudicate, apart from the general provisions of law and jurisprudence.

51. It must be duly noted that the learned Arbitrator upheld the principles of Natural Justice and warranted that the parties are granted relief.

52. As a creature of Contract, upholding the Contract and adjudicating on the lines drawn by it, is the Learned Arbitrator's responsibility. The

onus of the rightful interpretation of the Contract is also on the Learned Arbitrator. This Court refers to ***Foo Jong Peng and others v Phua Kiah Mai and another***, [2012] 4 SLR 1267, where the Hon'ble Supreme Court of Singapore delved into the interpretation of Contracts by the Learned Arbitrator during the Arbitral Process. The relevant portion of the judgment is reiterated below:-

"36. In summary, although the process of the implication of terms does involve the concept of interpretation, it entails a specific form or conception of interpretation which is separate and distinct from the more general process of interpretation (in particular, interpretation of the express terms of a particular document). Indeed, the process of the implication of terms necessarily involves a situation where it is precisely because the express term(s) are missing that the court is compelled to ascertain the presumed intention of the parties via the "business efficacy" and the "officious bystander" tests (both of which are premised on the concept of necessity). In this context, terms will not be implied easily or lightly. Neither does the court imply terms based on its idea of what it thinks ought to be the Contractual relationship between the Contracting parties. The court is concerned only with the presumed intention of the Contracting parties because it can ascertain the subjective intention of the Contracting parties only through the objective evidence which is available before it in the case concerned. In our view, therefore, although the Belize test is helpful in reminding us of the importance of the general concept of interpretation (and its accompanying emphasis on the need for objective evidence), we would respectfully reject that test in so far as it suggests that the traditional "business efficacy" and "officious bystander" tests are not central to the implication of terms. On the contrary, both these tests (premised as they are on the concept of necessity) are an integral as well as indispensable part of the law relating to implied terms in Singapore."

53. Further, in the case of *Ssangyong Engineering & Construction Co. Ltd. v. NHAI*, (2019) 15 SCC 131, the Hon'ble Supreme Court made the following pertinent observations:

"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).

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76. However, when it comes to the public policy of India, argument based upon "most basic notions of justice", it is clear that this ground can be attracted only in very exceptional circumstances when the conscience of the Court is shocked by infraction of fundamental notions or principles of justice. It can be seen that the formula that was applied by the Agreement continued to be applied till February 2013 — in short, it is not correct to say that the formula under the Agreement could not be applied in view of the Ministry's change in the base indices from 1993-1994 to 2004-2005. Further, in order to apply a linking factor, a Circular, unilaterally issued by one party, cannot possibly bind the other party to the Agreement without that other party's consent. Indeed, the Circular itself expressly stipulates that it cannot apply unless the Contractors furnish an undertaking/affidavit that the price adjustment under the Circular is acceptable to them. We have seen how the appellant gave such undertaking only conditionally and without prejudice to its argument that the Circular does not and cannot apply. This being the case, it is clear that the majority award has created a new Contract for the parties by applying the said unilateral Circular and by substituting

a workable formula under the Agreement by another formula dehors the Agreement. This being the case, a fundamental principle of justice has been breached, namely, that a unilateral addition or alteration of a Contract can never be foisted upon an unwilling party, nor can a party to the Agreement be liable to perform a bargain not entered into with the other party. Clearly, such a course of conduct would be contrary to fundamental principles of justice as followed in this country, and shocks the conscience of this Court. However, we repeat that this ground is available only in very exceptional circumstances, such as the fact situation in the present case. Under no circumstance can any court interfere with an Arbitral award on the ground that justice has not been done in the opinion of the Court. That would be an entry into the merits of the dispute which, as we have seen, is contrary to the ethos of Section 34 of the 1996 Act, as has been noted earlier in this judgment."

54. In ***Rajasthan State Mines and Minerals Limited v. Eastern Engineering Enterprises and Another***, (1999) 9 SCC 283, the Hon'ble Supreme Court held,

"44. From the resume of the aforesaid decisions, it can be stated that:

(a) It is not open to the Court to speculate, where no reasons are given by the Arbitrator, as to what impelled Arbitrator to arrive at his conclusion.

(b) It is not open to the Court to admit to probe the mental process by which the Arbitrator has reached his conclusion where it is not disclosed by the terms of the award.

(c) If the Arbitrator has committed a mere error of fact or law in reaching his conclusion on the disputed question submitted for his adjudication then the Court cannot interfere.

(d) If no specific question of law is referred, the decision of the Arbitrator on that question is not final, however much it may be within his jurisdiction and indeed essential for him to decide the question incidentally. In a case where specific

question of law touching upon the jurisdiction of the Arbitrator was referred for the decision of the Arbitrator by the parties, then the finding of the Arbitrator on the said question between the parties may be binding.

(e) In a case of non-speaking award, the jurisdiction of the Court is limited. The award can be set aside if the Arbitrator acts beyond his jurisdiction.

(f) To find out whether the Arbitrator has travelled beyond his jurisdiction, it would be necessary to consider the Agreement between the parties containing the Arbitration clause. Arbitrator acting beyond his jurisdiction is a different ground from the error apparent on the face of the award.

(g) In order to determine whether Arbitrator has acted in excess of his jurisdiction what has to be seen is whether the Claimant could raise a particular Claim before the Arbitrator. If there is a specific term in the Contract or the law which does not permit or give the Arbitrator the power to decide the dispute raised by the Claimant or there is a specific bar in the Contract to the raising of the particular Claim then the award passed by the Arbitrator in respect thereof would be in excess of jurisdiction.

(h) The award made by the Arbitrator disregarding the terms of the reference or the Arbitration Agreement or the terms of the Contract would be a jurisdictional error which requires ultimately to be decided by the Court. He cannot award an amount which is ruled out or prohibited by the terms of the Agreement. Because of specific bar stipulated by the parties in the Agreement, that Claim could not be raised. Even if it is raised and referred to Arbitration because of wider Arbitration clause such Claim amount cannot be awarded as Agreement is binding between the parties and the Arbitrator has to adjudicate as per the Agreement. This aspect is absolutely made clear in Continental Construction Co. Ltd.(supra) by relying upon the following passage from M/s. Alopi Parshad Vs. Union of India [1960] 2 SCR 703 which is to the following effect: - There it was observed that a Contract is not frustrated merely because the

circumstances in which the Contract was made, altered. The Contract Act does not enable a party to a Contract to ignore the express covenants thereof, and to Claim payment of consideration for performance of the Contract at rates different from the stipulated rates, on some vague plea of equity. The parties to an executory Contract are often faced, in the course of carrying it out, with a turn of event which they did not at all anticipate, a wholly abnormal rise or fall in prices, a sudden depreciation of currency, an unexpected obstacle to execution, or the like. There is no general liberty reserved to the courts to absolve a party from liability to perform his part of the Contract merely because on account of an unanticipated turn of events, the performance of the Contract may become onerous.

(i) The Arbitrator could not act arbitrarily, irrationally, capriciously or independently of the Contract. A deliberate departure or conscious disregard of the Contract not only manifests the disregard of his authority or misconduct on his part but it may tantamount to mala fide action.

