



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

% **Reserved on: 7th July, 2023**
Pronounced on: 24th August, 2023

+ **O.M.P. (COMM) 105/2021 & I.A. 10346/2021**

**DEDICATED FREIGHT CORRIDOR CORPORATION OF
INDIA LIMITED (DFCCIL) Petitioner**

**Through: Mr. Balbir Singh, ASG with Mr.
Anshul Rai, Ms. Anu Sura, Mr.
S.K. Pandey, Mr. Awanish Kumar
and Mr. Chandrashekhar AC and
Mr.Ujjawal Sharma, Advocates**

versus

TATA ALDESA JV, Respondent

**Through: Mr. Sameer Parekh, Mr. Prateek
Khandelwal and Mr. Jayant Bajaj,
Advocates**

**CORAM:
HON'BLE MR. JUSTICE CHANDRA DHARI SINGH**

J U D G M E N T

CHANDRA DHARI SINGH, J.

1. The instant petition under Section 34 of the Arbitration and Conciliation Act, 1996 ('the Act' hereinafter) has been filed against the final Award dated 11th September, 2020 whereby the Arbitral Tribunal allowed the claims filed by the respondent/claimant.

FACTUAL MATRIX

2. The petitioner is a special purpose vehicle established in 2006 under the erstwhile Companies Act, 1956, for the purpose of planning



and development, mobilizing financial resources, building, maintaining, and operating dedicated freight corridors and is under the administrative control of the Ministry of Railways.

3. The respondent/claimant is an unincorporated joint venture referred to as Tata-Aldesa Joint Venture ('Tata-Aldesa JV' hereinafter) comprising of Tata Projects Limited having office at Secunderabad, India and Aldesa Constructions, a private company incorporated in accordance with the Spanish Laws, having its registered office in Spain.

4. The petitioner undertook a project pertaining to "*Design and Construction of Civil, Structures and Track Works for Double Line Railway involving formation in Embankments/Cuttings, Ballast on formation, Track Works, Bridges, Structures, Buildings including Testing and Commissioning on Design-Build Lump Sum Basis for Bhaupur-Khurja Section of Eastern Dedicated Freight Corridor*" which was split into three contract packages divided into three lots *namely* Lot No. 101 for 135 kms, No. 102 for 102 kms and No. 103 for 106 kms.

5. The petitioner invited bids for the aforesaid three contract packages and 14 pre-qualified bidders visited the work site for inspection. The respondent/claimant submitted its bid for Lot No. 102 and was duly awarded the contract *vide* notification dated 24th January, 2013. Consequently, an agreement dated 08th March, 2013 was entered into between the parties and the deadline for the completion of work was decided to be 21st April, 2017.

6. Thereafter, the respondent/claimant wrote a letter dated 17th July, 2013 seeking clarification from the petitioner regarding the applicability of the size of boxes to be used for crossing roads below railway tracks for



the preparation of design, drawing, and execution in accordance with the Contract Agreement. In the said letter, the respondent/claimant also stated that the requirements sought by the petitioner were 'variations' which might result in additional time and costs. The petitioner responded to the said letter stating that the respondent/claimant had been handed over the clearances obtained from the State Public Works Department ('PWD' hereinafter) and can approach their office for any explanations or modifications relating to clearances. In the said response letter, the petitioner clarified that the submission of the plan, profile, and drawing should not be delayed owing to the issuance of approvals from the PWD. The response letter further noted that the Contract Agreement was a design and build contract and the respondent was required to build and design the alignment profiles and Roads under Bridges ('RUBs' hereinafter) in accordance with the terms of the Contract Agreement.

7. On 21st November, 2013, a final list of RUBs was executed by the parties and the same was incorporated in the alignment plan and the profile of the respondent/claimant. Thereafter, the respondent/claimant sent the alignment plan and profile to the petitioner for approval with the note that variations in cost and time relating thereto would be sent later.

8. The Engineer appointed by the petitioner rejected the claim with respect to increase in number and change in sizes of RUBs by the PWD *vide* letter dated 30th May, 2014. It also stated that the General Arrangement Drawings ("GADs") provided as part of the bidding document were indicative and were to be finalized after validation of the survey in compliance with the provisions of applicable Codes which cannot be considered a reason for any significant increase in the



quantities. The respondent again sent the approval request *qua* the aforesaid claim, however, the same was also rejected by the Engineer.

9. Consequently, the following three disputes arose between the parties-

- i) Whether additional Costs are payable in relation to variation in removal of unchartered utilities;
- ii) Whether additional costs are payable in relation to increase in earthwork due to introduction of new structures; and
- iii) Whether additional costs were incurred due to increase in scope of work arising from change in sizes/type of listed structures built by respondent/claimant, related earthwork and allied works, which amount to 'variation' in terms of the Contract Agreement.

10. The first two of the aforesaid issues were directly referred for the Arbitration and stands adjudicated. However, the dispute pertaining to the question whether the increase in the number and changes in the size of the RUBs can be considered as 'variation' or not and the dispute was referred to the Dispute Adjudication Board ('DAB' hereinafter). The claim was granted in favor of the respondent/claimant *vide* Order dated 29th May, 2018, however, both the parties, dissatisfied with the decision of the DAB invoked the arbitration clause as stipulated in the agreement.

