



* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
 % **Pronounced on: 31st July, 2023**

+ O.M.P. (COMM) 59/2023, I.A. 2562/2023, I.A. 2564/2023, I.A. 2565/2023 & I.A. 6924/2023

NTPC LTD

..... Petitioner

Through: Ms. Aishwarya Bhati, ASG with
 Mr. Rituraj Biswas, Mr. Mayank Prasad and Mr. Rustam Chauhan,
 Advocates

versus

TATA PROJECTS LTD

..... Respondent

Through: Mr. Rajiv Nayyar, Sr. Advocate
 with Mr. Naveen Chawla, Ms. Surabhi Rana, Mr. Rishabh K. Thakur and Mr. Mayank Bughani,
 Advocates

CORAM:
HON'BLE MR. JUSTICE CHANDRA DHARI SINGH
J U D G M E N T

CHANDRA DHARI SINGH, J.

IA No. 2565/2023 and IA No. 6924/2023

1. The present applications have been filed on behalf of the petitioner, seeking liberty to produce additional evidence to be taken on record by this Court submitting to the effect that the said documents/additional evidence are necessary for proper adjudication of the instant petition. These documents despite exercise of due diligence were not made a part of the Arbitral record which was filed before this Court. Hence, the



petitioner now prays that the documents as sought to be taken on record *vide* these applications.

2. For the reasons stated in the applications, the applications are allowed and the documents are taken on record.

3. The applications stand disposed of.

O.M.P. (COMM) 59/2023

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

“a. Call for the records of the arbitration proceedings; and/or

b. Quash and set aside the Award dated 14.09.2022 passed by the Ld. Tribunal, limited and confined to the extent where the award has been against the petitioner – NTPC; and/or

c. Award cost of the proceedings; and/or

d. Pass such other and further orders as are deemed fit and proper in the facts and circumstances of the case.”

FACTUAL MATRIX

2. The petitioner is a Public Sector Undertaking, incorporated under the Companies Act, 1956 and is engaged in the business of generation of electricity and allied activities.

3. The respondent is a company incorporated under the Companies Act, 1956 and is engaged in the business of executing urban and industrial infrastructure projects.

4. The petitioner is constructing Telangana Super Thermal Power Project Phase – I (2 x 800) at Karimnagar, in Telangana which is a coal based power plant with an installed capacity of 160 MW (i.e. two units of



800 MW). In pursuance of the same, the petitioner awarded the Balance of Plant Works (hereinafter “BoP”) to the respondent. The said BoP is the subject matter in the instant matter.

5. On 20th April, 2015 for the Balance of Plant Works (hereinafter “BoP”) and the petitioner floated tenders and issued invitation for bids. As per the said invitation, bids were requested from the parties for the works involving design, engineering, manufacturing, supply of all plant and equipment, mandatory spares, installation services, transportation, civil works, structural works, supervision, pre-commissioning, testing, commissioning and performance testing covered under BoP for the abovementioned thermal plant on Engineering, Procurement and Construction basis (hereinafter “EPC”).

6. The respondent submitted its Techno-Commercial bid for the said project on 11th June 2015 and thereafter on 27th October 2016 submitted its price bid.

7. The respondent being the successful bidder was awarded with the work on 10th January, 2017 and *vide* two separate letters, the petitioner issued Notification of Award (hereinafter “NOA”) in favour of the respondent. The Contract between the parties was formally executed on 1st February, 2017, separately for supply & services, containing main Agreements along with appendices, NOAs, special conditions of contract, general conditions of contract, technical specifications read along with amendments, clarifications, errata, techno-commercial bid & price bid and forms & procedures and integrity pact.

8. BOP was divided into separate contracts for Ex-Works Supply and Installation Works including Civil Work (hereinafter “Contract”). The



Contract contained a Cross-Fall Breach Clause, which combined the two Contracts into one since as per the Agreement, the project was to be completed within 42 months and 48 months from date of notification of award for project, for Unit No. 1 & Unit No. 2 respectively. The original Contract price for both the supply and services contracts is Rs. 2054.9 Crores. The term of the Contract has been extended till November, 2023 and the work is still ongoing.

9. In furtherance to the Contracts executed, the respondent commenced work on the site and present status of the project is that the respondent has done major supplies for the project and completed physical progress and financial progress to some extent.

10. During the execution process of the said project, the respondent encountered some deviation / variation in the specifications of the work contract and change in regulations. The disputes arose between the parties, which could not be sorted out and as per the provisions of Clause 6.1 of General Conditions of the Contract, the dispute was referred to Arbitration for adjudication. The petitioner invoked the Arbitration Clause 6.2.2 of General Conditions of the Contract *vide* notice dated 5th August 2020 and both parties nominated their respective arbitrators, who in turn appointed the presiding arbitrator, hence Arbitral Tribunal was constituted in terms of Clause 6.2.4 of General Conditions of the Contract.

11. The respondent in its Statement of Claim raised four different claims, which are narrated as under:

- a. Claim No. 1 is regarding change in scope for Railway siding works. It was stated in the bid documents that the petitioner



has a right to make changes, modifications, additions or deletions in the scope of work and the cost thereof i.e. change in the price shall be worked out between the parties. The dispute herein was whether a scope of work stated to be indicative of when the track length as per FSR was 21.5 Kms, could result in a final work awarded which substantially increases the work by 29%. During the execution of the work the track length, as a result of modification effected, got reduced to 25.136 Kms, which would be approximately 18% increase vis-à-vis what was indicated in the bid documents. The respondent herein claimed Rs.39,11,69,571/- on the said account.

- b. Claim No. 2 is towards the additional work in the cooling tower area. During the execution of the works, respondent submitted the design drawings which was approved by the petitioner but with a caveat that the respondent should consider the bore hole data. Since, by then the coal boulders had been removed, the respondent had to generate the bore hole data and based thereon the foundation level got revised from 151.07 m to 148.67 m. The increase was from (-) 21.8 m to (-) 4.92 m. This amounted to variation in scope of work, ultimately increasing the scope. The respondent herein claimed Rs.7,14,39,097/- on the said account.
- c. Claim No. 3 is for the test conducted on typical Gas Insulated Switchyard (hereinafter “GIS”) Bay Module. The GIS package had mono chamber and double chamber bays,



the petitioner required separate tests to be conducted in the mono chamber as well as the double chamber, but paid for only one type test on the plea that the respondent had conducted a singular test and further that the respondent had indicated in the bid document only one-unit price. The respondent herein claimed Rs.3,45,83,204/- on the said account.

- d. Claim No. 4 is on account of labour rates. After the bid was submitted on 19th January 2017, minimum wages were substantially increased *vide* the government notification. As a result of the same, the respondent had claimed that they are entitled to be recompenses. The respondent herein claimed Rs.24,26,70,516/- on the said account.

12. On 14th September, 2022, the impugned Award was passed and the petitioner had received the same on 19th September 2022. Being aggrieved by the impugned Award, the petitioner has filed the instant petition under Section 34 of The Act, 1996, wherein the learned Arbitral Tribunal allowed all the four Claims of the respondent/claimant.

SUBMISSIONS

(On behalf of the petitioners)

13. Ms. Aishwarya Bhati, learned Additional Solicitor General appearing on behalf of the petitioner submitted that the Award is being challenged *inter alia* on the ground that the relevant contractual provisions have not been considered by the learned Tribunal at all while allowing the Claims. Further, there was no evidence adduced with respect to the computation of the Claims.



14. It is submitted that, the learned Tribunal has committed patent illegality by allowing all the four Claims of the respondent despite there being unambiguous terms and conditions of the said Contract. It is further submitted that the learned Tribunal has exceeded its jurisdiction by allowing such claims.

15. It is submitted that the learned Tribunal committed patent illegality by accepting the computation of the Claims without there being any evidence to substantiate the same. The learned Tribunal failed to apply its mind to the sums claimed by the respondent and has perversely recorded that the sums claimed were not disputed by the petitioner, the same is contrary to the pleadings and submissions made during the course of the arguments before the Tribunal.

16. It is submitted that the Claim No. 1 relates to the alleged change in scope for Railway siding work. The petitioner issued a bid on 20th April 2015 for the said contract for work to be executed on EPC turnkey basis. The bid document explicitly stated that the layout of the proposed work was indicative only. On 23rd September 2016, a preliminary Feasibility Study Report (hereinafter “FSR”) was shared by the petitioner with the bidders. It was further made clear to the bidders that this FSR with respect to the railway siding work was merely indicative.

17. It is also submitted that the length of the railway track had to be determined by the respondent in consultation with the railway authorities. The preliminary FSR which was shared by the petitioner with the bidders during the bidding process which was eventually finalized by the railway authorities in February 2017. It is submitted that the respondent has wrongly alleged that, against a track length of 21.5 km indicated in the



preliminary FSR, the length increased to 27.66 km in the finalized FSR, amounting to 29% increase in track length. The respondent has wrongly stated that during the execution of work, the modified track length was reduced to 25.136 Km, amounting to 18% increase in the bid document and thus, respondent has wrongly sought extra compensation without assigning any reasons for the same.

18. It is further submitted that Claim No. 1 relates to the alleged additional work for the railway siding work allegedly done by the respondent. It is submitted that the respondent was responsible for the 'concept to commissioning' of this work as per which the respondent was responsible for planning and execution of the work.

19. It is submitted that, this Claim was resisted by the petitioner on the basis that the FSR submitted during the pre-bid stage was indicative only and the same was required to be reviewed and revalidated by the bidder. The bid document also clearly stated that the work will have to be executed only as per the Detailed Project Report (hereinafter "DPR") approved by the Railway Authorities which includes Engineering Scale Plan (hereinafter "ESP") and not on the basis of the FSR submitted during the pre-bid stage. Furthermore, the petitioner herein had filed an application dated 04th August 2022 before the learned Arbitral Tribunal to point out that the actual track length being constructed by the respondent herein as per proved ESP was only 22 Kms. Therefore, the learned Arbitral Tribunal erred in upholding the claim of Rs.39,11,69,571/- plus interest @ 13.55% in favour of the respondent.

20. It is also submitted that the learned Arbitral Tribunal failed to appreciate the true nature of EPC Contract which relates to execution of



work from “concept to commissioning” wherein quantification of the work had to be adjudged by the Contractor / respondent only. Therefore, the respondent had to perform all the work for the purpose of commissioning of the works. The learned Tribunal also erred in holding that the petitioner acted contrary to the ethos of the EPC Contract as it floated the tender at a stage when the scope of the EPC work was yet to be crystallized.

21. It is further submitted that it is the duty of the Contractor to review and revalidate the FSR and on the basis of the same had to prepare an ESP, DPR and Signal Interlocking Plan (hereinafter “SIP”). The work had to be carried out as per the ESP, DPR and SIP and not on the basis of the FSR which was initially never a part of the bidding document issued on 20th April 2015 and it was only shared on the specific request of the bidders on 23rd September 2016. This has been wrongly interpreted by the learned Arbitral Tribunal while passing the Award.