(j) The Arbitrator is not a conciliator and cannot ignore the law or misapply it in order to do what he thinks just and reasonable; the Arbitrator is a tribunal selected by the parties to decide the disputes according to law."

55. It is evident from the aforementioned judgments that in the instant matter the Arbitral Tribunal cannot steer away from the Contract. It should consider accessory pieces of evidence to base their decisions, but the pulp of the impugned Award should depend entirely upon the Contract and the interpretation that the Arbitral Tribunal gives it in accordance with the general principles that govern such interpretations.

56. In the case of ***Delhi State Industrial & Infrastructure Development Corpn. Ltd. v. Well Protect Manpower Services (P) Ltd., 2022 SCC OnLine Del 901*** this Court held as under:

“34. The scope of examination under Section 34(2-A) of the A&C Act is limited. This Court is not required to reevaluate and reappreciate the evidence and supplant its opinion over that of the Arbitral Tribunal. Unless the decision is found to be patently illegal, no interference with the Arbitral Award is called for. In Delhi Airport Metro Express (P) Ltd. v. Delhi Metro Rail Corpn. Ltd. [Delhi Airport Metro Express (P) Ltd. v. Delhi Metro Rail Corpn. Ltd., (2022) 1 SCC 131 : (2022) 1 SCC (Civ) 330] , Supreme Court had authoritatively explained that even an erroneous view would not vitiate the Arbitral award on the ground of patently illegality unless the error is manifest and one that strikes at the root of the matter. It is trite law that an Arbitral Tribunal is a final adjudicator of the evidence and its conclusion cannot be interfered with except where it is found to be patently illegal or in conflict with the public policy of India. In Dyna Technologies (P) Ltd. v. Crompton Greaves Ltd. [Dyna Technologies (P) Ltd. v. Crompton Greaves Ltd., (2019) 20 SCC 1] , the Supreme Court had held that courts would not interfere merely because an alternative view on facts exists. Similarly, in Associate Builders v. DDA [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , the Supreme Court had observed that “a possible view by the Arbitrator on facts has necessarily to pass muster as the Arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his Arbitral award.”

57. In view of the aforementioned judgment, it is evident that the learned Arbitrator, being the ultimate master of the Arbitration, can adjudicate the Claims in a manner that is on the lines of basic tenets of Law and the Principles of Natural Justice and Jurisprudence. As long as the Award does not shock the conscience of the Court, it warrants no interference of the Court.

Claim no. 12

58. Claim no. 12 is regarding the “**Cost of Arbitration**”. The petitioner objects to the Award of the cost of Rs. 50 Lakhs claiming it to be as it is harsh and unjustified. The relevant portion of the impugned Award is reproduced hereinafter:

“145. Having considered the respective Claims and counter Claims put forth on behalf of the parties in these proceedings, the last question which the Tribunal revert to is the question of award of costs of these Arbitral proceedings viz. What should be the cost and who should be asked to pay the cost to which party. The provision in relation to the cost of the proceedings is covered under Section 31 A of the Act under the head 'Regime for Cost' and encompasses the general rule that unsuccessful party will be ordered to pay the cost of the proceedings to the successful party. In the case in hand, the Claimant has been partly successful in its Claims and the Respondent has been unsuccessful. Therefore, this Tribunal is of the view that the Claimant should be awarded reasonable cost incurred by it in connection with these proceedings. Having regard to the fact that it has partly succeeded in its Claims, the question is as to what would be the reasonable cost within the meaning of Section 31 A of the Act. The Tribunal may observe that besides the expenses incurred by the Claimant in connection with the Arbitral proceedings i.e. fee paid to the Sole Arbitrator and other expenses incurred in arranging the venue(s) for Arbitral hearings and secretarial assistance at the hearings, Claimant Claims to have incurred legal fees in securing the legal assistance (Rs.73,55,000/- Rupees Seventy Three Lakhs Fifty Five Thousand only as per the certificate enclosed). The Tribunal is therefore of the view that it would meet the interest of justice if a sum of Rs 50 lakhs (Rupees Fifty Lakhs) in all is award to the Claimant as cost of the proceedings.”

59. Section 31A of the Act is reiterated herein below:

“31A. Regime for costs.

(1) In relation to any Arbitration proceeding or a proceeding under any of the provisions of this Act pertaining to the Arbitration, the Court or Arbitral tribunal, notwithstanding anything contained in the Code of Civil Procedure, 1908 (5 of 1908), shall have the discretion to determine--

(a) whether costs are payable by one party to another;

(b) the amount of such costs; and

(c) when such costs are to be paid.

Explanation.--For the purpose of this sub-section, "costs" means reasonable costs relating to--

(i) the fees and expenses of the Arbitrators, Courts and witnesses;

(ii) legal fees and expenses;

(iii) any administration fees of the institution supervising the Arbitration; and

(iv) any other expenses incurred in connection with the Arbitrator Court proceedings and the Arbitral award.

(2) If the Court or Arbitral tribunal decides to make an order as to payment of costs,

(a) the general rule is that the unsuccessful party shall be ordered to pay the costs of the successful party; or

(b) the Court or Arbitral tribunal may make a different order for reasons to be recorded in writing.

(3) In determining the costs, the Court or Arbitral tribunal shall have regard to all the circumstances, including--

(a) the conduct of all the parties;

(b) whether a party has succeeded partly in the case;

(c) whether the party had made a frivolous counter claim leading to delay in the disposal of the Arbitral proceedings; and

(d) whether any reasonable offer to settle the dispute is made by a party and refused by the other party.

(4) The Court or Arbitral tribunal may make any order under this section including the order that a party shall pay--

(a) a proportion of another party's costs;

(b) a stated amount in respect of another party's costs;

(c) costs from or until a certain date only;

(d) costs incurred before proceedings have begun;

(e) costs relating to particular steps taken in the proceedings;

(f) costs relating only to a distinct part of the proceedings; and

(g) interest on costs from or until a certain date.

(5) An Agreement which has the effect that a party is to pay the whole or part of the costs of the Arbitration in any event shall be only valid if such Agreement is made after the dispute in question has arisen."

60. It is, *sans* uncertainty, abundantly clear that the learned Arbitral Tribunal has only acted in consonance with the Act, to which it is bound. Awarding costs is within the discretion of the learned Arbitrator and the courts cannot question an Arbitrator's decision unless it is shown to be perverse.

61. Under Section 31A(2)(a) of the Act, the general principle of awarding costs is 'winner takes all'. The underlying rationale for the normal rule of costs was explained in ***ZN (Afghanistan) V. Secretary of State for the Home Department [2018] ewca Civ 1059*** as follows:

"a party has been compelled by the conduct of the other party to come to court in order to vindicate his legal rights. If those legal rights had been respected in the first place by

the other party, it should never have been necessary to come to court. Accordingly, there will normally be a causal nexus between the fact that costs have been incurred and the underlying merits of the legal Claim.”