11. Consequently, an Arbitral Tribunal was constituted. The arbitral proceedings initiated with the filing of statements of claim, and the hearing was concluded by the Tribunal and the impugned award was passed on with the following directions:



“The arbitral Tribunal awards an amount of Rs. 26,25,15,787/- which includes Rs. 37,50,000/- (Thirty seven lakhs fifty thousand paid by the Claimant as Arbitrator’s fee on behalf of the Respondent) plus applicable taxes on Rs. 20,27,46,850/-, this day the 1st September 2020 in favour of the Claimant on a non-judicial stamp paper of Rs. 100/- with the direction that the party concerned may make good the appropriate stamp duty as per the stamps Act of Delhi. In case, the payment of Awarded Amount is not made within 60 days of the publication of the Award, simple interest at 11% per annum shall be payable to the Claimant from the date of publication of Award.”

12. Aggrieved by the aforesaid award, the petitioner filed the present petition seeking the following reliefs:

“i. Quash and set aside the final Arbitral award dated 11.09.2020 jointly passed by the learned arbitral tribunal consisting of A.P. Mishra, Subodh Jain and Sudhir Mathur, arising out of contract agreement. HQ/EN/DB/Bhaupur-Khurja/lot-102 dated 08.03.2013 by which it has allowed the claim of the respondent/claimant seeking reimbursement of the additional costs incurred by him due to increase in size of certain structures, related earth work and allied works arising from change in size of certain structures as a result of variation in the firm list of structures provided in the contract.

ii. call for record of the Arbitration Proceeding;

iii. Pass any other order that is deemed fit and proper under the facts and circumstances of the case.”

SUBMISSIONS

13. The matter has been argued at length and this Court has heard both the parties and also considered the contentions made in the pleadings as



well as the written submissions. Upon a conjoint consideration of the pleadings, written submissions and the grounds pressed during the course of the arguments, the following submissions of the parties are found relevant for adjudication of the objections to the Award in question.

On behalf of the Petitioner

14. The learned ASG appearing for the petitioner submitted that the impugned Award suffers from patent illegality on the face of record and deserves to be set aside.

15. It is submitted that the respondent/claimant had clearly accepted the terms of the bid document without question at the time of award of tender, and therefore, the respondent/claimant was under an obligation to inspect the site and all the documents in order to re-verify and re-validate the technical data provided by the petitioner in relation to the bid as well as any other relevant factors that might impact the respondent/claimants designs and construction of earthwork.

16. It is submitted that the respondent/claimant was also under the obligation to notify the Engineer appointed by the petitioner, regarding any error, fault or other defects in the Employer's requirements w.r.t. purpose, scope, design and/or other technical criteria within a prescribed time, failing which, the alleged changes would not be considered as a 'variation' for the purpose of Clause 13.3 of the General Conditions of Contract ('GCC' hereinafter).

17. It is submitted that several clauses under the Employer's Requirement of the Contract Agreement clearly state that the technical



data such as plans, profiles, proposed alignment, etc. provided by the petitioner were indicative and to be reviewed and verified by the respondent/claimant, pursuant to which the respondent/claimant was required to modify the plan and profile accordingly. The changes, if any, were required to be communicated to the Engineer appointed by the petitioner within the time specified under Clause 5.1 of GCC read with the Appendix to Tender under the Contract Agreement. Thereafter, the Engineer would decide whether such changes would be deemed as “variations” under Clause 13 of the GCC or just as “minor deviations” for which no consideration would be payable by the petitioner. It is submitted that the respondent/claimant took no such steps to intimate the Engineer within the specified time and hence, cannot be permitted to approach the Engineer for initiation of variation procedure later.

18. It is submitted that the Clause 13.1 of the GCC only empowers the Engineer appointed by the petitioner to initiate variations at any time prior to issuing the taking-over certificate for the works upon their completion, either by an instruction or by a request for the respondent/claimant to submit a proposal. Therefore, the respondent/claimant can propose and make a claim for price adjustment only after the Engineer makes a request to the respondent/claimant to submit the proposal.

19. It is submitted that the Tribunal disregarded the express terms of the Agreement as the said terms prescribed for respondent/claimant to be under obligation to carefully examine and review the bid documents, undertake site inspection and secure clearances. It is submitted that the



petitioner only provided an option to the respondent/claimant to seek its assistance in obtaining such permissions and approvals

20. It is submitted that the principles of natural justice were violated as the profiles developed and communicated to the Tribunal by the petitioner were rejected without affording an opportunity of hearing to the petitioner.

21. It is submitted that the Contract Agreement contains several clauses wherein “variations” and “deviations” are permitted and the distinction between the two can also be seen therefrom based on where the contract price is adjusted. It is further submitted by the petitioner that the Arbitral Tribunal failed to recognize these terms separately and treated them as one and the same, thereby greatly impacting the effect of the said clauses.

22. It is submitted that the Arbitral Tribunal had incorrectly interpreted the terms of the Contract Agreement and passed the impugned award without any basis of evidence as to why it chose to interpret the express words of a contract in such an expansive manner.

23. It is submitted that the petitioner had earlier denied the claim of the respondent/claimant and repetitive denials by the petitioner would not restart or extend the limitation period. Therefore, the claim of the respondent/claimant was time barred and the impugned Arbitral Award had been passed without deciding the issue of limitation.