22. It is submitted on behalf of the petitioner that Clause 20A of Technical Specification Section-VI, Part-A, Sub-Section-IID, Civil Works clearly stated that the scope of work for respondent which included augmentation of railway siding work from concept to commissioning. The bid document did not provide for any quantification of any item. Therefore, the respondent only had to review and revalidate the FSR and it was not final determination.

23. Learned ASG appearing on behalf of the petitioner further submitted that all the bidders including the respondent were provided with the copy of FSR. In pre-bid conference, the petitioner made it clear that the work had to be undertaken as per the requirement of DPR, ESP



and SIP prepared by the bidder and approved by the Railways. The respondent was aware at the time of bidding that the approval of FSR was pending with the railways.

24. It is submitted on behalf of the petitioner that there was no basis for the learned Tribunal to interpret that the term 'indicative' was limited to changes within the outer parameters of the defined works. There is no basis for giving a restrictive meaning to the provisions of the Contract. It is further submitted that it is completely baseless to decide that the change of 29% was a drastic increase hence, such interpretation by the learned Tribunal rendered the contractual provisions otiose and amounts to patent illegality.

25. Learned ASG further submitted on behalf of the petitioner that there was no evidence regarding the expenditure incurred by the respondent towards Claim No. 1. Therefore, it was necessary to adjudicate on petitioner's application dated 04th August 2022, which was filed to point out the fact that the actual track length being constructed by the respondent as per approved ESP is only 22 Kms and prayed to direct the respondent to furnish particulars of the track length actually being constructed. The respondent in their reply to the said application did not furnish any proof regarding the actual track length that is now being constructed, nor has the respondent denied that the actual length being constructed is 22 Kms.

26. It is also submitted that the learned Tribunal failed to appreciate the merits of the application dated 04th August 2022, filed by the petitioner. It is submitted that as per joint record dated 29th November 2022, the respondent's representative agreed that the track length was 22.076 Kms.



Therefore, prior to passing of the Award, the respondent was stating that the track length as per ESP is 25.136 Kms but after passing of the Award, the respondent is agreeing to the petitioner's version that, the track length as per ESP is 22.076 Kms.

27. It is submitted that Clause 1.00.00 of Part A, Section VI, Sub-Section II – D (Civil Works) of Technical Specifications refers to the scope of civil, structural and architectural works of BoP package. It is submitted that the augmentation of Railway Siding System was specifically mentioned at Clause 20A as a part of the scope of respondent's work. This work included all the stages from 'concept to commissioning'. It is further submitted that, the same has been stated in clear terms that the FSR was indicative and had to be reviewed and revalidated for finalization of DPR as per which the work had to be carried out.

28. It is submitted that Clause 5.38.00 (A) and 5.38.1.0 specifically stated that the bidder was obligated to prepare the DPR and do detailed engineering and accordingly, construct the augmented railway siding. It is further submitted that the respondent has further failed to properly carry out its responsibility under Clause 9.2 of General Conditions of the Contract. Clause 9.2 has been reproduced herein below for reference:

“9.2 The Contractor confirms that it has entered into this Contract on the basis of a proper examination of the data relating to the Facilities (including any data as to boring tests) provided by the Employer, and on the basis of information that the Contractor could have obtained from a visual inspection of the Site (if access thereto was available) and of other data readily available to it



relating to the Facilities as at the date twenty-eight (28) days prior to bid submission. The Contractor acknowledges that any failure to acquaint itself with all such data and information shall not relieve its responsibility for properly estimating the difficulty or cost of successfully performing the Facilities.”

29. It is also submitted that as per Clause 9.3 of the General Conditions of Contract, the respondent was responsible to prepare and submit the DPR. The respondent was required to obtain all the approvals necessary for the performance of the Contract from all local, state or national government authorities. Since the respondent failed to get the DPR from the railways, no effort was made by the respondent to get the FSR reviewed and revalidated. The respondent has failed to undertake its contractual responsibility. The said Clause has been reproduced herein for convenience:

“9.3 The Contractor shall acquire in its name all permits, approvals and/or licenses from all local, state or national government authorities or public service undertakings in the country where the Site is located that are necessary for the performance of the Contract, including, without limitation, visas for the Contractor's and Subcontractor's personnel and entry permits for all imported Contractor's Equipment. The Contractor shall acquire all other permits, approvals and/or licenses that are not the responsibility of the Employer under GCC Sub Clause 10.3 hereof and that are necessary for the performance of the Contract.”

30. It is further submitted that the learned Arbitral Tribunal has erred in holding that increase of 29% was a dramatic increase and while



holding the same it has relied upon the purported increased length of 27.66 Kms. However, as per the paragraph 10(ix) of the Award, it is evident that as per the respondent the increased track length was only 25.136 Kms. It is therefore, clear that the basis of the learned Tribunals' finding with respect to the dramatic increase in the scope of work is contrary to a fact that does not even exist. No trade usage or contract provision was relied upon by the learned Tribunal for this finding.

31. It is submitted that the finding of the learned Arbitral Tribunal that the FSR was prepared by the petitioner unilaterally, is perverse. It is submitted that there was no provision in the Contract under which the FSR had to be prepared by the petitioner with consultation of the respondent. The preparation of the FSR was under process during the bidding process and the bidders were aware about the same. The petitioner could not have involved all the bidders in the process of approval of the FSR. The reasoning adopted by the learned Arbitral Tribunal is unreasonable. The respondent had to review and revalidate the FSR and nothing prevented the respondent from carrying out this review and revalidation, as was stipulated in the Contract but the respondent failed to undertake its contractual obligation.

32. It is submitted on behalf of the petitioner that learned Arbitral Tribunal has awarded the interest to the respondent for Claim No. 1. There is no evidence that the respondent had till date constructed 25.136 Kms, further there is no evidence put forth by the respondent to substantiate the claim that they have spent any amount towards such purported construction.



33. Learned ASG appearing on behalf of the petitioner has further submitted that the Claim No. 2 related to the alleged additional work done by the respondent towards additional excavation work done in the Induced Drought Cooling Towers (hereinafter “IDCT”) is erroneous. The existing ground level at site is called Natural Ground Level (hereinafter “NGL”). While constructing a building the level at which the foundation of the building starts is called Founding Level. The ground level desired to be achieved after completion of the construction is called Finish Ground Level (hereinafter “FGL”). The level of the ground is considered with reference to the Mean Sea Level and is called Reduced Level (hereinafter “RL”). It is further submitted that the learned Tribunal has wrongly held that both the cooling towers are constructed, whereas the fact is that the cooling towers are still being constructed.

34. It has been submitted that, in the present Contract, the bid documents provided bore log data for areas, covered in the project, but not for a few areas including the IDCT area. The petitioner had provided NGL for various locations but not for the IDCT area. The tender drawings depicted that this area was covered with coal boulders and the respondent was well aware of the same.

35. It is also submitted that the learned Tribunal has held that there were unforeseen conditions encountered by the respondent. It is submitted that the learned Tribunal failed to consider Clause 7.01.01 of Technical Specifications Section VI Part B, Section IIID-01 which stipulates that it was respondent’s responsibility to carry out geotechnical investigation for the cooling tower area.



36. It is submitted that, in the pre-bid conference, the bidders requested the petitioner to provide the natural ground levels (NGL) before the dumping of the boulders. The petitioner asked the bidders to consult the Site Levelling Plan, which indicated Reduced Level of IDCT area as +153.25 M. From the Site Levelling Plan, it was clear that this Reduced Level was for the FGL and not the NGL. Further, the cooling tower area was accessible to the respondent before bidding. It is further submitted that as per Clause 10.1 of General Conditions of Contract, the Employer i.e. the petitioner, took all the responsibility of the accuracy of data supplied by it, except when otherwise expressly stated in the Contract.

37. It is submitted that the aforesaid Claim of Rs.7,14,39,097/- plus interest @13.55% was allowed on the ground that the Site Levelling Plan depicted the NGL which was different from what the respondent encountered at site. Herein, the learned Arbitrator erred in amounting this as unforeseen condition under the Contract.

38. It is submitted that the Claim No. 3 raised by the respondent relates to the type test for GIS Bay Module. The respondent contended before the learned Arbitrator that it supplied Mono Chamber and Double Chamber Bays, the petitioner asked it to conduct type tests for both the Bays, but paid for only one test. This claim amounting to Rs.3,45,83,204 plus interest of 13.55% was allowed by the learned Arbitral Tribunal, which is contrary to the terms of the Contract and without any basis.

39. It is submitted that as per the terms of the Contract, the respondent had to carry out type tests as listed in the specification on the equipment to be supplied under the subject contract. It is submitted that the respondent had quoted only total charges (a lump-sum) against each type



test and the respondent failed to quote unit rate for these type tests under the column titled “*Charges for one type/rating*”.

40. It has been further submitted that the Claim No. 4 raised by the respondent relates to the additional costs incurred by it for payment of minimum wages revised by the Central Government notification dated 19th January 2017. It is submitted that the respondent was adequately compensated for the increase, under the price adjustment formula as per Appendix-2 of the Contract. The learned Arbitral Tribunal however, allowed the claim on the ground that the price adjustment formula only compensated the respondent with respect to the increase in Variable Dearness Allowance (hereinafter “VDA”) and not for the increase in minimum wages.

41. It is submitted that Clause 31.4.3 of the Special Conditions of the Contract specifically stated that the additional charges with respect to change in law will be compensated unless those charges were already compensated for other provisions of the Contract. The respondent was already compensated under the price adjustment clause. The same has been admitted by the respondent. Moreover, there is no basis for the division of minimum wages into separate components. The price adjustment clause compensated the respondent for the change in VDA. The respondent was only entitled to payment of this increase. Therefore, allowing the claim of the respondent in its favour is contrary to the Clause 31.4.3 of Special Conditions of the Contract.

42. It is submitted that the learned Tribunal erred in holding that the scope of work depicted as indicative by the FSR had to be examined from the prism of what an EPC contract is. It is submitted that the learned



Tribunal committed patent illegality by ignoring unambiguous provisions of the contract in favor of vague principles. The learned Tribunal derives its jurisdiction from the Contract between the parties and the dispute between the parties had to be decided as per the stipulation in the Contract.

43. Learned counsel for the petitioner has placed its reliance on *National Highway Authority of India v. IJM – Gayatri Joint Venture*, 2020 SCC OnLine Del 2498; *Food Corporation of India v. Chandu Construction & Anr.*, (2007) 8 SCC 466; *Delhi Jal Board v. Kaveri Infrastructure Pvt. Ltd. & Ors.*, MANU/DE/446/2013 and *Ssangyong Engineering and Construction Company v. National Highway Authority of India*, (2019) 15 SCC 131.

44. Learned counsel appearing on behalf of the petitioner submitted that in view of the arguments advanced and judgments relied upon, the present petition deserves to be allowed.