62. In ***Veolia Water UK plc v Fingal County Council***, [2006] IEHC 137,[2006] IEHC 240 the High Court of England and Wales stated that:

“The overriding starting position should remain that costs should follow the event. Parties who are required to bring a case to court in order to secure their rights are, prima facie, entitled to the reasonable costs of maintaining the proceedings. Parties who successfully defend proceedings are, again prima facie, entitled to the costs to which they have been put in defending what, at the end of the day, the court has found to be unmeritorious proceedings.”

63. As per the aforementioned Section 31A of the Act, it is understood that the Award of Costs must be decreed reasonably and not Award that is claimed *sans* comprehensive analysis by the learned Arbitral Tribunal.

64. From the aforementioned portion of the impugned Award, it can be understood that the learned Sole Arbitrator has awarded costs of the Arbitration after careful deliberation, reasonably and in compliance with the Act.

65. The contention made in objection to Claim no. 12 is thus not found to be a valid ground to set aside the Claim as decided by the Impugned Award as per Section 34 of the Act.

Claim no. 1

66. Claim no. 1 is regarding the **“Payment of Outstanding Annuity (18% simple interest p.a. calculated till 31.10.2016)”**. The petitioner objected to the Award in respect of this Claim, can be analysed on mainly

two grounds. *Firstly*, whether the learned Arbitral Tribunal failed to appreciate the evidence on record on consonance with the Concessionaire Agreement, and *secondly*, whether the rate of interest awarded is legally tenable.

67. In order to carefully analyse the Award with regard to these two grounds, the relevant portion of the impugned Award is reiterated below:

“90. A conjoint reading of the Clauses and the conditions contained in Section 12 read with Section 9.10, and making a harmonious construction thereof, leaves no manner of doubt that the Annuity Commencement Date could either be the date of issue of Completion Certificate OR the Provisional Certificate, issuance of which presupposes that the Project had been completed by and large and whereupon the Concessionaire shall be entitled to receive Annuity from the Respondent in accordance with the provisions of Article 12. The said Provisional Certificate was not withheld within the meaning of Section 9.8 as no defects and/or deficiencies have been pointed out by the Respondent after conducting its own inspection, calling upon the Claimant to remedy and rectify such defects or deficiencies. In fact, the statement about the status of work attached with the final completion certificate would show that the entire outstanding work mentioned in the punch list had been completed within the stipulated period of 90 days. As regards "Commercial Operations Date" is concerned, the communication of the Respondent dated 5.5.2014 in no uncertain terms declares that Bawana Industrial Area was put into commercial operation with effect from 15.12.2013. Both these compliances successfully establish that it has completed most of the Mandatory capital Works before the issuance of the Provisional Certificate and whatever outstanding works remained (as per the punch list attached with the provisional certificate) were executed and completed by 15.3.2014 and it was only then that a Completion Certificate was issued by

the TPE and forwarded to the Claimant after taking approval of the Competent Authority.

91. If we read the Annuity Commencement Date as the date on which the 'Completion Certificate' was issued, then the other clause "or the Provisional Certificate is issued" would be rendered nugatory and meaningless. The harmonious interpretation which can be given to Section 9.10 is that it could either be the date of issuance of 'Provisional Certificate' or the 'Completion Certificate'. The computation of Annuity Commencement Date from the date of Provisional Certificate can be resorted if the Concessionaire had completed the outstanding works indicated in the punch list in Section 9.16, which in the case in hand has been completed by the Claimant as certified by the Third Party Engineer and will be deemed to have been accepted by the Respondent as the statement of completion of the outstanding works attached to the completion certificate is signed by the representative of the Respondent as well.

92. The parties to the CA have entered into the CA with open eyes and the CA is in respect of a commercial venture, therefore, the stipulations, terms and conditions contained in the CA are binding not only on the parties to the CA but also on this Tribunal. Therefore, there is no escape from the conclusion that the date of issuance of Provisional Certificate must be treated as the 'Annuity Commencement Date' in the case in hand. Consequently, the Tribunal holds that the first annuity had become due and payable to the Claimant on 15.12.2013 and the subsequent four annuities had become due and payable on 15.12.2014, 15.12.2015, 15.12.2016 and on 15.12.2017."

68. From the above-quoted paragraphs, it is evident that the learned Arbitral Tribunal has carefully considered the evidence on record along with the Concessionaire Agreement to decide this Claim. Therefore, the first ground of objection is not proven to be a valid ground for interference to set aside the impugned Award.

69. The main ground taken by the learned counsel for the petitioner while assailing the impugned Arbitral Award is that the impugned Arbitral Award is *ex-facie* erroneous and suffers from patent illegality, arbitrary, and contrary to the Contract executed between the parties, and the provisions of law and public policy. The law regarding patent illegality and public policy of India is no longer *res integra* and has been authoritatively clarified by the Hon'ble Supreme Court in several judicial pronouncements.

70. Before delving into the judicial decisions, it is pertinent to reproduce the relevant portion of Section 34 of the Act, 1996:

"34. Application for setting aside Arbitral award.—(1)

Recourse to a Court against an Arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and subsection (3).

(2) An Arbitral award may be set aside by the Court only if—

(a) the party making the application [establishes on the basis of the record of the Arbitral tribunal that]—

(i) a party was under some incapacity; or (ii) the Arbitration Agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

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

(iv) the Arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to Arbitration, or it contains decisions on matters beyond the scope of the submission to Arbitration: Provided that, if the decisions on matters submitted to Arbitration can be separated from those not so submitted, only that part of the Arbitral award which contains decisions on matters not submitted to Arbitration may be set aside; or

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

(b) the Court finds that—

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

(ii) the Arbitral award is in conflict with the public policy of India. [Explanation 1.—For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,— (i) the making of the award was induced or affected by fraud or corruption or was in violation of Section 75 or Section 81; or

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

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

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

(2-A) An Arbitral award arising out of Arbitrations other than international commercial Arbitrations, may also be set aside by the court, if the court finds that the award is vitiated by patent illegality appearing on the face of the award: Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by reappraisal of evidence.]”

71. In *Ssangyong Engineering & Construction Co. Ltd. (Supra)*, the Hon’ble Supreme Court while explaining the scope of the expression ‘public policy of India’ made the following pertinent observations:

“23. What is clear, therefore, is that the expression ”public policy of India”, whether contained in Section 34 or in

Section 48, would now mean the “fundamental policy of Indian law” as explained in paragraphs 18 and 27 of Associate Builders (supra), i.e., the fundamental policy of Indian law would be relegated to the “Renusagar” understanding of this expression. This would necessarily mean that the Western Geco (supra) expansion has been done away with. In short, Western Geco (supra), as explained in paragraphs 28 and 29 of Associate Builders (supra), would no longer obtain, as under the guise of interfering with an award on the ground that the Arbitrator has not adopted a judicial approach, the Court’s intervention would be on the merits of the award, which cannot be permitted post amendment. However, insofar as principles of natural justice are concerned, as contained in Sections 18 and 34(2)(a)(iii) of the 1996 Act, these continue to be grounds of challenge of an award, as is contained in paragraph 30 of Associate Builders (supra).

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

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

policy or public interest, cannot be brought in by the backdoor when it comes to setting aside an award on the ground of patent illegality.