24. It is submitted that the compound interest imposed by the arbitral award on the amount to be paid by the petitioner is exorbitant, and unreasonable as such interest rate is in contradiction of the terms of the agreement which does not provide for any such understanding.



25. Therefore, it is submitted that the impugned award may be set aside by this Court.

(On behalf of respondent)

26. The learned counsel appearing for the respondent vehemently opposed the contentions made by the petitioner submitting to the effect that the impugned award passed by the Arbitral Tribunal is a well-reasoned and unanimous award.

27. It is submitted that the petitioner did not raise any grounds permissible in law and the award has been passed based on the admitted facts and documents on record.

28. It is submitted that the award only interprets the terms of contract which is entirely within the prerogative of the Tribunal. It is also submitted that the award only confirms the findings of the DAB that are concurrent to the findings made by the Tribunal granting the final award in favour of the respondent.

29. It is submitted that the Arbitrators, under the terms of the Contract and law are empowered to interpret the terms of the Contract and the same is strictly within the domain of powers conferred to the Tribunal.

30. It is submitted that clause 2.0 of part 2, volume 1 of the Contract Agreement provides for changes in the list of bridges and other structures to be considered as 'variation'. It is also submitted that the provisions of the contract require the petitioner to compensate the respondent for additional costs incurred due to the said variation.

31. It is submitted that the respondent/claimant had intimated the petitioner regarding the changes in the sizes and structures, therefore, categorizing the said changes as 'variation' as stipulated under the terms



of contract. However, the said claim raised by the respondent/claimant was denied by the Engineer appointed by the petitioner.

32. It is submitted that there is no dispute with regard to the computation of the additional quantities/works and the same was duly verified by the Project Management Consultant ('PMC' hereinafter) at the request of the Tribunal, therefore, the only dispute before the Tribunal was whether the said additional work could be covered under the term 'variation' as discussed and agreed between the parties.

33. It is submitted that the Tribunal dealt with the issue of acceptance of claim as amounting to 'variation' in detail and had observed that the ground raised by the petitioner was only an afterthought and the terms of the contract were wrongly interpreted by the petitioner.

34. It is also submitted that the claim filed by the respondent/claimant is not barred by limitation as the contract between the parties contained three tier dispute resolution where the claim was first referred to the DAB and then to the Arbitration. It is further submitted that the period of limitation in construction contracts will run only from the date of the final bill and the parties are at liberty to raise the issue till the issuance of the final bill and the same would not be treated as time barred.

35. It is further submitted that the respondent was paying compound interest to the petitioner at 13.75% which the petitioner had charged to the respondent against the part release of the retention money and the Tribunal had awarded the interest on that basis only.

36. Hence, the learned counsel submitted that the impugned award, to the extent challenged by the petitioners, is neither patently illegal, nor



against the fundamental policy of law or public policy of the Country and therefore, the petition is liable to be dismissed.

FINDINGS AND ANALYSIS

37. Before delving into the substantive aspects of the instant case, it is crucial to reiterate the fundamental concepts, purpose, and objectives of the Act. Additionally, a comprehensive analysis of Section 34 of the Act is essential. This examination is indispensable for a holistic comprehension of the implications that the provisions therein have on the authoritative powers and jurisdictional scope of this Court.

38. The inherent intent behind enactment and implementation of the Act was to establish a comprehensive legal framework that governs the process of arbitration, providing an efficient and effective alternative dispute resolution mechanism. The Act aims to promote the resolution of disputes through arbitration in a fair, impartial, and expeditious manner, while also ensuring that the process is conducted and concluded with minimal judicial intervention. It seeks to provide parties with the freedom to choose their arbitrators and the arbitration procedure, as well as to uphold the principle of party autonomy in shaping the resolution process.

39. The object of the Act has been discussed by the Courts in several judgments. In ***Union of India vs. Varindera Constructions Ltd., (2018) 7 SCC 794***, the Hon'ble Supreme Court analyzed the objectives of the Act and held as under:

“12. The primary object of the arbitration is to reach a final disposition in a speedy, effective, inexpensive and expeditious manner. In order to regulate the law regarding arbitration, legislature came up with legislation which is



known as Arbitration and Conciliation Act, 1996. In order to make arbitration process more effective, the legislature restricted the role of courts in case where matter is subject to the arbitration. Section 5 of the Act specifically restricted the interference of the courts to some extent. In other words, it is only in exceptional circumstances, as provided by this Act, the court is entitled to intervene in the dispute which is the subject-matter of arbitration. Such intervention may be before, at or after the arbitration proceeding, as the case may be. In short, court shall not intervene with the subject-matter of arbitration unless injustice is caused to either of the parties.”

40. Therefore, it is evident that the primary objective of the Act is to effectively and expeditiously dispose of the disputes between the parties. In order to adhere to the legislative intent, it has been deemed necessary by the Hon’ble Supreme Court and by the mandate of the Act to limit interference in the process of arbitration, irrespective of the stage of the arbitration proceedings.

41. In the instant case, the petitioners have invoked Section 34 of the Act to challenge the impugned Award. Therefore, it becomes imperative to discuss the nature and scope of the aforesaid provision. The relevant portion of the provision is reproduced hereunder for perusal and consideration.