(On behalf of the respondent)

45. *Per Contra*, Mr. Rajiv Nayyar, learned senior counsel on behalf of respondent vehemently opposed the averments made by the Learned counsel for the petitioner and submitted that the present petition has been filed with the sole objective/purpose of harassing the respondent and to coerce them, which they are not legally entitled to and to escape from their liability. The present petition is nothing but an abuse of the process of law, instituted with the intent to derail the process of law.

46. Learned senior counsel appearing on behalf of the respondent submitted that none of the grounds pleaded by the petitioner fall within the parameters as set out under Section 34 of the Act, 1996. The grounds



raised, pleaded and orally argued are all factual grounds and the petitioner has failed to demonstrate any perversity or patent illegality in the impugned award.

47. It is submitted that the petitioner in their course of arguments have attempted to adduce fresh evidence and documents before this Court. Petitioner has placed reliance on a document dated 29th November 2022 and 15th March 2023, which are the documents, after passing of the Award and has argued that the works related to the railway siding work is still ongoing and yet not completed.

48. It is submitted that the said document and plea is an afterthought and legally untenable as the same amounts to going beyond the pleadings and records which were placed before the learned Arbitral Tribunal. Therefore, the same cannot be looked into at the stage of Section 34. It is further submitted that the allegation that the railway siding work is still ongoing is also incorrect, as there are no pleadings or documents placed by the petitioner to this effect before the learned Arbitral Tribunal.

49. It is further submitted that the learned Arbitral Tribunal while awarding Claim No. 1 relating to the railway siding work has gone into detailed arguments and evidences. It is only after due deliberation of the relevant contractual provisions and the omissions on the part of petitioner in arguing that the bid FSR was an indicative document, the learned Tribunal has held that the respondent is in fact required to carry out additional works under the revised/final FSR, approved plans and engineering drawings.

50. It is submitted that it cannot be said that the learned Tribunal has not appreciated the documents placed before it as it is visible on the face



of it that, during the cross-examination of petitioner's witness i.e. RW - 1, the witness admitted that as per the bid FSR provided to the bidders, the track length was 21.7 Kms. The witness further admitted that a revised FSR was thereafter provided to the respondent after the award of the Contract, which increased the track length to 27.66 Kms. The said witness further admitted that there were additional railway lines provided in the revised FSR. The witness also admitted that the track length as per the DPR was 25.136 Kms. Thus, the additional works required to be carried out by the respondent was admitted by the witness itself.

51. It is submitted that the respondent herein had placed all the relevant documents in support of their Claim No. 1, while no documents were placed by the petitioner to contend the track length was not revised or that the final track length was not 25.136 Kms or that the work was incomplete.

52. It is further submitted that post the award of the Contract, the respondent noted that there were additional works that were required to be executed in the railway siding area due to reasons attributable to the petitioner. During bidding stage, on 23rd September 2016, petitioner provided FSR to bidders, based on which the prices were quoted by the respondent and same formed part of the Contract. Respondent's scope is based on FSR dated 23rd September 2016.

53. It is submitted that the petitioner has not acted *bonafidely* and increased the scope of the railway siding works, after accepting the bid therefore, the respondent has a right to claim additional amounts as the FSR was indicative and the Contract was an EPC Contract, is only eyewash to cover its breaches.



54. It is further submitted that the petitioner cannot take advantage of its own wrong by contending that the FSR provided was only indicative and that respondent was to work as per the approved plans by the Railway. It is submitted that concept to commissioning does not mean petitioner could insist to perform their additional works free of costs.

55. It is submitted that the respondent was denied with its rights for revalidation of FSR, as petitioner, had contrary, to the terms of the Contract altered/increased the scope of works by directly engaging themselves with railways, without keeping petitioner in the loop in obtaining the approval on FSR along with in-principle conceptual layout and handed over to the petitioner after the award of Contract. Further, minutes of meetings dated 18th October 2016 between the petitioner and railways, were not shared with the respondent. It is submitted that the petitioner concealed the fact of variation done to the FSR between the petitioner and railways, so as to get the benefit of getting additional railway line executed under this Contract, at the expense of respondent, under the alleged pretext of FSR being indicative and EPC Contract.

56. It is submitted that as per Clause 5.38.00(A) of the Technical specifications, Section VI, Part-B/ Subsection III D, the respondent was required to coordinate with the railways based on tender FSR and get the In-Principle Approval of the DPR and EPC. However, contrary to the same, during Oct 2016 - Jan 2017 i.e. during the period between bid opening and award of Contract, the petitioner without the involvement of the respondent, directly coordinated with the railways and got the FSR revised with increase lengths and also obtained In-Principle Approval of the railways. Thus, the petitioner caused breach of the agreement as it did



not inform about the increase in the length and also got revised the FSR, resulting in additional works for the railway siding works, after award of the Contract.

57. It is submitted that the term EPC does not mean that additional works or scope variation or variation in scope shall also fall under the ambit of EPC and scope of concept to commissioning does not give the petitioner any rights to get additional railway lines/additional scope which was not envisaged originally during submission of bid/under the Contract.

58. It is also submitted that the respondent was denied of its obligations to prepare the FSR as the petitioner had contrary to the terms of Contract got altered/increased the scope of works by directly engaging themselves with railways in obtaining the approval on FSR along with in-principle conceptual layout before award of the Contract to the respondent. It is further submitted that there was substantial variation in the FSR provided by the petitioner to the bidders for consideration during bid submission and the respondent could not have estimated a variation of 5.7 Kms of new/additional lines in the scope of work, the indicative FSR could not have been revised by the petitioner without involvement of the respondent, which on the face of it is a breach of the contractual obligations.

59. It is further submitted that the learned Tribunal made two categorical observations with regard to the increase in the scope of work in the railway siding work. The 1st was 29% increase between the bid FSR and the revised FSR wherein the track length was increased from 21.55 to 27.66 kms. The 2nd was the final track length as per the approved



DPR and ESP in which the track length was reduced from the proposed 27.66 km to 25.136 kms which still constituted a 17% increase from the bid FSR on which the respondent had made its financial bid.

60. It is submitted that since the petitioner did not provide bore logs for the IDCT area, it was difficult for the respondent to estimate and predict the levels. During the pre-bid queries, the petitioner was requested to provide NGL before coal boulders were dumped and the ground level of the coal boulder heap, to which the petitioner had stated to refer the “Site Level Plan”, which provided the NGL as (+) 153.25M. Respondent had thus considered this figure as the NGL for IDCT area. However, post the execution of the work contract, during execution and soil examination, the data provided by the petitioner was found to be totally different. Thus, there was major increase in the works to be executed as compared to works envisaged during pre-award of the Contract.

61. It is further submitted that, with reference to Clause No. 35 (Unforeseen Conditions) of the General Conditions of the Contract, which entitled the respondent herein, for adjustment towards time for completion and contract price as per the provisions of the Contract towards such additional works. Although there was a road around the area, still the area was inaccessible and without the removal of the boulder the NGL could not be accurately be verified by the Respondent.

62. It is submitted in regard to Claim No. 3 that the issue before the learned Tribunal was not relating to the supply of the two different types of module/chamber, but the issue was the reimbursement of cost towards the additional cost incurred by the respondent in conducting the



additional test on the insistence of the petitioner. It is further submitted that the respondent had quoted the price for '1' test.

63. It is submitted in regard to the claim of basic wages that, the petitioner has compensated only the VDA component under the price adjustment clause of Contract and had not compensated the impact of the revision in the basic wages. The price adjustment formula had no compensatory elements for increase in the minimum wages, was rightly held by the learned Arbitral Tribunal.

64. It is further submitted that it is a matter of fact that price adjustment does not compensate the said increase in minimum wages and therefore, the respondent was entitled under the provision of Clause 25 and Clause 31.4.3 of Special Conditions of the Contract, which clearly states that the respondent is entitled for any additional cost which has not been compensated under the price adjustment. The amendment in the minimum wages act amounted to a change in law, which entitled the respondent to raise the claims towards the additional cost incurred towards the labour component.

65. Supporting his contention, the learned counsel appearing on behalf of the respondent relied upon the judgments passed in *The Oriental Insurance Co. Ltd v. HCL Infosystems Ltd.*, OMP (COMM) 436/2022; *Union of India v. M/S Satish Builders*, OMP (COMM) 96/2023; *Flowmore Limited v. M/s Skipper Limited*, OMP (COMM) 247/2019 and *Tata Projects Limited V. NTPC Limited O.M.P. (COMM) 139/2021 and 171/2021*.

66. It is therefore submitted that the present challenge filed by the petitioner is baseless and does not fall within the strict category



mentioned under Section 34 of the Act, 1996. The grounds raised are frivolous. None of the grounds are substantial and cover the categories mentioned under Section 34 of the Act, 1996. Hence, the petition is not liable to be set aside and dismissed.

FINDINGS AND ANALYSIS

67. The matter was heard at length with arguments advanced by the learned counsels on both sides. This Court has also perused the entire material on record. This Court has duly considered the factual scenario of the matter, judicial pronouncements relied by the parties and pleadings presented by the learned counsel of the parties.

68. The petitioner has raised objections against the impugned Award dated 14th September 2022 on the ground of patent illegality as the Claims have been allegedly decided in contravention to the terms of the Contract entered by the parties.

69. The challenge to the impugned Arbitral Award *inter alia* has been made on the ground that the learned Arbitral Tribunal 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 Arbitral Tribunal has not only overlooked the facts of the case but has also ignored the documents and evidence on record in the matter.

70. 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 reasoning. Thus, amounting to patent illegality.

Spirit of the Arbitration Act

71. Before embarking on the technical paraphernalia of the case, it is pertinent to understand the context and legislative intent behind the passing of the Act, 1996. The Arbitration and Conciliation Act, 1996 has been enacted to consolidate and amend the law relating to domestic arbitration as well as international commercial arbitration in India after taking into account the United Nations Commission On International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration, 1985.

72. The law regarding patent illegality, public policy, and fundamental policy of India is no longer *res integra*. The Act, 1996 has been well interpreted with regard to Section 34 through various judicial precedents. The scope of Section 34 being very limited in nature, has been thoroughly explored by the Indian legal system.

73. The challenge of an Award under Section 34 arising out of Arbitration proceedings must satisfy the tests laid down by virtue of the provisions of the Act, 1996, and the law settled by way of pronouncements by the Hon'ble Supreme Court. The Act, 1996 has been set forth with the intention to limit the interference of the Courts in the arbitral proceedings.

74. The Arbitral Tribunal, who in its wisdom, passes an Award, upon conducting the arbitration proceedings with the participation of parties to the dispute, considering the Statement of Claim and Statement of Defense



presented by and on behalf of the parties, the relevant documents placed on record by the parties, is considered as Court for the purposes of adjudicating the dispute before it. An unfettered scope of intervention in its functioning would defeat the spirit and purpose of the Act, 1996. Therefore, the Hon'ble Supreme Court has time and again reiterated that the scope of intervention of the Courts is limited in the cases of challenge under Section 34.