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

28. To elucidate, paragraph 42.1 of Associate Builders (supra), namely, a mere contravention of the substantive law of India, by itself, is no longer a ground available to set aside an Arbitral award. Paragraph 42.2 of Associate Builders (supra), however, would remain, for if an Arbitrator gives no reasons for an award and contravenes Section 31(3) of the 1996 Act, that would certainly amount to a patent illegality on the face of the award.

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30. What is important to note is that a decision which is perverse, as understood in paragraphs 31 and 32 of Associate Builders (supra), while no longer being a ground for challenge under “public policy of India”, would certainly amount to a patent illegality appearing on the face of the award. Thus, a finding based on no evidence at all or an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside on the ground of patent illegality. Additionally, a finding based on documents taken behind the back of the parties by the Arbitrator would also qualify as a decision based on no evidence inasmuch as such decision is not based on evidence led by the parties, and therefore, would also have to be characterised as perverse.”

72. It is evident from the aforementioned precedents that there is no perversity with regard to Claims No. 2,5,9 and 12. But, the Arbitral Award with regards to claim 1 is partly perverse and liable to be set aside, within the degree of perversity.

73. Here, it is pertinent to elaborate on the meaning of the ‘Fundamental Policy of Indian Law’, as the petitioner has taken a plea that the Impugned Arbitral Award is contrary to the fundamental policy of Indian Law and hence, being opposed to the Public Policy of India.

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

28. In a recent judgment, ONGC Ltd. v. Western Geco International Ltd., 2014 (9) SCC 263, this Court added three other distinct and fundamental juristic principles which must be understood as a part and parcel of the fundamental policy of Indian law. The Court held-

35. What then would constitute the “fundamental policy of Indian law” is the question. The decision in ONGC [ONGC Ltd. v. Saw Pipes Ltd., (2003) 5 SCC 705] does not elaborate that aspect. Even so, the expression must, in our opinion, include all such fundamental principles as providing a basis for administration of justice and enforcement of law in this country. Without meaning to exhaustively enumerate the purport of the expression “fundamental policy of Indian law”, we may refer to three distinct and fundamental juristic principles that must necessarily be understood as a part and parcel of the fundamental policy of Indian law. The first and foremost is the principle that in every determination whether by a court or other authority that affects the rights of a citizen or leads to any civil consequences, the court or authority concerned is bound to adopt what is in legal parlance called a “judicial approach” in the matter. The duty to adopt a judicial approach arises from the very nature of the power exercised by the court or the authority does not have to be separately or additionally enjoined upon the for a concerned. What must be remembered is that the importance of a judicial

approach in judicial and quasi-judicial determination lies in the fact that so long as the court, tribunal or the authority exercising powers that affect the rights or obligations of the parties before them shows fidelity to judicial approach, they cannot act in an arbitrary, capricious or whimsical manner. Judicial approach ensures that the authority acts bona fide and deals with the subject in a fair, reasonable and objective manner and that its decision is not actuated by any extraneous consideration. Judicial approach in that sense acts as a check against flaws and faults that can render the decision of a court, tribunal or authority vulnerable to challenge.

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

39. No less important is the principle now recognised as a salutary juristic fundamental in administrative law that a decision which is perverse or so irrational that no reasonable person would have arrived at the same will not be sustained in a court of law. Perversity or irrationality of decisions is tested on the touchstone of Wednesbury principle of reasonableness. Decisions that fall short of the standards of reasonableness are open to challenge in a court

of law often in writ jurisdiction of the superior courts but no less in statutory processes wherever the same are available. 40. It is neither necessary nor proper for us to attempt an exhaustive enumeration of what would constitute the fundamental policy of Indian law nor is it possible to place the expression in the straitjacket of a definition. What is important in the context of the case at hand is that if on facts proved before them the Arbitrators fail to draw an inference which ought to have been drawn or if they have drawn an inference which is on the face of it, untenable resulting in miscarriage of justice, the adjudication even when made by an Arbitral Tribunal that enjoys considerable latitude and play at the joints in making awards will be open to challenge and may be cast away or modified depending upon whether the offending part is or is not severable from the rest.”

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

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

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33. It must clearly be understood that when a court is applying the “public policy” test to an Arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the Arbitrator on facts has necessarily to pass muster as the Arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his Arbitral award. Thus an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score. Once it is found that the Arbitrators approach is not arbitrary or capricious, then he is the last word on facts.....”

75. It is therefore clear that the decisive factor is that *first*, the learned Arbitrator had to adopt a judicial approach; *second*, the Principles of Natural Justice had to be upheld; *third*, the decision must not have been egregious, or rather, perverse.

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

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

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

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

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

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

point, therefore, their Lordships think that the judgment of Pratt, J was right and the conclusion of the Learned Judges of the Court of Appeal erroneous.”

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

“42. In the 1996 Act, this principle is substituted by the patent illegality’ principle which, in turn, contains three sub heads –

42.1 (a) a contravention of the substantive law of India would result in the death knell of an Arbitral award. This must be understood in the sense that such illegality must go to the root of the matter and cannot be of a trivial nature. This again is a really a contravention of Section 28(1)(a) of the Act, which reads as under:

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

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

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

*“28. Rules applicable to substance of dispute.—
(3) In all cases, the Arbitral tribunal shall decide in accordance with the terms of the*

Contract and shall take into account the usages of the trade applicable to the transaction.”

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

79. In order to decide on the perversity of the impugned Award, it is integral to first apply the triple test with regard to the grounds raised by the petitioner in this instant petition.

80. In ***J.G. Engineers (P) Ltd. v. Union of India***, (2011) 5 SCC 758, the Hon'ble Supreme court held as below:

27. Interpreting the said provisions, this Court in ONGC Ltd. v. Saw Pipes Ltd. [(2003) 5 SCC 705] held that a court can set aside an award under Section 34(2)(b)(ii) of the Act, as being in conflict with the public policy of India, if it is (a) contrary to the fundamental policy of Indian law; or (b) contrary to the interests of India; or (c) contrary to justice or morality; or (d) patently illegal. This Court explained that to hold an award to be opposed to public policy, the patent illegality should go to the very root of the matter and not a trivial illegality. It is also observed that an award could be set aside if it is so unfair and unreasonable that it shocks the conscience of the court, as then it would be opposed to public policy.

81. Since the Patent Illegality has been observed in the Impugned Award of a certain claim only, the impugned Award will not be set aside in its entirety. When the learned Arbitrator has evidently decided on the

other claims with due regard to the Law and Contract, the Court finds no reason to set aside the entire impugned Award and nullify the time and effort by the parties and the learned Arbitral Tribunal wholly.

82. In ***N.H.A.I. vs. The Additional Commissioner (Arbitration Appeal 03 of 2022, Bombay High Court, Nagpur Civil Bench) 2022 SCC Bom 1688***, it was held as below:

“(22) Thus, it becomes clear that in a given case, the Court, while exercising power under Section 34 of the Act of 1996, can set aside an Award partly, depending upon the facts and circumstances of the case. In this context, reference can also be made to the judgment of the Supreme Court in the case of J.G. Engineers Pvt. Ltd. Vs. Union of India and another (2011) 5 SCC 758.