“34. Application for setting aside arbitral award.— (1) *Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).*
 (2) *An arbitral award may be set aside by the Court only if—*
 (a) *the party making the application establishes on the basis of the record of the arbitral tribunal that—*



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

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

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

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

(b) the Court finds that—

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

(ii) the arbitral award is in conflict with the public policy of India.

Explanation 1.—For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,—

(i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or

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

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



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

42. On perusal of the aforesaid provision it is clear that the intent of the legislature while enacting the Act, as well as while carrying out the amendments to the same, was that there should be limited intervention of the Courts in arbitral proceedings, especially after the conclusion of the proceedings. It is well settled that any claim brought before a Court of law under Section 34 of the Act shall be in accordance with the principle of the provisions laid down under the Act as well as interpreted by the Hon'ble Supreme Court.

43. From the foregoing discussion, it is already settled that Section 34 of the Act has a limited scope and the Courts can only intervene if the conditions mentioned in the said provision are fully met. Before moving towards the issue in the instant case, it is imperative that this Court discusses the role of the Arbitral Tribunal.

44. The Arbitral Tribunal is constituted with the consent of both the parties when the arbitration clause is invoked by either of the parties. Upon constitution, the Tribunal conducts the inquiry and proceedings with the participation of the parties to the dispute. It is considered that the Tribunal, while adjudicating a case delves into the Statement of Claim, Statement of Defense presented by and on behalf of the parties and passes an award after due deliberations on issues in question. Therefore, as per the settled principle, an unfettered intervention in the Tribunal's functioning would defeat the spirit and purpose of the Act.



45. The question of powers conferred to the Arbitrator has already been settled by several judicial dicta laid down by the Hon'ble Supreme Court. No doubt, an Arbitrator appointed by the parties has wide powers, but the Act itself provides for scrutiny on both the Arbitrator and the Award passed by him. Therefore, there is limited scope of intervention in the same and the accountability is confined to an extent.

46. The question of powers conferred to the Courts while examining the challenge made to an Arbitral Award is also answered by the Hon'ble Supreme Court in several cases and it is well settled that the Court need not examine the validity of findings or the reasoning behind the findings given by the Arbitrator. Therefore, the only question before the Courts while adjudicating an arbitral challenge is whether the conclusion drawn in the impugned Award is supported by the findings of the Arbitrator. The said principle was reiterated by the Hon'ble Supreme Court in **Anand Brothers (P) Ltd. vs. Union of India & Ors., (2014) 9 SCC 212**, and it was held as under:

"7. Before we examine whether the expression "finding" appearing in Clause 70 would include reasons in support of the conclusion drawn by the arbitrator, we consider it appropriate to refer to the Constitution Bench decision of this Court in Raipur Development Authority v. Chokhamal Contractors wherein this Court was examining whether an award without giving reasons can be remitted or set aside by the Court in the absence of any stipulation in the arbitral agreement obliging the arbitrator to record his reasons. Answering the question in the negative, this Court held that a nonspeaking award cannot be set aside except in cases where the parties stipulate that the arbitrator shall furnish reasons for his award. This Court held: (SCC pp. 750-51, para 33) —33 When the parties to the dispute insist upon



reasons being given, the arbitrator is, as already observed earlier, under an obligation to give reasons. But there may be many arbitrations in which parties to the dispute may not relish the disclosure of the reasons for the awards. In the circumstances and particularly having regard to the various reasons given by the Indian Law Commission for not recommending to the Government to introduce an amendment in the Act requiring the arbitrators to give reasons for their awards we feel that it may not be appropriate to take the view that all awards which do not contain reasons should either be remitted or set aside.¶ Having said that, this Court declared that the Government and their instrumentalities should-as a matter of policy and public interest-if not as a compulsion of law, ensure that whenever they enter into an agreement for resolution of disputes by way of private arbitrations, the requirement of speaking awards is expressly stipulated and ensured. Any laxity in that behalf might lend itself to and, perhaps justify the legitimate criticism, that the Government failed to provide against possible prejudice to public interest.

8. The following passage is in this regard apposite: (Raipur Development Authority case, SCC pp. 752-53, para 37) —

37. There is, however, one aspect of non-speaking awards in non-statutory arbitrations to which Government and governmental authorities are parties that compel attention. The trappings of a body which discharges judicial functions and is required to act in accordance with law with their concomitant obligations for reasoned decisions, are not attracted to a private adjudication of the nature of arbitration as the latter, as we have noticed earlier, is not supposed to exert the State's sovereign judicial power. But arbitral awards in disputes to which the State and its instrumentalities are parties affect public interest and the matter of the manner in which Government and its instrumentalities allow their interest to be affected by such arbitral adjudications involve larger questions of policy and public interest. Government



and its instrumentalities cannot simply allow large financial interests of the State to be prejudicially affected by non-reviewable---except in the limited way allowed by the statute-non-speaking arbitral awards. Indeed, this branch of the system of dispute resolution has, of late, acquired a certain degree of notoriety by the manner in which in many cases the financial interests of Government have come to suffer by awards which have raised eyebrows by doubts as to their rectitude and propriety. It will not be justifiable for Governments or their instrumentalities to enter into arbitration agreements which do not expressly stipulate the rendering of reasoned and speaking awards. Governments and their instrumentalities should, as a matter of policy and public interest-if not as a compulsion of law-ensure that wherever they enter into agreements for resolution of disputes by resort to private arbitrations, the requirement of speaking awards is expressly stipulated and ensured. It is for Governments and their instrumentalities to ensure in future this requirement as a matter of policy in the larger public interest. Any lapse in that behalf might lend itself to and perhaps justify, the legitimate criticism that Government failed to provide against possible prejudice to public interest.