75. The Hon'ble Supreme Court in ***Delhi Airport Metro Express (P) Ltd. v. DMRC, (2022) 1 SCC 131***, has observed as under:

“28. This Court has in several other judgments interpreted Section 34 of the 1996 Act to stress on the restraint to be shown by Courts while examining the validity of the arbitral awards. The limited grounds available to Courts for annulment of arbitral awards are well known to legally trained minds. However, the difficulty arises in applying the well-established principles for interference to the facts of each case that come up before the Courts. There is a disturbing tendency of Courts setting aside arbitral awards, after dissecting and reassessing factual aspects of the cases to come to a conclusion that the award needs intervention and thereafter, dubbing the award to be vitiated by either perversity or patent illegality, apart from the other grounds available for annulment of the award. This approach would lead to corrosion of the object of the 1996 Act and the endeavours made to preserve this object, which is minimal judicial interference with arbitral awards. That apart, several judicial pronouncements of this Court would become a dead letter if arbitral awards are set aside by categorising them as perverse or patently illegal without appreciating the contours of the said expressions.



30. Section 34(2)(b) refers to the other grounds on which a court can set aside an arbitral award. If a dispute which is not capable of settlement by arbitration is the subject-matter of the award or if the award is in conflict with public policy of India, the award is liable to be set aside. Explanation (1), amended by the 2015 Amendment Act, clarified the expression “public policy of India” and its connotations for the purposes of reviewing arbitral awards. It has been made clear that an award would be in conflict with public policy of India only when it is induced or affected by fraud or corruption or is in violation of Section 75 or Section 81 of the 1996 Act, if it is in contravention with the fundamental policy of Indian law or if it is in conflict with the most basic notions of morality or justice.

31. In *Ssangyong [Ssangyong Engg. & Construction Co. Ltd. v. NHAI, (2019) 15 SCC 131 : (2020) 2 SCC (Civ) 213]*, this Court held that the meaning of the expression “fundamental policy of Indian law” would be in accordance with the understanding of this Court in *Renusagar Power Co. Ltd. v. General Electric Co. [Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCC 644]*. In *Renusagar [Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCC 644]*, this Court observed that violation of the Foreign Exchange Regulation Act, 1973, a statute enacted for the “national economic interest”, and disregarding the superior Courts in India would be antithetical to the fundamental policy of Indian law. Contravention of a statute not linked to public policy or public interest cannot be a ground to set at naught an arbitral award as being discordant with the fundamental policy of Indian law and neither can it be brought within the confines of “patent illegality” as discussed above. In other



words, contravention of a statute only if it is linked to public policy or public interest is cause for setting aside the award as being at odds with the fundamental policy of Indian law. If an arbitral award shocks the conscience of the court, it can be set aside as being in conflict with the most basic notions of justice. The ground of morality in this context has been interpreted by this Court to encompass awards involving elements of sexual morality, such as prostitution, or awards seeking to validate agreements which are not illegal but would not be enforced given the prevailing mores of the day. [Ssangyong Engg. & Construction Co. Ltd. v. NHAI, (2019) 15 SCC 131 : (2020) 2 SCC (Civ) 213]”

76. The above-mentioned judgment by the Hon’ble Supreme Court states that the concepts which are to be followed under Section 34 of the Act, 1996 is crystal clear. When a court applies the ‘public policy’ test to an arbitration award, the court does not function as a court of appeal, and as a result, any mistakes of fact that may have been made cannot be rectified. This is something that must be recognized very well. Since, the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when delivering his arbitral award, each possible view that the arbitrator may have on the facts needs to pass his approval in order for it to be considered. Therefore, an award that is based on scant evidence or on evidence that a trained legal mind deems to be of insufficient quality would not be deemed to be invalid on the basis of this criterion. After it has been established that the arbitrator's method is neither arbitrary nor capricious, then it can be said that he has the final word on the facts. There is also no dispute on the position of law that an Arbitrator being



creature of a Contract, has to confine himself to the provisions of the Contract while deciding the dispute.

77. The petitioner before this Court has invoked Section 34 of the Act, 1996, to challenge the impugned Award. The relevant portion of the said provision is reproduced hereunder for perusal and consideration:

“Section 34 – Application for setting aside arbitral awards---

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

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

(a) the party making the application I[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.¹[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*[(2A) An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the Court, if the Court finds that the award is vitiated by patent illegality appearing on the face of the award:*



Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by reappreciation of evidence.]

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

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

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

(5) ³An application under this section shall be filed by a party only after issuing a prior notice to the other party and such application shall be accompanied by an affidavit by the applicant endorsing compliance with the said requirement.

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



78. The learned Arbitral Tribunal, while adjudicating upon Claim nos. 1, 2, 3, and 4 has given reasoning for its decision. Claim No. 1 was regarding the change in scope of railway siding works resulting in additional work, Claim No. 2 was regarding the additional work in the induced draught cooling tower area due to variation in data by NTPC and actual NGL, Claim No. 3 was regarding additional charges incurred on test conducted on two typical GIS bay module and Claim No. 4 was regarding increase in minimum wage rates by the government. The petitioner has alleged that the learned Arbitral Tribunal has completely ignored the evidences on record while adjudicating upon these claims.

79. The petitioner has raised objections against the impugned Award on the basis of Claims 1, 2, 3 and 4. In order to properly adjudicate upon the validity of the impugned Award, and properly scrutinize if the impugned Award is liable to be set aside as per the provisions given in Section 34 of the Act, 1996, it is integral to examine each Claim in their own capacity and apply the test of perversity on them.

Claim No.1- Change in scope of railway siding works resulting in Additional Work.

80. The respondent claimed Rs.44,47,53,908/- inclusive of interest @ 13.55% for the change in scope of railway siding works resulting in additional work. The relevant portion of the reasoning of the Award has been reproduced below:

“10.(vi). Whilst it is true that in the bid documents, while indicating the scope of work, it was made known that the said scope of work listed was indicative of, but the effect thereof i.e. indicating that the scope of work was indicative of, has to be



considered from the prism of what an EPC contract is. As recorded in various sub paras of para 6 of the instant Award, bid documents pertaining to EPC contracts must define with clarity the scope of work. The scope of work indicated in the bid documents prepared by the respondent, though hedged by the expression 'indicative of, led the bidders while preparing the bid, to take into account that the proposed track length to be augmented was 21.5 Km. That the number of new bridges to be constructed would be 4 and the number of existing bridges to be increased in length i.e. extended would be 2. The finally approved feasibility study report increased the track length to be augmented to 27.66 Km. The number of new bridges to be constructed got reduced from 4 to 2 and the number of existing bridges, length where of was to be increased got enhanced from 2 to 8. A cardinal change in the scope of work is writ large because the scope of work finally indicated, in contrast to the scope of work contemplated by the bid documents, got increased by 29% as regards the track length. Though there is discussion in the correspondence regarding the change in scope of work pertaining to the bridges, but since the claim No.1 is premised on change in track length the Tribunal need not elaborate on the change in scope of work pertaining to the bridges. An increase of 29% is indeed a dramatic increase. An owner of a work cannot circumvent the competitive procurement process by resorting to drastic modifications between what is indicated in the tender documents and what is indicated in the final procurement order.

10.(ix). On the issue of change in scope of work, vis-a-vis what was listed in the Tender documents



and the finally approved FSR in January 2017 which was conveyed to the claimant in February 2017, a further modification was effected on 30.05.2019. The track length got reduced to 25.14 Km and the same is reflected in the layout plan Ex.RW1/C1 . In response to question No.4 7: 'Is this the document referred to in question 46, RW1 stated : I presume that the document shown to me is the ESP approved by the Railways'. In para 73 of the Statement of Claim the claimant has inter-alia pleaded that on 30.05.2019 the final track length got reduced to 25.1 Km. In para 68 of the Statement of Defense said plea has not been denied. The claim No. 1 is premised on the Track length finally constructed being 25.1 Km. The Tribunal highlights that vis-a-vis the approved track length earlier where the change in the scope of work was 29% in comparison with the work proposed to be constructed in the tender documents, the percentage of variation by way of increase is 17%. The same would also qualify as a drastic modification.

10.(xii). The Tribunal concludes on claim No.1 by holding that the claimant is entitled to INR 39,11,69,571.00. The claimants claim of INR 44,47,531,908.00 is inclusive of interest @ 13.55% from 20.07.2020 till 23.07.2021 i.e. the date when the Statement of Claim was filed. Keeping in view that as per Appendix-1 of Contract Agreements dated 01.02.2017, on the mobilization advance paid by the respondent to the claimant it had been claiming interest@ 13.55% p.a., the Tribunal grants same rate of interest to the claimant. The claimant would be entitled to simple interest @ 13.55% on the sum of INR 39, 11,69,571.00 from 20.07.2020 which is the date when the claim was first submitted to the respondent till date of



payment.”

81. It was held by the learned Tribunal that the petitioner during the final consultation i.e. after awarding the Contract did not include the respondent in the consultation process with railways, for finalization of FSR. The official letter for the award of the Contracts was issued on 10th January 2017 and they were executed on 1st February 2017. The final FSR got approved and the same was communicated to the respondent only on 10th February 2017, i.e., after the formalities of awarding the Contract was completed and the respondent was declared the Contractor.

82. The learned Arbitral Tribunal held that the bare comparison of the FSR issued before the execution of the work Contracts and after, indicates that the scope of work was increased. The track length to be laid, in the final approved FSR got enhanced to 27.66 Kms, as against 21.5 Kms listed in the earlier FSR, along with a reduction in the number of new bridges to be constructed from 4 to 2 units, it also increased the work related to existing bridges from 2 to 8 units.

83. In pursuance of deciding this claim, reliance is being placed on ***Food Corpn. of India v. Vikas Majdoor Kamdar Sahkari Mandli Ltd., (2007) 13 SCC 544***. The Hon’ble Supreme Court has discussed upon a principle wherein, a party does additional work which was not provided under the scope of work in a contract. It held as under:

“19. The principle of quantum meruit is often applied where for some technical reason a contract is held to be invalid. Under such circumstances an implied contract is assumed, by which the person for whom the work is to be done contracts to pay reasonably for the work done, to the person who



does the work. The provisions of this section are based on the doctrine of quantum meruit, but the provisions of the Contract Act admit of a more liberal interpretation; the principle of the section being wider than the principle of quantum meruit. The principle has no application where there is a specific agreement in operation. A person who does work or who supplies goods under a contract, if no price is fixed, is entitled to be paid a reasonable sum for his labour and the goods supplied. If the work is outside the contract, the terms of the contract can have no application; and the contractor is entitled to be paid a reasonable price for such work as was done by him.

20. If a party to a contract has done additional construction for another not intending to do it gratuitously and such other has obtained benefit, the former is entitled to compensation for the additional work not covered by the contract. If an oral agreement is pleaded, which is not proved, he will be entitled to compensation under Section 70. Payment under this section can also be claimed for work done beyond the terms of the contract, when the benefit of the work has been availed of by the defendant.

21. The term “extra” is generally used in relation to the works, which are not expressly or impliedly included in the original contract price, provided the work is within the framework of the original contract. The question whether a particular work is extra will depend upon the terms and conditions of the contract, and other documents connected therewith.”