(23) In the said case also, the doctrine of severability was invoked and it was held that when the Award deals with several Claims that can be said to be separate and distinct, the Court can segregate the Award on items that do not suffer from any infirmity and uphold the Award to that extent. Thus, it becomes clear that the contention raised on behalf of the appellants in the present case, that the PDJ ought to have set aside the Arbitral Award in its entirety, is not justified.”

83. In ***J.G. Constructions Pvt. Limited vs. Union of India & Another Supra (2011) 5 SCC 758***, the Hon’ble Supreme Court held as below:

“78. In this case also, the loss to be suffered in case of breach, was a genuine pre-estimated loss, which the Contractor is to pay as compensation for such breach. The Contractor at the time of executing the Contract knew about the said liability. The Arbitrator, by ignoring the agreed terms of Contract and also the legal provision has passed the award rejecting the counter-Claim of the appellants thereby committing legal misconduct. The entire award passed by Arbitrator is, therefore, required to be interfered

with and liable to be set aside since the appellants would have entitled to adjust the amount payable to the respondent against Claim Nos. 2, 4, 6, 7, 8, 9 and 13, had the Arbitrator not rejected the counter-Claims by committing patent illegality and legal misconduct. Therefore, the Learned Arbitrator is required to reconsider the counter-Claims of the respondents and to pass an award by making necessary adjustment of the amount payable to the Claimant/Contractor against Claim Nos. 2, 4, 6, 7, 8, 9 and 13 in terms of the finding recorded by this Court.

79. In view of the above, the appeal filed by the appellants is allowed. The award passed by the Arbitrator on 05.09.2001 and corrected on 22.09.2001 as well as the order dated 12.12.2003 passed by the Learned Ad hoc Additional District Judge No. 2, Kamrup, Guwahati in Misc. (Arbitration) Case No. 590/2001, are set aside. The Arbitration proceeding is remitted back to the Learned Arbitrator for reconsideration of the counter-Claims of the respondents and for passing an award by making necessary adjustment of the amount payable to the Contractor/Claimant against his Claim Nos. 2, 4, 6, 7, 8, 9 and 13 in terms of the finding recorded by this Court. Considering the facts and circumstances of the case, we leave the parties to bear their own cost."

84. Therefore, as discussed in the foregoing paragraphs, in the present petition, the learned Arbitrator has erred in decreeing the impugned Award with respect to Claim no. 1. The entire Award need not be set aside due to the perversity in one specific Claim and Counter-Claim.

85. A key ground of perversity raised by the petitioner is that though there exists a Concessionaire Agreement, the Learned Arbitral Tribunal had awarded an interest rate that is contrary to the provisions of the Agreement.

86. It is pertinent to discuss the provisions relating to the grant of the rate of interest in the impugned Award as per the Act, 1996:

“31. Form and contents of Arbitral award.

(7) (a) Unless otherwise agreed by the parties, where and in so far as an Arbitral award is for the payment of money, the Arbitral tribunal may include in the sum for which the award is made interest, at such rate as it deems reasonable, on the whole or any part of the money, for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made.”

[(b) A sum directed to be paid by an Arbitral award shall, unless the award otherwise directs, carry interest at the rate of two per cent. higher than the current rate of interest prevalent on the date of award, from the date of award to the date of payment.

Explanation.—The expression “current rate of interest” shall have the same meaning as assigned to it under clause (b) of section 2 of the Interest Act, 1978 (14 of 1978).]”

87. A bare reading of Section 31 (7) (a) of the Act makes it evident that the Section applies only where there is no previous Agreement as to the rate of interest to be awarded. It is as plain as a pikestaff that the Arbitral Tribunal has gone beyond the Contract and awarded an interest rate that is quite clearly not the rate the parties had previously agreed upon *vide* the Agreement.

88. The powers of an Arbitral Tribunal are those conferred upon it by the parties within the limits allowed by the applicable law, together with any additional powers that may be conferred automatically by the operation of law. The Hon’ble Supreme Court has held that there is the primacy of Agreement over the powers of the Arbitral Tribunal

regarding the rate of interest of an Arbitral Award. The Hon'ble Supreme Court in *State of Haryana v. S.L. Arora & Co., (2010) 3 SCC 690* says as under:

“34. Thus it is clear that Section 31(7) merely authorises the Arbitral Tribunal to award interest in accordance with the Contract and in the absence of any prohibition in the Contract and in the absence of specific provision relating to interest in the Contract, to award simple interest at such rates as it deems fit from the date on which the cause of action arose till the date of payment. It also provides that if the award is silent about interest from the date of award till the date of payment, the person in whose favour the award is made will be entitled to interest at 18% per annum on the principal amount awarded, from the date of award till the date of payment. The calculation that was made in the execution petition as originally filed was correct and the modification by the respondent increasing the amount due under the award was contrary to the award.”

89. In *Morgan Securities and Credits Pvt. Ltd. v Videocon Industries Ltd., (2023) 1 SCC 602* the Court has interpreted Section 31(7)(b) with respect to two phrases - *first*, the expression “sum”; and *second*, “unless the award otherwise directs”. It was held that the learned Arbitrator must exercise the discretion in good faith, must take into account relevant and not irrelevant considerations, and must act reasonably and rationally taking cognizance of the surrounding circumstances.

20. The interpretation of Section 31(7)(b) has to focus on the meaning of two phrases — first, the expression “sum”; and second, “unless the award otherwise directs”. The phrase “sum” has been interpreted in the opinion of Bobde, J. and in the concurring opinion of Sapre, J. in Hyder Consulting [Hyder Consulting (UK) Ltd. v. State of Orissa, (2015) 2 SCC 189 : (2015) 2 SCC (Civ) 38] to mean the amount

directed to be paid by an Arbitral award as arrived in Section 31(7)(a), which would include the aggregate of the principal and the pre-award interest. While Sapre, J. was of the view that the Arbitrator only has the discretion to determine the rate of post-award interest, Bobde, J. did not expressly discuss the ambit of discretion of the Arbitrator while granting post-award interest. In Bobde, J.'s opinion, there was no discussion on whether the Arbitrator had the discretion to order post-award interest on a part of the "sum" that was arrived at under Section 31(7)(a).

21. On the interpretation of the words "unless the award otherwise directs", Sapre, J. interpreted them to mean that post-award interest is a statutory mandate and that the Arbitrator only has the discretion to determine the rate of interest to be awarded. Bobde, J. did not specifically interpret the phrase "unless the award otherwise directs". The Learned Judge made a passing reference to the phrase in para 7 of the judgment, where he observed that : (Hyder Consulting case [Hyder Consulting (UK) Ltd. v. State of Orissa, (2015) 2 SCC 189 : (2015) 2 SCC (Civ) 38] , SCC p. 201)

"7. ... In other words, what clause (b) of sub-section (7) of Section 31 of the Act directs is that the "sum", which is directed to be paid by the award, whether inclusive or exclusive of interest, shall carry interest at the rate of eighteen per cent per annum for the post-award period, unless otherwise ordered."