9. Reference may also be made to the Arbitration and Conciliation Act, 1996 which has repealed the Arbitration Act, 1940 and which seeks to achieve the twin objectives of obliging the Arbitral Tribunal to give reasons for its arbitral award and reducing the supervisory role of courts in arbitration proceedings. Section 31(3) of the said Act obliges the Arbitral Tribunal to state the reasons upon which it is based unless the parties have agreed that no reasons be given or the arbitral award is based on consent of the parties. There is, therefore, a paradigm shift in the legal position under the new Act which prescribes a uniform requirement for the arbitrators to give reasons except in the two situations mentioned above. The change in the legal



approach towards arbitration as an alternative dispute resolution mechanism is perceptible both in regard to the requirement of giving reasons and the scope of interference by the court with arbitral awards. While in regard to requirement of giving reasons the law has brought in dimensions not found under the old Act, the scope of interference appears to be shrinking in its amplitude, no matter judicial pronouncements at time appear to be heading towards a more expansive approach that may appear to some to be opening up areas for judicial review on newer grounds falling under the caption 'public policy' appearing in Section 34 of the Act. We are referring to these developments for it is one of the well-known canons of interpretation of statutes that when an earlier enactment is truly ambiguous in that it is equally open to diverse meanings, the later enactment may in certain circumstances serve as the parliamentary exposition of the former.

xxx xxx xxx

14. It is trite that a finding can be both: a finding of fact or a finding of law. It may even be a finding on a mixed question of law and fact. In the case of a finding on a legal issue the arbitrator may on facts that are proved or admitted explore his options and lay bare the process by which he arrives at any such finding. It is only when the conclusion is supported by reasons on which it is based that one can logically describe the process as tantamount to recording a finding. It is immaterial whether the reasons given in support of the conclusion are sound or erroneous. That is because a conclusion supported by reasons would constitute a "finding" no matter the conclusion or the reasons in support of the same may themselves be erroneous on facts or in law. It may then be an erroneous finding but it would nonetheless be a finding. What is important is that a finding presupposes application of mind. Application of mind is best demonstrated by disclosure of the mind; mind in turn is best disclosed by recording reasons. That is the soul of every adjudicatory process which affects the rights of the parties...."



47. On perusal of the aforementioned paragraphs, it is amply clear that the amendment made to the Act also aims to achieve the twin objectives i.e. obliging the Tribunal to provide reasons for its award and reducing the supervisory role of the courts in the proceedings. Therefore, it is well established that the courts can only examine the Award and should not conduct an inquiry into the facts and evidence of the matter.

48. Therefore, the Hon'ble Supreme Court, by way of various judgments, has laid down the grounds for which an arbitral award may be interfered with by the Court. According to the principle of limited and restricted intervention by the Courts, the decisive test of validity of an award is rigorous. Hence, in the instant case, this Court needs to analyze whether the petitioner had rightly and successfully invoked the limited grounds so available.

49. The aforementioned statutory provision and established judicial dictum establishes the criteria upon which an Arbitral Award may be set aside by the Court. These criteria encompass three essential facets: firstly, when the award contravenes the public policy; secondly, when the award exhibits patent illegality; and lastly, when the Arbitrator fails to adhere to the fundamental principle of natural justice.

50. Even though the petitioner has asserted the infringement of the principles of natural justice, the primary ground put forth by the learned ASG is that the impugned Arbitral Award is evidently flawed and suffers from 'patent illegality'. The law regarding the patent illegality is no more *res integra* and has been clarified by the Hon'ble Supreme Court in a



number of judicial pronouncements and it is well settled that a patent error in law must be based on a clear ignorance or disregard to the law.

51. In *ONGC Ltd. v. Saw Pipes Ltd.*, (2003) 5 SCC 705, the Hon'ble Supreme Court dealt with the interpretation of the term 'patent illegality' and laid down two qualifications for the same. First one being an obvious and evident illegality and second one being the mandate to analyze whether the said illegality goes to the root of the matter and is not trivial in nature. The relevant paragraph of the judgment is reproduced herein:

"30. It is true that under the Act, there is no provision similar to Sections 23 and 28 of the Arbitration Act, 1940, which specifically provided that the arbitrator shall pass award within reasonable time as fixed by the court. It is also true that on occasions, arbitration proceedings are delayed for one or other reason, but it is for the parties to take appropriate action of selecting proper arbitrator(s) who could dispose of the matter within reasonable time fixed by them. It is for them to indicate the time-limit for disposal of the arbitral proceedings. It is for them to decide whether they should continue with the arbitrator(s) who cannot dispose of the matter within reasonable time. However, non-providing of time-limit for deciding the dispute by the arbitrators could have no bearing on interpretation of Section 34. Further, for achieving the object of speedier disposal of dispute, justice in accordance with law cannot be sacrificed. In our view, giving limited jurisdiction to the court for having finality to the award and resolving the dispute by speedier method would be much more frustrated by permitting patently illegal award to operate. Patently illegal award is required to be set at naught, otherwise it would promote injustice.