84. As enunciated in the aforementioned judgment, the scope of work is the most crucial component of the construction contract since it



determines whether the work as contemplated in the Contract has been completed or not. Since, if the work contemplated has not been completed, it results in a breach of the Contract. A party is only required to complete the work specified in the scope of the work clause. What constitutes work within or outside the scope of the work clause in a construction contract is a source of contention among contract parties, culminating in substantial commercial arbitrations. This disagreement raises the question of whether work performed outside the scope of the construction contract entitles a party to additional remuneration for the services performed.

85. The judgment in ***Food Corpn. of India (Supra)*** set forth that under Section 70 of the Indian Contract Act, 1872 the Court follows the *quantum meruit* principle. It states that, before a person can invoke the benefits of this section, the three conditions must be met i.e., firstly, the claimant must lawfully do something for or deliver something to another individual, secondly, the claimant must not act gratuitously when doing or delivering something, and thirdly, the person for whom or to whom something is done or delivered must appreciate the service or item.

86. At this juncture, reliance is also being placed on ***State of Chhattisgarh v. SAL Udyog (P) Ltd., (2022) 2 SCC 275***. In the said judgment, Hon'ble Supreme Court has held that the law on interference in matters of awards under the Act, 1996, has been circumscribed with the object of minimizing interference by courts in arbitration matters. The relevant para has been reproduced below:

“14. One of the grounds on which an award may be set aside is “patent illegality”. What would



constitute “patent illegality” has been elaborated in Associate Builders v. DDA [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204], where “patent illegality” that broadly falls under the head of “Public Policy”, has been divided into three sub - heads in the following words : (SCC p. 81, para 42)

“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 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.—(1)-(2) * * **

(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.
(emphasis supplied)”*

87. Further, in ***MSK Projects (I) (JV) Ltd. v. State of Rajasthan, (2011) 10 SCC 573***, the Hon’ble Supreme Court has observed as follows:

“17. If the arbitrator commits an error in the construction of the contract, that is an error within his jurisdiction. But if he wanders outside the contract and deals with matters not allotted to him, he commits a jurisdictional error. Extrinsic evidence is admissible in such cases because the dispute is not something which arises under or in relation to the contract or dependent on the construction of the contract or to be determined within the award. The ambiguity of the award can, in such cases, be resolved by admitting extrinsic



evidence. The rationale of this rule is that the nature of the dispute is something which has to be determined outside and independent of what appears in the award. Such a jurisdictional error needs to be proved by evidence extrinsic to the award. (See Gobardhan Das v. Lachhmi Ram [AIR 1954 SC 689] , Thawardas Pherumal v. Union of India [AIR 1955 SC 468] , Union of India v. Kishorilal Gupta & Bros. [AIR 1959 SC 1362] , Alopri Parshad & Sons Ltd. v. Union of India [AIR 1960 SC 588] , Jivarajbhai Ujamshi Sheth v. Chintamanrao Balaji [AIR 1965 SC 214] and Renusagar Power Co. Ltd. v. General Electric Co. [(1984) 4 SCC 679 : AIR 1985 SC 1156])”

88. The Hon’ble Supreme Court in the matter of ***UHL Power Co. Ltd. v. State of H.P.***, (2022) 4 SCC 116, has observed as under:

“19. In Parsa Kente Collieries Ltd. v. Rajasthan Rajya Vidyut Utpadan Nigam Ltd. [Parsa Kente Collieries Ltd. v. Rajasthan Rajya Vidyut Utpadan Nigam Ltd., (2019) 7 SCC 236 : (2019) 3 SCC (Civ) 552] , adverting to the previous decisions of this Court in McDermott International Inc. v. Burn Standard Co. Ltd. [McDermott International Inc. v. Burn Standard Co. Ltd., (2006) 11 SCC 181] and Rashtriya Ispat Nigam Ltd. v. Dewan Chand Ram Saran [Rashtriya Ispat Nigam Ltd. v. Dewan Chand Ram Saran, (2012) 5 SCC 306] , wherein it has been observed that an Arbitral Tribunal must decide in accordance with the terms of the contract, but if a term of the contract has been construed in a reasonable manner, then the award ought not to be set aside on this ground, it has been held thus : (Parsa Kente Collieries case [Parsa Kente Collieries Ltd. v. Rajasthan Rajya Vidyut Utpadan Nigam Ltd., (2019) 7 SCC 236 : (2019) 3 SCC (Civ) 552] ,



SCC pp. 244-45, para 9)

“9.1. ... It is further observed and held that 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. It is further observed by this Court in the aforesaid decision in para 33 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. It is further observed that 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.

9.2. Similar is the view taken by this Court in NHAI v. ITD Cementation India Ltd. [NHA v. ITD Cementation India Ltd., (2015) 14 SCC 21 : (2016) 2 SCC (Civ) 716] , SCC para 25 and SAIL v. Gupta Brother Steel Tubes Ltd. [SAIL v. Gupta Brother Steel Tubes Ltd., (2009) 10 SCC 63 : (2009) 4 SCC (Civ) 16] , SCC para 29.

(emphasis supplied)”



89. In *National Highways Authority of India v. JSC Centrodorstroy*, (2016) 12 SCC 592, the aspect of the interpretation of the terms of the Contract by the Arbitrator has been discussed, wherein the Hon'ble Supreme Court has observed as follows:

“13. Having considered rival submissions, we are of the view that the assessment made by the Arbitral Tribunal in the instant case as affirmed by the High Court was definitely within its jurisdiction. It has consistently been laid down by this Court that construction of the terms of a contract is primarily for an arbitrator or Arbitral Tribunal to decide and unless the arbitrator or Arbitral Tribunal construes the contract in such a way that no fair minded or reasonable person could do, no interference by Court is called for. Viewed thus, we do not see any reason or justification to interfere in the matter. The view that the increase in rates of service tax in respect of bank guarantee and insurance premium is directly relatable to terms of the contract and performance under the contract is certainly a possible view.”

90. Considering the view adopted by the Hon'ble Supreme Court, it is a settled position of law that the Arbitrator cannot exceed the contract's provisions. An arbitrator must decide in accordance with the terms of the Contract. However, if an arbitrator interprets term of the contract in a reasonable manner, this will not be a ground for setting aside the Award. The Arbitrator is primarily responsible for determining the interpretation of a contract's provisions, unless the arbitrator interprets the contract in a way that no fair-minded or reasonable person could do.



91. The learned Arbitral Tribunal has taken the ground that, the clauses and terms relied upon by the respondent determine that, in case of change in scope of work, the price has to be adjusted accordingly. Further, as also observed by the learned Tribunal, the respondent had submitted its price bid with reference to the scope of work indicated in the bid documents and the learned Tribunal has critically held that the increase in scope of work is a dramatic modification and the petitioner cannot possibly circumvent the competitive procurement process.

92. The learned Tribunal has given sufficient reasoning keeping in view the scope of work in the tender documents. It has held that, in an EPC contract, prospective bidders must be informed of the owner's desired scope of work, and when so indicated, as in the present case, with the stipulation that the work described in the tender documents is merely *indicative*, modifications may be made within the outer parameters of the defined scope of work, and the contractor cannot claim that the scope of work was expanded. These outer parameters are immutable.

93. The learned Arbitral Tribunal was of the view that, by shifting the chainage points and increasing the scope of work, the petitioner cannot take refuge on the words '*indicative of*' used in the bid documents. The learned Tribunal highlighted that vis-a-vis the bid documents and the final approved FSR, the track length got increased from 21.5 Kms to 25.136 Kms. The learned Tribunal has further held the change in scope of work by the petitioner is done consciously, under the garb that, what was indicated earlier was merely '*indicative of*'.

94. Upon a bare perusal of the impugned Award, this Court is of the view, the learned Arbitral Tribunal had not uncritically accepted the



respondent's arguments, but had applied its mind before concluding that the claims were valid and payable by the petitioner. The petitioner is incorrect in asserting that the claim was founded solely on the increase in track length, as the respondent also performed numerous ancillary works in order to increase the track length. The aggregate claim for the railway siding work comprised all such works that were necessitated by the lengthening of the railway track.

95. Further, by applying the ratio of the abovementioned judgments, the principle of *quantum meruit* is being considered here. Compensation under *quantum meruit* is awarded for the services rendered by the contractor when the payment thereof is not fixed by the contract. A *quantum meruit* claim arises, where work is done or services rendered by the contractor for the employer or owner, in circumstances which entitle the constructor doing the work or rendering the services to receive a reasonable additional remuneration, the situation being one where either there is no construction contract or there is a contract but the particular situation is not covered under that construction contract.

96. This Court further finds that, after accepting the respondent's proposal, the petitioner increased the scope of the railway siding works without good faith. Therefore, claiming subsequently that the respondent had no right to claim additional amounts because the scope of work in the earlier FSR was indicative and the Contract was an EPC Contract, is merely an attempt to conceal its violations. This aspect of the petitioner's conduct has been meticulously addressed in the Award by the learned Tribunal, which has, to its credit, noted the petitioner's conduct. Applying



the abovementioned ratio and observation, Claim No. 1 has been decided rightly.

97. Further, with regard to the Claim No. 1, the petitioner placed reliance on the additional evidence/documents filed *vide* applications bearing IA No. 2565/2023 and IA No. 6924/2023, which included the joint record dated 29th November 2022, and minutes of weekly review meeting dated 15th March 2023, wherein it has been contended to the effect that the respondent has admitted to the construction of track length which is less than the length stated in the impugned Award on the basis of which, the learned Arbitral Tribunal allowed the said Claim.

98. In the matter of ***Canara Nidhi Ltd. v. M. Shashikala, (2019) 9 SCC 462***, the Hon'ble Supreme Court has discussed on the aspect of additional evidence in a petition under Section 34 and held as under:

“18. After referring to Justice B.N. Srikrishna Committee's Report and other judgments and observing that the decision in Fiza Developers [Fiza Developers & Inter-Trade (P) Ltd. v. AMCI (India) (P) Ltd., (2009) 17 SCC 796 : (2011) 2 SCC (Civ) 637] must be read in the light of the amendment made in Section 34(5) and Section 34(6) of the Act and amendment to Section 34 of the Arbitration Act, 1996, in Emkay Global Financial Services Ltd. v. Girdhar Sondhi [Emkay Global Financial Services Ltd. v. Girdhar Sondhi, (2018) 9 SCC 49 : (2018) 4 SCC (Civ) 274] , it was held as under : (SCC p. 63, para 21)

“21. It will thus be seen that speedy resolution of arbitral disputes has been the reason for enacting the 1996 Act, and continues to be the reason for adding amendments to the said Act to



strengthen the aforesaid object. Quite obviously, if issues are to be framed and oral evidence taken in a summary proceeding under Section 34, this object will be defeated. It is also on the cards that if Bill No. 100 of 2018 is passed, then evidence at the stage of a Section 34 application will be dispensed with altogether.....