However, in para 13 of the judgment, the Learned Judge observed : (Hyder Consulting case [Hyder Consulting (UK) Ltd. v. State of Orissa, (2015) 2 SCC 189 : (2015) 2 SCC (Civ) 38] , SCC p. 202)

"13. ... Thereupon, the Arbitral Tribunal may direct interest to be paid on such "sum" for the post-award period vide clause (b) of sub-section (7) of Section 31 of the Act, at which stage the amount would be the sum arrived at after the merging of interest with the principal; the two components having lost their separate identities."

90. According to Section 31(7)(b), if the Arbitrator does not grant post-award interest, the Award holder is entitled to post-award interest at eighteen percent; the impugned Award of the learned Arbitrator granting post-award interest on the principal amount does not suffer from an error apparent. The Court may only interfere where the Learned Arbitrator has failed in adopting a judicial approach during the Arbitration Proceedings, analysis of the Contract, and thus while giving the Impugned Award. Where it is evident that the Arbitrator had worked well within his limits and there has not been any arbitrary exercise of power, there is no scope of interference of this Court with respect to the change in the rate of interest of an award.

91. Further, in ***Executive Engineer v. Gokul Chandra Kanungo, 2022 SCC OnLine SC 1336***, the Hon'ble Supreme Court held that if the Arbitral tribunal has the discretion to award a rate of interest, it must be reasonable. The relevant paragraph is reiterated hereinunder:

*“10. The provisions of Section 31(7)(a) of the 1996 Act fell for consideration before this Court in many cases including in the cases of *Hyder Consulting (UK) Limited (supra)* and *Delhi Airport Metro Express Private Limited v. Delhi Metro Rail Corporation*⁵. A perusal of clause (a) of subsection (7) of Section 31 of the 1996 Act would reveal that, no doubt, a discretion is vested in the Arbitral tribunal to include in the sum for which the award is made interest, on the whole or any part of the money, for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made. However, it would reveal that the section itself requires interest to be at such rate as the Arbitral tribunal deems reasonable. When a discretion is vested to an Arbitral tribunal to award interest at a rate which it deems reasonable, then a duty would be*

cast upon the Arbitral tribunal to give reasons as to how it deems the rate of interest to be reasonable. It could further be seen that the Arbitral tribunal has also a discretion to award interest on the whole or any part of the money or for the whole or any part of the period between the date of cause of action and the date on which the award is made. When the Arbitral tribunal is empowered with such a discretion, the Arbitral tribunal would be required to apply its mind to the facts of the case and decide as to whether the interest is payable on whole or any part of the money and also as to whether it is to be awarded to the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made.”

92. In ***Vedanta Ltd. v. Shenzhen Shandong Nuclear Power Construction Co. Ltd.***, (2019) 11 SCC 465 the Hon’ble Supreme Court held as under:

“9. The discretion of the Arbitrator to award interest must be exercised reasonably. An Arbitral Tribunal while making an award for interest must take into consideration a host of factors, such as : (i) the “loss of use” of the principal sum; (ii) the types of sums to which the interest must apply; (iii) the time period over which interest should be awarded; (iv) the internationally prevailing rates of interest; (v) whether simple or compound rate of interest is to be applied; (vi) whether the rate of interest awarded is commercially prudent from an economic standpoint; (vii) the rates of inflation; (viii) proportionality of the count awarded as interest to the principal sums awarded.”

93. In ***MSK Projects Ltd v State of Rajasthan*** [2011] 10 SCC 573, a Hon’ble Supreme Court held:

“20. This Court, in ONGC Ltd. v. Saw Pipes Ltd. [(2003) 5 SCC 705 : AIR 2003 SC 2629] and Hindustan Zinc Ltd. v. Friends Coal Carbonisation [(2006) 4 SCC 445] , held that an Arbitration award contrary to substantive provisions of law, or provisions of the 1996 Act or against the terms of the

Contract, or public policy, would be patently illegal, and if it affects the rights of the parties, it would be open for the court to interfere under Section 34(2) of the 1996 Act.

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*25. So far as the rate of interest is concerned, it may be necessary to refer to the provisions of **Section 3 of the Interest Act, 1978**, the relevant part of which reads as under:*

“3.Power of court to allow interest.—(1) In any proceedings for the recovery of any debt or damages or in any proceedings in which a Claim for interest in respect of any debt or damages already paid is made, the court may, if it thinks fit, allow interest to the person entitled to the debt or damages or to the person making such Claim, as the case may be, at a rate not exceeding the current rate of interest....”

Thus, it is evident that the aforesaid provisions empower the court to award interest at the rate prevailing in the banking transactions. Thus, impliedly, the court has a power to vary the rate of interest agreed by the parties.”

94. Further in ***Union of India vs. D. Khosla and Company, 2022 SCC OnLine J&K 356***, the Hon’ble Supreme Court held,

“28. By ignoring Clause 12 and 21 of the Contract and acting in derogation thereof, the Arbitrator has admittedly travelled beyond his jurisdiction and has acted contrary to the terms and conditions of the Contract of which he was a creature. I am aware that interpretation of a particular clause by the Arbitrator may not be open to scrutiny by this Court, however, instant case is not of interpretation to any clause but is a apparent case of ignoring clause-12 and 21 of the Contract Agreement. As per Clause-12 and 21, no Claim could have been raised by the Contractor on account of extra expenditure incurred due to change in the site of foundation and adjudicated upon by the Arbitrator in his favour.

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30. The Arbitrator appears to have ignored the terms and conditions of the Contract Agreement and awarded the Claim in favour of the Contractor. Claim was, thus, not sustainable and therefore, wrongly upheld by the Court below.

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47. Be that as it may, in view of the discussion made above, I am of the considered view that the Arbitrator has clearly exceeded his jurisdiction and has awarded most of the items of Claims by either ignoring the terms and conditions of the Contract or acting in derogation thereof."

95. The Hon'ble Supreme Court had earlier held in ***Associate Engineering Company v. Govt. of Andhra Pradesh and others, (1991) 4 SCC 93***, that the Learned Arbitrator cannot simply overlook the provisions in the Contract. The relevant paragraphs are reiterated below:

"24. The Arbitrator cannot act arbitrarily, irrationally, capriciously or independently of the Contract. His sole function is to arbitrate in terms of the Contract. He has no power apart from what the parties have given him under the Contract. If he has travelled outside the bounds of the Contract, he has acted without jurisdiction. But if he has remained inside the parameters of the Contract and has construed the provisions of the Contract; his award cannot be interfered with unless he has given reasons for the award disclosing an error apparent on the face of it.

25. An Arbitrator who acts in manifest disregard of the Contract acts without jurisdiction. His authority is derived from the Contract and is governed by the Arbitration Act which embodies principles derived from a specialised branch of the law of agency (see Mustill & Boyd's Commercial Arbitration, Second Edition, p. 641). He commits misconduct if by his award he decides matters excluded by the Agreement (see Halsbury's Laws of England, Volume II, Fourth Edition, Para 622). A deliberate departure from Contract amounts to not only manifest

disregard of his authority or a misconduct on his part, but it may tantamount to a mala fide action. A conscious disregard of the law or the provisions of the Contract from which he has derived his authority vitiates the award."