31. Therefore, in our view, the phrase "public policy of India" used in Section 34 in context is required to be given a wider meaning. It can be stated that the concept of public policy connotes some matter which concerns public good





and the public interest. What is for public good or in public interest or what would be injurious or harmful to the public good or public interest has varied from time to time. However, the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice. Hence, in our view in addition to narrower meaning given to the term “public policy” in Renusagar case [1994 Supp (1) SCC 644] it is required to be held that the award could be set aside if it is patently illegal. The result would be — award could be set aside if it is contrary to:

- (a) fundamental policy of Indian law; or*
- (b) the interest of India; or*
- (c) justice or morality, or*
- (d) in addition, if it is patently illegal.*

Illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court. Such award is opposed to public policy and is required to be adjudged void.”

52. In ***State of Chhattisgarh v. Sal Udyog (P) Ltd., (2022) 2 SCC 275***, the Hon’ble Supreme Court further discussed the fundamentals of patent illegality, taking in view the judgments passed in several cases and held as under:

“14. The law on interference in matters of awards under the 1996 Act has been circumscribed with the object of minimising interference by courts in arbitration matters. 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.

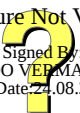
42.3. (c) Equally, the third sub-head of patent illegality is really a contravention of Section 28(3) of the Arbitration Act, which reads as under:

‘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.”

15. *In Ssangyong Engg. & Construction Co. Ltd. v. NHAI [Ssangyong Engg. & Construction Co. Ltd. v. NHAI, (2019) 15 SCC 131: (2020) 2 SCC (Civ) 213] , speaking for the Bench, R.F. Nariman, J. has spelt out the contours of the limited scope of judicial interference in reviewing the arbitral awards under the 1996 Act and observed thus : (SCC pp. 169-71, paras 34-41)*

“34. What is clear, therefore, is that the expression “public policy of India”, whether contained in Section 34 or in Section 48, would now mean the “fundamental policy of Indian law” as explained in paras 18 and 27 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] i.e. the fundamental policy of Indian law would be relegated to “Renusagar” understanding of this expression. This would necessarily mean that Western Geco [ONGC v. Western Geco International Ltd., (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12] expansion has been done away with. In short, Western Geco [ONGC v. Western Geco International Ltd., (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12] , as explained in paras 28 and 29 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , would no longer obtain, as under the guise of interfering with an award on the ground that the arbitrator has not adopted a judicial approach, the Court's intervention would be on the merits of the award, which cannot be permitted post amendment. However, insofar as principles of natural justice are concerned, as contained in Sections 18 and 34(2)(a)(iii) of the 1996 Act, these continue to be grounds of challenge of an award, as is contained in

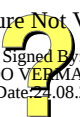


para 30 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] .

35. It is important to notice that the ground for interference insofar as it concerns “interest of India” has since been deleted, and therefore, no longer obtains. Equally, 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”. This again would be in line with paras 36 to 39 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , as it is only such arbitral awards that shock the conscience of the court that can be set aside on this ground.

36. Thus, it is clear that public policy of India is now constricted to mean firstly, that a domestic award is contrary to the fundamental policy of Indian law, as understood in paras 18 and 27 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , or secondly, that such award is against basic notions of justice or morality as understood in paras 36 to 39 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] . Explanation 2 to Section 34(2)(b)(ii) and Explanation 2 to Section 48(2)(b)(ii) was added by the Amendment Act only so that Western Geco [ONGC v. Western Geco International Ltd., (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12] , as understood in Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , and paras 28 and 29 in particular, is now done away with.

37. Insofar as domestic awards made in India are concerned, an additional ground is now available under sub-section (2-A), added by the Amendment Act, 2015, to Section 34. Here, there must be patent illegality appearing on the face of the award, which refers to such illegality as goes to the root of the





matter but which does not amount to mere erroneous application of the law. In short, what is not subsumed within “the fundamental policy of Indian law”, namely, the contravention of a statute not linked to public policy or public interest, cannot be brought in by the backdoor when it comes to setting aside an award on the ground of patent illegality.

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

39. To elucidate, para 42.1 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , namely, a mere contravention of the substantive law of India, by itself, is no longer a ground available to set aside an arbitral award. Para 42.2 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , however, would remain, for if an arbitrator gives no reasons for an award and contravenes Section 31(3) of the 1996 Act, that would certainly amount to a patent illegality on the face of the award.

40. The change made in Section 28(3) by the Amendment Act really follows what is stated in paras 42.3 to 45 in Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , namely, that the construction of the terms of a contract is primarily for an arbitrator to decide, unless the arbitrator construes the contract in a manner that no fair-minded or reasonable person would; in short, that the arbitrator's view is not even a possible view to take. Also, if the arbitrator wanders outside the contract and deals with matters not allotted to him, he commits an error of jurisdiction. This ground of challenge will now fall within the new ground added under Section 34(2-A).

41. What is important to note is that a decision which is perverse, as understood in paras 31 and 32 of



Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , while no longer being a ground for challenge under “public policy of India”, would certainly amount to a patent illegality appearing on the face of the award. Thus, a finding based on no evidence at all or an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside on the ground of patent illegality. Additionally, a finding based on documents taken behind the back of the parties by the arbitrator would also qualify as a decision based on no evidence inasmuch as such decision is not based on evidence led by the parties, and therefore, would also have to be characterised as perverse.”