So read, we clarify the legal position by stating that an application for setting aside an arbitral award will not ordinarily require anything beyond the record that was before the arbitrator. However, if there are matters not contained in such record, and are relevant to the determination of issues arising under Section 34(2)(a), they may be brought to the notice of the court by way of affidavits filed by both parties. Cross-examination of persons swearing to the affidavits should not be allowed unless absolutely necessary, as the truth will emerge on a reading of the affidavits filed by both parties. We, therefore, set aside the judgment in Girdhar Sondhi v. Emkay Global Financial Services Ltd. [Girdhar Sondhi v. Emkay Global Financial Services Ltd., 2017 SCC OnLine Del 12758] of the Delhi High Court and reinstate that of the learned Additional District Judge dated 22-9-2016. The appeal is accordingly allowed with no order as to costs.” (emphasis supplied)

The legal position is thus clarified that Section 34 application will not ordinarily require anything beyond the record that was before the arbitrator



and that cross-examination of persons swearing in to the affidavits should not be allowed unless absolutely necessary...”

99. In another judgment of the Hon’ble Supreme Court in ***PSA SICAL Terminals (P) Ltd. v. Board of Trustees of V.O. Chidambranar Port Trust Tuticorin***, **2021 SCC OnLine SC 508**, it was observed as under:

“43. It will thus appear to be a more than settled legal position, that in an application under Section 34, the court is not expected to act as an appellate court and reappreciate the evidence. The scope of interference would be limited to grounds provided under Section 34 of the Arbitration Act. The interference would be so warranted when the award is in violation of “public policy of India”, which has been held to mean “the fundamental policy of Indian law”. A judicial intervention on account of interfering on the merits of the award would not be permissible. However, the principles of natural justice as contained in Section 18 and 34(2)(a)(iii) of the Arbitration Act would continue to be the grounds of challenge of an award. The ground for interference on the basis that the award is in conflict with justice or morality is now to be understood as a conflict with the “most basic notions of morality or justice”. It is only such arbitral awards that shock the conscience of the court, that can be set aside on the said ground. An award would be set aside on the ground of patent illegality appearing on the face of the award and as such, which goes to the roots of the matter. However, an illegality with regard to a mere erroneous application of law would not be a ground for interference. Equally, reappreciation of evidence would not be permissible on the ground of patent illegality appearing on the face of the award.”



100. In light of the aforementioned judgment, this Court is strictly of the view that any new documents/evidences which were not the part of the arbitration proceedings, cannot be relied upon by this Court in a petition under Section 34 unless absolutely necessary. A petition under Section 34 is meant only for examining the legality and/or enforceability of an award. No extra latitude can be demanded from the Court in the form of fresh issues, new factual allegations, new documents/evidences etc. Taking such steps leads to invariable result in delaying the court proceedings and derailing the arbitration process.

101. In view of the above, I do not find any reason for interference with the impugned Award *qua* Claim No. 1.

Claim No.2 – Additional work in the induced draught cooling tower area due to variation in data by NTPC.

102. The respondent had claimed Rs.7,14,39,097/-, for the additional costs incurred by it due to the additional work in the induced draught cooling tower. The relevant portion of the reasoning of the Award has been reproduced below:

“11.(iii). The table indicates the net allowable bearing pressure of Ton Per Square Meter. The said table, in Column 1 thereof, under the heading: Founding Depth/Stratum records: '2.0m below NGL' and under column No. 4 for NGL below 2.0m, pertaining to Rafts, records the figure '18'. Just above the table in Para T of the Clause it is recorded: 'During design the maximum Allowable Bearing Pressure shall be limited to the values as furnished in Table 1. In case, bidder decide to carry out Geotechnical investigation, the Allowable Bearing Pressure shall be as per the



approved Geotechnical report and shall be limited to the values as furnished in Table 1'. The heading of the 4th column records: 'Rafts (width > 6m) for 75mm permissible settlement in case of soil and 12mm in case of rocky strata'. Now, considering the net allowable bearing pressure of 18 T/m² and permissible settlement of the strata, the twin factors of the 4th column, founding level was arrived at 2.18m below founding level by the claimant. During arguments, Learned Additional Solicitor General did not refute said computation. Thus, the claimant claims to have arrived at the foundation level for IDCT area as $153.25 - 2.18 = 151.07$. The contract requires the bore hole data to be generated by the claimant after the- coal boulders were removed. Needless to state, that for every Raft foundation the load bearing capacity of the soil is an essential ingredient. The bore hole data provides the morphological features of the soil and the same generates the load bearing capacity of the soil. For example, boring 6 feet below the ground level the morphological features of the soil continue to show the same to be loamy, sans presence of rocks, the load bearing capacity of the soil would be less requiring either the length and breadth of the pillars to be increased so that the section area is more and as a result, per square meter pressure is less, or to bore deeper to reach a soil strata which has rock and can withstand a higher load bearing capacity, and as a result the length and the breadth of the pillars to be less i.e. section area less. In the former case, the height of the column would be less and, in the latter, it would be more. Structural reinforcement has to be of a kind that the structure which stands on these columns is stable and at the same time is cost effective. In the instant case the respondent indicated costs effectiveness by providing afore-



noted data. The respondent did not dispute that after the coal boulders were removed and the claimant generated the bore hole data in the IDCT area, the foundation level changed from 151.07m to 148.67m. The difference is $151.07 - 148.67 = 2.4$. As noted above, the claimant had worked out 2.18m as founding level below NGL. This got revised to 4.92m. Thus, it is apparent that with reference to the NGL and the other data and parameters given in the bid documents the foundation level would work out to 151.07 and the RL to + 153.25. After the bore hole data was generated, these figures got changed to 148.67 and 149.948. This would clearly be a change in the scope of work arising out of unforeseen conditions which could not reasonably be foreseen. The site could not be physically accessed because there were coal boulders lying all over. That from a distance the site could be visually seen is irrelevant.

11.(iv). There is another interesting aspect to this issue. Two cooling towers called Unit-I and Unit-II were to be erected by the claimant in the IDCT Area. It constructed both the cooling towers. For Unit-I and Unit-II, NGL taken by the claimant was 153.25m because FGL indicated in the bid document was 153.25m and in the bid clarification the bidders were informed, when questioned what NGL they should adopt for the price bid calculation, it was conveyed that they should refer to the drawing which indicated FGL to be 153.25m. Considering information provided by the respondent, the Foundation Level was considered as 151.07m for both the Units. During execution, claimant detected change in soil strata and found NGL for Unit-I at 149.948m and for Unit-2 at 150.872m. Accordingly, founding level for Unit-I was arrived at 148.675m and for Unit-II at



148.675m. Conscious of the fact that price variation claim would be made, for reasons only known to the respondent it agreed that for Unit II the levels be taken as per the bid documents but insisted for the levels to be changed for Unit-I. This explains the Claim No. 2 being restricted only to the additional scope of work executed for Unit-I.”

103. The learned Arbitral Tribunal has referred to the following clauses while adjudicating upon the abovementioned issue:

“GCC 9.2 (Contractor's Responsibility): "The Contractor confirms that it has entered into this Contract on the basis of a proper examination of the data related to the Facilities (including any data as to boring tests) provided by the Employer and on the basis of information that the Contractor could have obtained from a visual inspection of the site (if access thereto was available) and of other data readily available to it relating to the Facilities as at the date twenty eight (28) days prior to bid submission. The Contractor acknowledges that any failure to acquaint itself with all such data and information shall not relieve its responsibility for properly estimating the difficulty or cost of successfully performing the Facilities.

GCC 10.1: (Employer's Responsibility): The Employer shall ensure the accuracy of all information and/or data to be supplied by the employer as described in Appendix 6 (Scope of works and supply by the Employer) to the Form of Contract Agreement, except when otherwise expressly stated in the Contract.

GCC 35.0: Unforeseen Conditions: 122 35. 1 If during the execution of the Contract, the Contractor shall encounter on the site any physical conditions (other than climatic conditions) or artificial obstructions that could not have been



reasonably foreseen prior to the date of the Contract Agreement by an experienced contractor on the basis of reasonable examination of the data relating to the Facilities (including any data as to boring tests) provided by the Employer, and on the basis of information that it could have obtained from a visual inspection of the Site (if access thereto was available) or other data readily available to it relating to the Facilities, and if the Contractor determines that it will in consequence of such conditions or obstructions incur additional cost and expense or require additional time to perform its obligations under the Contract that would not have been required if such physical conditions or artificial obstructions had not been encountered, the Contractor shall promptly, and before performing additional work or using additional Plant and Equipment or Contractor's Equipments, notify the Project Manager in writing:

- (a) the physical conditions or artificial obstructions on the Site that could not have been reasonable foreseen*
- (b) the additional work and for Plant and Equipments and/or Contractor's Equipments required, including the steps which the contractor will or proposes to take to overcome such conditions or obstructions*
- (c) the extend of the anticipated delay*
- (d) the additional cost and expense that the Contractor is likely to incur*

On receiving any notice from the Contractor under this GCC Sub Clause 35.1, the Project Manager shall promptly Consult with the Employer and the Contractor and decide upon the actions to be taken to overcome the physical conditions or artificial obstructions encountered. Following such consultations, the Project Manager shall instruct the Contractor with a copy of the Employer, of the



actions to be taken.

35.2 Any reasonable additional cost and expense incurred by the Contractor in following the instructions from the Project Manager to overcome such physical conditions or artificial obstructions referred to in GCC Sub-Clause 35. 1 shall be paid by the Employer to the Contractor as an addition to the Contract Price;

35.3 If the Contractor is delayed or impeded in the performance of the Contract because of any such physical conditions or artificial obstructions referred to in GCC Sub Clause 35. 1, the Time for Completion shall be extended in accordance with GCC clause 40 (Extension of Time for Completion)."

104. The learned Arbitral Tribunal while adjudicating upon this issue reasoned that, Clause 35.1 of the General Conditions of Contract explicitly provides, if during the execution of the contract the contractor encounters at site, any physical condition or obstruction which could not be reasonably foreseen and incurs additional cost, the contractor would be entitled to be reimbursed the same. The primary question decided was, whether the area, where the said two units of cooling towers were to be erected was filled with coal boulders, which had led to the alleged additional work on account of the respondent.

105. The learned Arbitral Tribunal further held that the IDCT area was covered with approximately 2 lakhs m³ of mill rejects/boulders. Thus, the site was inaccessible, and the respondent was unable to compile any data; it had to rely on the data provided by the petitioner. Nonetheless, after the awarding of the Contract and the removal of the coal boulder, the actual site conditions differed from the level provided by the petitioner during



the pre-bid stage, resulting in the need for additional work. Further, Clause No. 35 (Unforeseen Conditions) of the General Conditions of the Contract, entitled the respondent, in this case, to an adjustment in completion time and contract price, in accordance with the terms of the Contract for these additional works. It was also held that even though, there was a road surrounding the said area, it was still inaccessible, and the respondent could not accurately verify the NGL without the boulder being removed.