96. In ***Indian Oil Corpn. Ltd. v. Shree Ganesh Petroleum, (2022) 4 SCC 463***, the Hon'ble Supreme Court has reiterated that the Arbitrator is a creature of the Contract. The relevant paragraphs are reproduced below:

"43. An Arbitral Tribunal being a creature of Contract, is bound to act in terms of the Contract under which it is constituted. An award can be said to be patently illegal where the Arbitral Tribunal has failed to act in terms of the Contract or has ignored the specific terms of a Contract.

44. However, a distinction has to be drawn between failure to act in terms of a Contract and an erroneous interpretation of the terms of a Contract. An Arbitral Tribunal is entitled to interpret the terms and conditions of a Contract, while adjudicating a dispute. An error in interpretation of a Contract in a case where there is valid and lawful submission of Arbitral disputes to an Arbitral Tribunal is an error within jurisdiction.

45. The Court does not sit in appeal over the award made by an Arbitral Tribunal. The Court does not ordinarily interfere with interpretation made by the Arbitral Tribunal of a Contractual provision, unless such interpretation is patently unreasonable or perverse. Where a Contractual provision is ambiguous or is capable of being interpreted in more ways than one, the Court cannot interfere with the Arbitral award, only because the Court is of the opinion that another possible interpretation would have been a better one.

46. In Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , this Court held that an award ignoring the terms of a Contract would not be in public interest. In the instant case, the award in respect of the lease rent and the lease term is in patent disregard of the terms and conditions of the lease Agreement and thus

against public policy. Furthermore, in Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] the jurisdiction of the Arbitral Tribunal to adjudicate a dispute itself was not in issue. The Court was dealing with the circumstances in which a court could look into the merits of an award.

47. In this case, as observed above, the Impugned award insofar as it pertains to lease rent and lease period is patently beyond the scope of the competence of the Arbitrator appointed in terms of the dealership Agreement by the Director (Marketing) of the appellant.

48. The lease Agreement which was in force for a period of 29 years with effect from 15-4-2005 specifically provided for monthly lease rent of Rs 1750 per month for the said plot of land on which the retail outlet had been set up. It is well settled that an Arbitral Tribunal, or for that matter, the Court cannot alter the terms and conditions of a valid Contract executed between the parties with their eyes open.

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50. In PSA Sical Terminals (P) Ltd. v. V.O. Chidambranar Port Trust [PSA Sical Terminals (P) Ltd. v. V.O. Chidambranar Port Trust, (2021) 18 SCC 716 : 2021 SCC OnLine SC 508] this Court referred to and relied upon Ssangyong Engg. & Construction [Ssangyong Engg. & Construction Co. Ltd. v. NHAI, (2019) 15 SCC 131 : (2020) 2 SCC (Civ) 213] and held : (PSA Sical Terminals case [PSA Sical Terminals (P) Ltd. v. V.O. Chidambranar Port Trust, (2021) 18 SCC 716 : 2021 SCC OnLine SC 508] , SCC para 85)

“85. As such, as held by this Court in Ssangyong Engg. & Construction [Ssangyong Engg. & Construction Co. Ltd. v. NHAI, (2019) 15 SCC 131 : (2020) 2 SCC (Civ) 213] , the fundamental principle of justice has been breached, namely, that a unilateral addition or alteration of a Contract has been foisted upon an unwilling party. This Court has further held that a party to the Agreement cannot be made liable to perform something for which it has not entered into a Contract. In our view, re-writing a Contract for the parties

would be breach of fundamental principles of justice entitling a court to interfere since such case would be one which shocks the conscience of the Court and as such, would fall in the exceptional category.”

51. In PSA Sical Terminals [PSA Sical Terminals (P) Ltd. v. V.O. Chidambranar Port Trust, (2021) 18 SCC 716 : 2021 SCC OnLine SC 508] this Court clearly held that the role of the Arbitrator was to arbitrate within the terms of the Contract. He had no power apart from what the parties had given him under the Contract. If he has travelled beyond the Contract, he would be acting without jurisdiction.

*52. In PSA Sical Terminals [PSA Sical Terminals (P) Ltd. v. V.O. Chidambranar Port Trust, (2021) 18 SCC 716 : 2021 SCC OnLine SC 508] this Court referred to and relied upon the earlier judgment of this Court in Army Welfare Housing Organisation v. Sumangal Services (P) Ltd. [Army Welfare Housing Organisation v. Sumangal Services (P) Ltd., (2004) 9 SCC 619] and held that an Arbitral Tribunal is not a court of law. It cannot exercise its power *ex debito justitiae*.*

53. In Satyanarayana Construction Co. v. Union of India [Satyanarayana Construction Co. v. Union of India, (2011) 15 SCC 101 : (2014) 2 SCC (Civ) 252] , a Bench of this Court of coordinate strength held that once a rate had been fixed in a Contract, it was not open to the Arbitrator to rewrite the terms of the Contract and award a higher rate. Where an Arbitrator had in effect rewritten the Contract and awarded a rate, higher than that agreed in the Contract, the High Court was held not to commit any error in setting aside the award.

97. In light of the aforementioned judicial decisions, it can be said that the Arbitral Tribunal may not resort to Section 31(7)(b) to Award a rate of interest when express provisions regarding the same are present in the Concessionaire Agreement.

98. In the instant case, the Concessionaire Agreement expressly stipulated the rate of interest when there is a delayed payment.

Section 1.2 Interpretations

(p) unless otherwise provided, any interest to be calculated and payable under this Agreement, shall accrue pro-rata on a monthly basis and from the respective due dates as provided for in this Agreement.

Section 20.21 Interest and Right of Set off and Lien

Any sum which is due and payable under any of the provisions of this Agreement by one party to the other shall, if the same is not paid within the time allowed for payment thereof, be deemed to be a debt owed by the Party responsible for such payment to the Party entitled to receive the same. Such sum shall until payment thereof carry interest at the rate specified herein, and if not specified at the rate of SBI PLR plus 2% (two percent) per annum, from the due date and until the date of payment or otherwise realisation thereof by the Party entitled to receive the same. Without prejudice to any other right or remedy available under this Agreement or under law, the Party entitled to receive such amount shall also have the right of set off.

Provided this provision for payment of interest for delayed payment shall not be deemed or construed to (i) authorise any delay in payment of any amount due by a party or (ii) be a waiver of the underlying breach of the payment obligations.

Provided further, in the event any sums whatsoever are due and owing to DSIIDC shall recover the same by appropriating such dues from the Annuity, Performance Security and/or exercising lien over the revenue of the Concessionaire generated from the Project.

99. The relevant portion of the Award that is being objected by the petitioner is reproduced herein :-

“126. According to the Claimant as per Section 11.4(b) of the CA was to be made within 15 from the end of each month which has not been done and there was delay. So the Respondent must pay interest on the delayed amount, the Tribunal is not inclined to grant any interest to the Claimant under this Claim because there exists no provision under the C.A for payment of interest for delay in disbursement of monthly payment.”