16. *In Delhi Airport Metro Express (P) Ltd. [Delhi Airport Metro Express (P) Ltd. v. DMRC, (2022) 1 SCC 131] referring to the facets of patent illegality, this Court has held as under : (SCC p. 150, para 29)*

“29. Patent illegality should be illegality which goes to the root of the matter. In other words, every error of law committed by the Arbitral Tribunal would not fall within the expression “patent illegality”. Likewise, erroneous application of law cannot be categorised as patent illegality. In addition, contravention of law not linked to public policy or public interest is beyond the scope of the expression “patent illegality”. What is prohibited is for Courts to reappreciate evidence to conclude that the award suffers from patent illegality appearing on the face of the award, as Courts do not sit in appeal against the arbitral award. The permissible grounds for interference with a domestic award under Section 34(2-A) on the ground of patent illegality is when the arbitrator takes a view which is not even a possible one, or interprets a clause in the contract in such a manner which no fair-minded or reasonable person would, or if the arbitrator commits an error of jurisdiction by wandering outside the contract and



dealing with matters not allotted to them. An arbitral award stating no reasons for its findings would make itself susceptible to challenge on this account. The conclusions of the arbitrator which are based on no evidence or have been arrived at by ignoring vital evidence are perverse and can be set aside on the ground of patent illegality. Also, consideration of documents which are not supplied to the other party is a facet of perversity falling within the expression “patent illegality”.”

53. On perusal of the above judicial dicta, it is clear that the patent illegality is an illegality which goes to the root of the matter, but excludes the erroneous application of the law by an arbitral tribunal or the re-appreciation of evidence by an appellate court or a court adjudicating the challenge of an Award under Section 34 of the Act.

54. The aforesaid precedents have settled the position of challenge to an Award and it is settled that the petitioner need to show the patent illegality in the impugned Award which goes to the root of the award and in the absence of the same, the impugned Award cannot be held to be patently illegal.

55. The petitioner in the present case has raised an objection against the impugned Award, citing patent illegality of a fundamental nature. The said objection raised by the petitioner will be subjected to scrutiny in accordance with the already established principles enshrined within the statute itself, and expounded upon by the Hon’ble Supreme Court.

56. Taking into account the comprehensive spectrum of legal principles established and expounded upon by the Hon’ble Supreme Court, due consideration shall be accorded to both the contested Award



and the reasons rendered by the Arbitral Tribunal within it. In the course of addressing the contentions between the involved parties, the Tribunal delineated the subsequent overarching issues for assessment, as outlined within the impugned Award.

“3.1 The Tribunal, after going through the Statement of Claims, response by the Respondent in defense and the pleadings during the arbitral proceedings, identified the following relevant issues which have direct relationship with the dispute in question:

- i) Whether the change in Sizes of listed structure is a variation or not vis-a-vis interpretation of the Clause 2.0(3) of the Employer’s Requirement, Section 6 relating to Scope of Work.*
- ii) Can the dispute for the additional Earth work on account of change in sizes of claimed structures be denied under “Sub clause 2.0(3) Scope of Work and clauses 18(2), 18(4), 1.1.6.9 etc.” on the plea that the data provided in the tender document is indicative?*
- iii) Does “Sub-Clause 2.3.1 (2)- Designed alignment” imply that variation will be admissible only after alignment is designed and approved considering changes due to not only site survey, GeoTechnical report, Hydrology Report, listed structures but also additional structures? Also, does sub clause 1.1.6.9 “Variation clause” become inapplicable only after the finalisation of alignment and profile?*
- iv) What should be the basis of calculation of difference in earthwork on account of change in sizes of claimed structures being part of the listed structures?*
- v) How to assess and deal with the impact of dispute number 3 on dispute number 2, if any?*

57. Upon deliberations during the arbitral proceedings, the Tribunal rendered its decision on the aforesaid issues. In addressing the question of



whether changes in the dimensions of listed structures amount to a 'variation' with regard to Clause 2.0(3) of the Employer's Requirements (Scope of work), the Tribunal made the following observation:

“3.2.1 With regard to (i) above, i.e., whether changes in the sizes of listed structures constitutes 'variation' or not vis-à-vis Clause 2.03 of the Employer's Requirements (Scope of Work), the AT observes as under:

Sub- Clause 2.03 is reproduced below for ready reference:

Sub-Clause 2.0 (3)

The technical data provided by the Employer in Site Details. Part 4 of Bidding Document like plan and profile, GAD of bridges, geotechnical details, hydrological data, linear water way for bridges are indicative. However list of bridges, level crossings, RUBs, ROB and chartered utilities are furnished and any change will be treated as a variation. Contractor shall validate the indicative plan and profile provided by the Employer as above, after doing detailed topographic survey, hydrological survey, sub-surface and other site investigations. During the survey Contractor is required to capture sufficient details of existing railway network like formation, bridges /catchment area, Highest Flood Level, bed level, protection works etc.), Level Crossings, details of the structures coming on the proposed alignment, utilities and any other infringement at site etc. Based upon the survey the Contractor can modify/change the plan and profile of the alignment so as to get the best fit designed alignment of the section but remaining within the land boundaries set by the Employer.”