106. The learned Tribunal has also observed in detail about the issue regarding the bore-log data which were given for other areas, but none were provided for the IDCT area, which was filled with coal debris, as alleged by the respondent. It held that, throughout the period before the Contract was awarded, the area was inaccessible for any field inspections. Post-award of the Contract, while executing the removal of coal boulders, the respondent observed a significant change/variation in the data presented by the employer during the tendering stage and NGL, as it had undergone substantial changes relative to bid considerations.

107. The Hon'ble Supreme Court in ***South East Asia Marine Engg. & Constructions Ltd. (SEAMEC LTD.) v. Oil India Ltd., (2020) 5 SCC 164***, has dealt with the aspect of extent of interference by the Courts in a petition under Section 34 of the Act, 1996. The relevant paras of the judgment are reproduced below:

“12. It is a settled position that a court can set aside the award only on the grounds as provided in the Arbitration Act as interpreted by the courts. Recently, this Court in Dyna Technologies (P) Ltd. v. Crompton Greaves Ltd. [Dyna Technologies



(P) Ltd. v. Crompton Greaves Ltd., (2019) 20 SCC 1 : 2019 SCC OnLine SC 1656] laid down the scope of such interference. This Court observed as follows : (SCC pp. 11-12, para 24)

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

(emphasis supplied)

13. It is also settled law that where two views are possible, the Court cannot interfere in the plausible view taken by the arbitrator supported by reasoning. This Court in Dyna Technologies [Dyna Technologies (P) Ltd. v. Crompton Greaves Ltd., (2019) 20 SCC 1 : 2019 SCC OnLine SC 1656] observed as under : (SCC p. 12, para 25)



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

108. In light of the judgment of the Hon’ble Supreme Court mentioned hereinabove, it is particularly evident that the mandate of Section 34 of the Act, 1996 grants limited scope of scrutiny and interference by the Courts. The same has to be followed in its true letter and spirit, as also observed by the Hon’ble Supreme Court in various cases. The Arbitral Tribunal's decision regarding the interpretation of a contract is final, and the court cannot substitute its own interpretation for that of the arbitral tribunal. The scope of interference with a challenged award under Section 34 of the Act, 1996, is admittedly restricted. Unless the court determines that the challenged award is manifestly illegal on its face or violates the fundamental policy of Indian law, the challenged award cannot be set aside.

109. The learned Tribunal has observed and held that during the execution of the works, it was discovered that the ground level specifications provided by the petitioner for the IDCT area were incorrect, necessitating the respondent to perform additional work in the cooling tower. Although the clause required the contractor to conduct an



inspection, the petitioner neglected to provide access to the site. There were no means for a visual inspection to determine the actual ground and underground conditions at the site where the IDCT towers were to be constructed due to the presence of coal boulders. In addition, per Clause 10.1, the petitioner must have ensured the accuracy of all information and data provided by the petitioner. Due to the same, the learned Tribunal held that there was a substantial increase in the amount of work to be performed compared to what was anticipated before the contract was awarded to the respondent.

110. This Court is of the view that, no perversity *ex facie* is visible in the reasoning afforded by the learned Tribunal with regard to the Claim No. 2. Further, it is only in the interest of justice that the learned Tribunal has considered the scenario to allow the Claim No. 2 in favour of the respondent. It is only because the respondent had incurred extra costs due to the unforeseen conditions. The principle of ‘unforeseen conditions’ clearly overrides the Contractor’s responsibility as per the terms of the Contract because the Employer’s responsibility in the instant case is not executed in proper manner due to the contradiction between the data provided by the petitioner during the bidding process and the data collected during the actual execution of the works. The learned Tribunal has rightly held that the Claim No. 2 and the quantification thereof, is justified for the additional works executed.

111. In view of the above, I do not find any reason for interference with the impugned Award *qua* Claim No. 2.

Claim No.3 - Additional charges incurred on test conducted on two typical GIS bay module.



112. The respondent had claimed Rs.3,45,83,204/- for the additional charges incurred on test conducted on two typical GIS bay module. While adjudicating upon Claim No. 3, the following reasoning was given by the learned Arbitral Tribunal:

“12. (v). The Tribunal notes that Schedule 8-B provided to the bidders shows that against Column 4 'No. of Type/Rating', No. '1 ', has been printed. This clearly indicates that the bidders were required to quote per '1' number of test for each of the equipment. Since the dispute relates only to GIS package, the Tribunal notes the table, sans it being filled up by the claimant, limited to this item in the schedule.

12.(vii). Ex-facie, the claimant had not quoted on lump-sum basis but had quoted per '1' number test cumulating to INR16.81 crores. Since the respondent had waived, by exercising its right of waiver under sub-clause (c) of clause 1.06.02 of Technical Specifications Section VI, certain tests and the benefit of cost saving by exercising the right of waiver was availed of by the respondent, the claimant became entitled to be paid, at the rate quoted for the type tests it conducted. The argument of the respondent that the price quoted was lump-sum, being rejected by the Tribunal, a remainder sub""issue needs to be focussed upon. The test conducted was the same for the mono-chamber as well as the double chamber Bay Module, but this does not mean that the claimant carried out only 1 test. The same test conducted on two distinct equipment's does not mean that a singular test was conducted. The test conducted was in the plural. 1 +1=2. Overlooking said tests which were conducted by the claimant at the asking of the respondent and for which the respondent paid the claimant, since the dispute



pertains only to GIS Bay Module, the Tribunal notes that for the type tests conducted on the GIS Bay Module the claimant had raised an invoice in sum of INR 3,45,83,204.00 crores each for the two tests conducted, one on the mono-chamber and the second on the double chamber GIS Bay Modules. Admittedly the respondent cleared one invoice and the other was rejected. The Tribunal concludes that the claimant had established claim No. 3 and is entitled to INR 3,45,83,204.00. Post conducting the tests the claimant had submitted the report on 18.06.2018. The claimant is held entitled to interest on said sum from 18.06.2018@ 13.55% simple interest till date of payment.”

113. The learned Tribunal noted that the respondent’s grievance with regards to the Claim No. 3 is towards the additional type test conducted by the respondent on the GIS Bay Module. It held that it is *prima facie* clear and evident from the perusal of the “Schedule – 8B – Break-up of Type Test Charges for Equipment Priced in Schedule – 2”, that the price quoted by the respondent for the Type Test is only per ‘1’ test for each of the equipment.

114. It was further held by the learned Tribunal that the Contract only mentioned “Gas Insulation Switchyard” and did not mention any module type/ model (mono/double chamber) of the same. Therefore, it was for the respondent to decide whether mono-chamber or double-chamber bay module was required. In spite of possessing valid type test reports, the petitioner elected to conduct a type test and recommended repeating the type test on the actual product being supplied, as well as on two typical switchgear bay modules (mono chamber and double chamber), which was a mere additional requirement. In addition, during a joint meeting



conducted on 26th October 2017 to discuss the additional costs, that the respondent will incur, for type testing on the GIS Package, the respondent provided only an estimate of the costs.

115. This Court is of the view that, the issue before the learned Tribunal was not related to the supply of the two different types of module/chamber, but was regarding the reimbursement of cost towards the additional cost incurred by the respondent in conducting the additional test on the insistence of the petitioner. Hence, the respondent became entitled to be paid, at the rate quoted for the type tests it conducted. Although the respondent carried out the identical test on both the single-chamber and the double-chamber Bay Module, this would not entail that they only performed a single test overall. When one test is carried out on two different pieces of equipment, this does not constitute a single test having been carried out. The test that was carried out was in plural, as also observed by the learned Arbitral Tribunal.

116. Therefore, in view of the above, I do not find any reason for interference with the impugned Award *qua* Claim No. 3.

Claim No. 4 - Increase in minimum wage rates by the government.

117. The respondent had claimed Rs.24,26,70,516/- with regards to the increase in minimum wage rates by the government. The relevant portion of the reasoning of the Award has been reproduced below:

“13.(ix). It is settled law that different clauses in a contract have to be interpreted in a harmonious manner. The Tribunal finds that the formula prescribed towards price adjustment in APPENDIX-2 is relatable to and linked to the CPI-IW, but only to the labour component value of such works. The CPI-IW measures the temporal change



in the retail prices of fixed basket of goods and services being consumed by an average working-class family. CPI-IW is used to determine dearness allowance. Thus, CPI-IW is based on the schedule comprised of a basket of goods and services. Basic rate of wages is not a part linked to the basket of goods and services. The Tribunal therefore holds that the price adjustment formula in the contract in relation to the value of the major component of the work is meant to compensate the claimant for the increased in cost borne by it when it paid to the labour the increase in VOA during execution of the contract. APPENDIX-2 has no compensatory elements regarding increase in the minimum wages. Clause 25 and Clause 31.4.3 of the SCC contemplate the effect of any new law, regulation, ordinance, order or by of havIng the force of law. Clause 31.4.1 of the SCC obliges the claimant to comply with existing labour laws. As per clause 25 of the sec any new enactment, rule or notification having the force of law, which comes into effect seven days prior to the date set for opening of price bid shall entitle the contractor to be recompensate the additional cost incurred by the contractor. The Tribunal accordingly holds that the claimant is entitled to be reimbursed the increase minimum wages which paid to its labour when minimum wages got enhanced w.e.f. 19.01.2017. The claimant would be entitled to the benefit of APPENDIX2 to be applied on said minimum wages concerning VDA payable to the labour. The Tribunal finds force in the conclusion arrived at by it from the decision of the Supreme Court reported as (2015) 14 sec 21 'NHAI Vs. ITD Cementation India Ltd.' wherein the issue pertaining to upward revision of royalty with reference to a formula of escalation was resolved by holding that the effect of a legislation, notification or enactment has to be



considered independent of the formula of escalation.”

118. Before discussing this claim further, the relevant clauses as also noted by the learned Arbitral Tribunal have been reproduced below:

“Clause 25 of the Special Conditions of the Contract

If after the date seven (7) days prior to the date of Stage-II (Price) Bid Submission, in the country where the Site is located, any law, regulation, ordinance, order or by law having the force of law is enacted, promulgated, abrogated or changed (which shall be deemed to include any change in the interpretation or application by the competent authorities) that subsequently affects the costs and expenses of the contractor and/or the Time for Completion, the Contract Price shall be correspondingly increased or decreased, and /or the Time for Completion shall be reasonably adjusted to the extent that the Contractor has thereby been affected in the performance of any of its obligations under the contract. However, these adjustments would be restricted to items of both direct transactions between the Employer and the Contractor. Assignee of Foreign Contractor (if applicable) and Bought out items (to be despatched directly from sub-vendor's works to NTPC site). These adjustments shall not be applicable on procurement of raw materials, intermediary components etc_ by the Contractor/Assignee of Foreign Contractor. Notwithstanding the foregoing, such additional or reduced costs shall not be separately paid or credited if the same has already been accounted for in the price adjustment provisions where applicable, in accordance with Appendix-2 of the Contract Agreement.