100. The Claim no. 1 was on the payment of the outstanding Annuity amount. The Impugned Arbitral Award regarding the said Claim is well-reasoned and validates the Award of five annuities to the along with interest. Nonetheless, the rate of interest granted is the rate provided under Section 31(7)(b) of the Act and is not in accordance with the provisions of the Concessionaire Agreement.

101. In ***Delhi Airport Metro Express (P) Ltd. (Supra)***, the Hon’ble Supreme Court had conclusively decided on the question of the rate of interest when there exists an Agreement defining the lines of the same. The relevant paragraphs are reproduced below:

“28. It could thus clearly be seen that as per Article 29.8 of the concession Agreement, the termination payment would become due and payable to the Concessionaire by DMRC within thirty days of a demand being made by the Concessionaire. It further provides that if DMRC fails to disburse the full termination payment within 30 days, the amount remaining unpaid shall be disbursed along with interest at an annualised rate of SBI PLR plus two per cent for the period of delay on such amount. It can thus clearly be seen that Article 29.8 of the concession Agreement deals with payment of interest on termination payment amount.

30. It is thus clear that the Arbitral Tribunal has directed that the termination payment would be as per the provisions of the concession Agreement and the interest on the

termination payment would accrue from 7-8-2013 (i.e. the date 30 days after the demand of termination payment by Damepl on 8-7-2013). It is pertinent to note that though the Arbitral Tribunal has found that the rates of interest on loans taken by the appellant Damepl are lower than SBI PLR + 2%, it has observed that it was beyond the competence of the Arbitral Tribunal to change or alter or modify the provisions of the concession Agreement. The Arbitral Tribunal, therefore, has granted interest at an annualised rate of SBI PLR + 2%, though it had found that the rate of interest on which the loan was taken by the appellant Damepl was on the lower side. The Arbitral Tribunal, therefore, has rightly given effect to the specific Agreement between the parties with regard to the rate of interest. We find that the Arbitral award has been passed in consonance with the provisions as contained in clause (a) of sub-section (7) of Section 31 of the 1996 Act and specifically, in consonance with the phrase “unless otherwise agreed by the parties”.

102. It is thus transparent from the aforementioned reasons, that Claim 1 is liable to be set aside with regards to the rate of interest awarded being contrary to the rate of interest agreed upon by the parties *vide* Concessionaire Agreement. Thus, the Impugned Arbitral Award is not in consonance with Section 31(7)(a) of the Act.

103. The part of the award in Claim no. 1 clearly being irregular with respect to the Concessionaire Agreement, is liable to be set aside.

104. The Court does not have the power to modify the interest rate in the Impugned Award. The Award with respect to the aforementioned Clause must be set aside to the portion with regards to the interest specified. The part of the Award in Claim no. 1 that Awards the Annuities does not warrant the interference of the Court.

105. In *NHAI v. M. Hakeem*, (2021) 9 SCC 1 the two-judge bench of the Hon'ble Supreme Court pronounced a judgment that states that the power of the court under Section 34 to "set aside" the Impugned Arbitral Award does not include the power to modify such an Award. There are limited grounds not dealing with the merits of an award, "limited remedy" under Section 34 is to either set aside an award or remand a matter under circumstances mentioned under Section 34. Lastly held, Section 34 jurisdiction cannot be assimilated with revisional jurisdiction under Section 115 of the Civil Procedure Code, 1908. The relevant paragraph is reproduced hereinunder:

"35. In Krishna Bhagya Jala Nigam Ltd. v. Harischandra Reddy [Krishna Bhagya Jala Nigam Ltd. v. Harischandra Reddy, (2007) 2 SCC 720] , a judgment of this Court referred to in para 36, this Court reduced the rate of interest for the pre-Arbitration period, pendente lite and future interest. It also referred to a suggestion that a certain amount be reduced from the awarded amount from Rs 1.47 crores to Rs 1 crore, which the Learned counsel for the respondent therein fairly accepted. Obviously, these orders were also made under Article 142 of the Constitution of India and do not carry the matter very much further. From these judgments, to deduce, in para 39, that the judicial trend appears to favour an interpretation which would read into Section 34 a power to modify, revise or vary an award is wholly incorrect. The observation found in McDermott [McDermott International Inc. v. Burn Standard Co. Ltd., (2006) 11 SCC 181] decision clearly bound the Learned Single Judge and any decision to the contrary would be incorrect."

106. It is thus transparent from the aforementioned reasons, that Claim 1 is liable to be set aside partly with regards to the rate of interest awarded

being contrary to the rate of interest agreed upon by the parties *vide* Concessionaire Agreement. Thus, the a part Impugned Arbitral Award is not in consonance with Section 31(7)(a) of the Act.

107. On the basis of the abovementioned analysis, it is evident that the Impugned Award has failed at the triple test with regard to part of the Award of Claim no. 1. Thus, the Award of this Claim is found to be perverse, and thus Patently Illegal and contrary to the fundamental policies of India.

CONCLUSION

109. In light of the facts, submissions and contentions in the pleadings, and arguments advanced by the parties, and the applicable laws and judgments, this Court is inclined to hold forth that there appears a Patent Illegality in the impugned Award with respect to part of the Award in Claim 1, which is contrary to the provisions of the Agreement between the parties.

110. Further, the learned Arbitrator has passed the Impugned Award without considering the afore-mentioned clauses of the Agreement while adjudicating on the Rate of Interest to be granted. Therefore, the Impugned Award, being contrary to provisions of the Agreement, suffers from infirmity and patent illegality.

111. In view of the above discussion of facts and law, this Court finds no reason to completely set aside the Impugned Arbitral Award. Therefore, the Impugned Award is set aside only with regard to the part of Claim no. 1, i.e, rate of interest, where perversity, and 'Patent Illegality' has also been observed in foregoing paragraphs.

112. Thus, the portion of the Award in Claim no. 1 that dictates the Interest due is set aside due to its perversity.

113. Hence, the instant petition is partly allowed with respect to the Arbitral Award in claim no. 1, and thus a part of the Award with regard to the rate of interest in this claim is set aside.

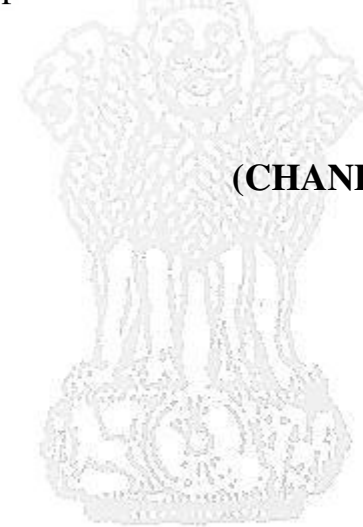
114. The petitioner is at liberty to take appropriate steps to initiate the arbitration proceedings in accordance with law.

115. Pending applications, if any, also stand dismissed.

116. The judgment be uploaded on the website forthwith.

(CHANDRA DHARI SINGH)
JUDGE

MARCH 16, 2023
SV/AS



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