Clauses 31.4.1 and 31.4.3 of the Special



Conditions of the Contract

31.4. 1: "During the entire period of the contract, the Contractor and his Sub-Contractors shall at all times abide by all existing labour enactments, rules made therein, regulations, notifications and bye-laws by the appropriate government, local authority or any other labour laws or notification that may be issued under any labour law prevailing as on the date seven (7) days prior to the date set for opening of the Price Bids, published by the State or Central Government or Local Authorities. An illustrative list of applicable acts, notifications, rules etc. in connection with the labour as applicable as mentioned subsequently at para 31.4.8 in sec. This list is not in any way exhaustive and shall not absolve the Contractor from any of his liabilities or responsibilities in compliance with any other laws, regulations, notifications that may be in force during the tenure of the contract.

31.4.3:"If due to an enactment of any new Act or Statute and rules made there under or any modifications to the Act/Statute or rules made thereunder, all after seven (7) days prior to the date set for opening of Price Bids and as a consequence thereof, the contractor has to incur additional cost or expenditure, the same shall be reimbursed by the Employer to the Contractor, excepting those due to reasons attributable to the Contractor and those being already compensated by other provisions of the Contract, like price adjustment, taxes and duties etc."

119. The learned Arbitral Tribunal held that the respondent had been recompensed with the VDA element, amounting to Rs.7,20,37,487/- which is a part of the gross sum under Claim No. 4. Hence, the said amount was deducted from the gross claimed sum.



120. The learned Tribunal also held that, the parties have agreed to the terms of the Contract, wherein as per Clause 25, Clauses 31.4.1 and 31.4.3 of the Special Conditions of the Contract, it is the petitioner's responsibility and liability to reimburse the respondent due to a change in law. Although, the petitioner has contended that as per Appendix – 2 to the Contract, which contains a Price Adjustment Formula, the respondent has been reimbursed already. The said argument was not accepted by the learned Tribunal as the only the VDA component had been reimbursed but the issue of minimum basic wage was left untreated.

121. This Court has placed reliance to the judgment of a Coordinate Bench of this Court, in the matter of ***L and T Mhps Boilers (P) Ltd. v. NTPC Ltd., 2021 SCC OnLine Del 5127***, wherein the Claim regarding increase in labour wages, was not set-aside. In the said case, the Arbitral Tribunal had allowed the claim of the contractor on the basis, that they were entitled to the reimbursement of additional expenditure. Clause 25 and 26, similar to Clauses 25, 31.4.1 and 31.4.03 of Special Conditions of the Contract of the instant matter, stated 'reimbursement in case of change in law'. It was also established that the contractor incurred additional expenditure and the same was on account of increase in labour wages as notified under the notification. The Court in the abovementioned case held as follows:

“9. The principal dispute between the parties relates to L&T's claim for additional payment on account of increase in the cost of labour resulting from increase in the minimum rates of wages payable to various categories of labour in terms of the Notification issued under the Minimum Wages Act, 1948. According to L&T, the said Notification



constituted a change in the law resulting in L&T incurring additional costs, which was required to be reimbursed in terms of Clause 26 of the SCC as applicable to the Contract Agreement.

x x x

21. This Court is unable to accept that the impugned award is ex-face contrary to the term of the Contract Agreement and therefore, is vitiated by patent illegality. The Arbitral Tribunal has interpreted the provisions of Clause 26 of the SCC along with Appendix-2 to the Contract Agreement. The decision of an arbitral tribunal in respect of construction of a contract is final and the court cannot supplant its view in place of that of the Arbitral Tribunal. Concededly, the scope of interference with an impugned award under Section 34 of the A&C Act is limited. Unless the court finds that the impugned award is patently illegal on the face of the award or falls foul of the fundamental policy of Indian Law, the impugned award cannot be set aside. In the present case, the Arbitral Tribunal's interpretation as to the construction of Clause 26 of the SCC is a plausible one. This Court is unable to accept that such an interpretation is ex-face erroneous and contrary to the plain language of the Contract Agreement.

x x x

30. The Arbitral Tribunal had considered and rejected the aforesaid contentions. The Arbitral Tribunal had examined the language of Clause 26 of the SCC and found that the said clause had implied the use of the word 'reimbursement'. The Arbitral Tribunal reasoned that for the petitioner to establish the claim on the basis of reimbursement, it was required to establish that it had incurred additional expenditure and the same was on account of increase in labour wages as notified under the Notification. The scope of



examination under Section 34 is limited. The decision of the Arbitral Tribunal regarding consideration and interpretation of the Contract is final and this Court cannot supplant its opinion over that and cannot interfere with the impugned award unless, it finds that the same is patently illegal. This Court is unable to accept that the Arbitral Tribunal's view with regard to interpretation of Clause 26 of SCC is patently illegal and no reasonable person could have accepted the same. The said view is clearly a plausible one.”

122. The aforementioned judgment is similar to the instant matter. The Court held that the clauses relating to the change in basic wages is clear and unambiguous. It was held that the Court must only interfere when the illegality goes to the root of the matter. The Court further affirmed the view of the Arbitral Tribunal that the notification of the minimum wages for labour is in two parts. The first being the basic minimum wage rate and the second being a VDA. The second component of VDA was already factored as per Appendix – 2 of the Contract Agreement, which is again, similar to the instant matter. Thus, it was accepted that the Appendix-2 only factored in the VDA and did not factor in any rise in the basic minimum rate of wages.

123. The learned Arbitral Tribunal in the present matter, has taken into account the VDA and has confirmed the stand of the respondent that the Appendix – 2 is applicable only to the periodic increase in the VDA, and has no concern with the increase in minimum wages. It further held that the increase in minimum wages is due to issuance of notification by the



Central Government and the same is fairly covered by Clause 25 read with Clause 31.4 of the Special Conditions of Contract.

124. In view of the judgment referred to in the foregoing paragraphs, it is apparent that the learned Tribunal has rightly allowed the claim *qua* increase in minimum basic wage due to change in law. In this instance, the Arbitral Tribunal's interpretation of Clauses 25, 31.4.1 and 31.4.03 of Special Conditions' construction is plausible. The learned Arbitral Tribunal has applied its judicial mind in a proper manner by not enforcing a principle which can be termed to be against the public policy of India. Since, no relevant grounds in terms of Section 34 of the Act, 1996 is made out by the petitioner, this Court cannot disturb the impugned Award as the same has been passed after assessing and appreciating all the factual aspects and contractual provisions. Therefore, this Court finds no perversity in the reasoning of the learned Arbitral Tribunal by allowing Claim No. 4.

125. In view of the above, I do not find any reason to interfere with the impugned Award *qua* Claim No. 4.

126. In view of the abovementioned judgments and discussion, this Court is of the view that the patent illegality should be an illegality which goes to the foundation of the matter. To put it in another way, not every violation of the law that is committed by the Arbitral Tribunal would be considered, an instance of patent illegality. Furthermore, an incorrect application of law cannot be classified as blatantly breaking the law. In addition, the term patent illegality does not apply to violations of law that is not connected to public policy or the interest of the general public.



127. Since it has been a settled principle that it is against the law for the courts to re-evaluate the evidence, in order to reach the conclusion that the award suffers from patent illegality. This is because courts do not sit in appeal against arbitral awards. When an arbitrator takes a view that is not even a possible one, or interprets a clause in the contract in such a manner that no fair-minded or reasonable person would, or if an arbitrator commits an error of jurisdiction by wandering outside the contract and dealing with matters that are not allotted to them, these are examples of situations in which it is permissible to interfere with a domestic award under Section 34(2-A) on the ground of patent illegality.

128. In addition to the above, the above mentioned principles state that the arbitral award is to contain reasons which are intelligible and adequate. Such reasons need not be elaborated, but must have three characteristics of being proper, intelligible, and adequate. If the challenge to an award is based on the ground that the same is unintelligible, the same would be equivalent to providing no reasons at all.

129. Moreover, an arbitral award that does not provide any explanations for its conclusions leaves itself open to legal scrutiny for the reasons given above. The arbitrator has reached certain perverse conclusions, and those conclusions, to the extent that they are based on no evidence or have been arrived at by ignoring essential evidence, can be set aside on the basis that they are obviously illegal. The practice of taking into account the evidence, that has not been made available to the opposite party is another example of the perversity that is encompassed by the term 'patent illegality'.



130. This Court finds that the 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 by the Court.

131. The law which has been settled by the Hon'ble Supreme Court is that the scope of interference with an Arbitral Award under Section 34 of the Act, 1996 is fairly limited and narrow. The Courts shall not sit in an appeal while adjudicating a challenge to an Award which is passed by an Arbitrator, the master of evidence, after due consideration of facts, circumstances, evidence, and material before him.

132. It has been held in a catena of judgments of the Hon'ble Supreme Court that, there is a legal presumption in favour of the Award being valid and the person challenging the Award has to make out one of the grounds enumerated under Section 34(2) of the Act, 1996. In pursuance of this, this Court is of the view that the learned Arbitral Tribunal in the instant case has considered the relevant contractual provisions and has passed the impugned Award as per the law.

CONCLUSION

133. The petitioner has failed to corroborate the evidence as to how the learned Tribunal's findings' regarding the Claims is patently illegal. The learned Tribunal has dealt with the Clauses in detail and has construed, and applied the same correctly while dealing with Claim Nos. 1, 2, 3 and 4. Thus, the Award cannot be found faulted with, as no ground has been made out to set aside the impugned Award inasmuch as the threshold to interfere with in an arbitral award has not been made out. Further, with



regard to the instant petition, the allegations of misinterpreting and illegally defining the terms of the Contract by the learned Tribunal is rejected and it is held that the Contractual provisions have been constructed in a harmonious manner.

134. It is a cardinal duty of the Constitutional Courts to adhere to this check on the powers of the court and always keep in mind that the Arbitral Award which has been passed by respecting the mandate of the disputing parties, should not be set aside unless and until it suffers from a grave error that shocks the entire conscience of the court.

135. A perusal of the impugned Award makes it evident that there is no patent illegality or error apparent on the face of the record. The learned Arbitral Tribunal has passed the Award after considering all the relevant material placed before it during the arbitral proceedings. The impugned Award is well-reasoned and is not in contravention of the fundamental policy of Indian law, and thus there is no reason for interference by this Court.

136. Considering the factual matrix of the case, authorities cited, pleadings presented and arguments advanced, this court comes to the conclusion that the Arbitral Award dated 14th September 2022 passed by the learned Arbitral Tribunal in the matter titled as '***Tata Projects Ltd. v. NTPC Ltd.***', does not suffer from any infirmities and any kind of patent illegality that *per se* violates any law, that is fundamental in nature, enshrined in Section 34 of the Act, 1996. The impugned Award is thus not patently illegal and neither in conflict with the public policy of India nor contrary to the terms of the Contract entered into between the petitioner and the respondent. The learned Arbitral Tribunal has rightly



construed the terms of the Contract for imparting justice to the party whose rights have been affected.

137. In view of the above discussion of facts and law, this Court finds no reason to set aside the impugned Arbitral Award.

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

139. The judgment be uploaded on the website forthwith.

(CHANDRA DHARI SINGH)
JUDGE

JULY 31, 2023
dy/ryp