3.2.2 It is apparent from a reading of Sub-clause 2.03 that any structures outside the list will be treated as variation. The dispute, however, centers around the scenario where the sizes of these listed structures undergo a change and, if so, whether it qualifies as 'variation' or not. The Respondent contends that in D & B Contracts, this risk devolves on the Claimant. A deeper examination of the terminology in Contract documents and the contemporaneous conduct of



the parties, however, reveals the following facts which have a bearing on the AT's analysis and conclusion:

** The 'list' of Minor bridges and RUBs contains information such as Serial number, Bridge No., Chainage and the span. In contrast, the list of 17 Buried Boxes given at page 1868 of CA does not indicate any size or span of the buried boxes and only an approximate location has been given*

** Sub-clause 3.1 (23) of CA highlighted by the Respondent in his defence lays down that construction of RCC Boxes should conform to IRS Code, IRC and MORTH Specifications. Here again, the AT noticed that in the case of many of the bridges in the list, the Employer himself has given sizes/ specifications that are different from the codes mentioned above.*

** It is also noteworthy that the Respondent was in correspondence with various Local/Govt. bodies (CD-1 to CD-7) possibly to reduce cost by restricting dimensions of bridges. If indeed MORTH/IRC Specifications are so inviolable, as the Respondent would have us believe, it is intriguing as to why he himself was making such efforts with the Local bodies/PWD authorities and then approved various structures (including some in the list) whose dimensions were at variance with the said standards (either less or more) even before the Claimant came into picture. Evidently, the Respondent has not been consistent in his stand as regards specifications causing confusion and, possibly, even speculative bidding as well.*

Sub-clause 1.1.6.9 of Particular Conditions of Contract (P 109 CA) relating to variation reads as follows:

"Variation means any change in the scope of works, design and specification and criteria for testing and performance of the completed. works specified in Employer's Requirement."



3.2.3 As mentioned above, spans and foundations having undergone a change, there is little doubt that variation has occurred in the scope of work qualifying for consideration under Clause 1.1.6.9. The Respondent's contention that in Lump sum contracts, such as the subject contract, nothing extra is payable is unacceptable since there is a provision for variation in the contract and this variation has indeed occurred due to factors which could not have been either forecast or evaluated at the time of bidding. In the circumstances, it is unfair to hold the view that in lump sum contracts all risks devolve on the Claimant.

3.2.4 There is also merit in the contention of the Claimant that Clause 2.0(3), which mentions about the list and states that "any change in the list will be treated as variation ", is unambiguous. The said list, as stated earlier also, contains details like S. No., Chainage, and size of the bridge. Respondent's interpretation that 'only' the number of bridges is firm and the sizes are to be decided as per site conditions and codes/manuals, consultation with Local bodies and utility owners is somewhat ludicrous and, therefore, unacceptable. Contract documents do not have the word 'only' which the Respondent wishes to insert now in order to give a different interpretation to buttress his argument. This is clearly an after-thought as wording given in contract documents is sacrosanct. Also, inasmuch as the sizes of bridges could potentially vary from the MORTH/IRC Specifications to the specifications worked out / negotiated with Local bodies/villages, goes further to conclusively establish that the extent of variation that would finally be approved was unpredictable, given the myriad options available. In these rather speculative circumstances, no bidder is expected to have factored in costs that may widely vary in the course of execution, thereby making his bid unviable. It is all the more so when there is no apparent ambiguity in the wording of Clause 2.0(3) mentioning variation if there is change in the firm list.

3.2.5 There is enough evidence on record of this Tribunal to substantiate that the Claimant has been consistently insisting



right from the beginning that the change in sizes of structures constitutes variation in terms of Clause 2.0(3). Vide Claimant's letters at CDs-7 to CD- 9, it was made clear that any change to the size of the structures would amount to variation. This evidences contemporaneous understanding of the parties which was further confirmed by the Joint Inspection report signed by the parties on 27/11/2013. This joint 'decision-making' in respect of sizes of structures underscores the fact that the sizes could not have been unilaterally decided by the Claimant as averred by the Respondent. In other words, Respondent's letter dated 27/11/2013, which finally approves the sizes, tantamounts to a variation instruction and this cannot be interpreted in any other way. Even though the Respondent did not agree with this interpretation vide his letters dated 22.8.2013 and 2.9.2013, the Claimant persisted and reiterated his variation claim vide letter dated 25.11.2013 (CD-20). This letter was neither countered by the Respondent thereafter nor was the contractor restrained from further execution of the jointly agreed sizes of structures pending resolution of the issue of variation. The Respondent can thus be construed to be complicit in the interpretation that change in size indeed constitutes variation. This contemporaneous conduct and understanding of the parties leads the AT to infer that the change in the sizes of the structures was indeed a 'variation'.

3.2.6 It is, therefore, concluded that the variation in structures as listed at Pages 38 to 42 in the Statement of Claims is payable, keeping in view the change in Scope of Work. It is seen that the Respondent vide its submission dated 15.10.2019 has agreed with quantities claimed by claimed for structures even as he has disputed the entitlement of the claimant for variation. These quantities are considered admissible for payment.”

58. Upon awarding the sum of Rs.26,25,15,787/-, the Tribunal also remarked that Clause 2.0(3) delineating the list encompassing particulars such as Serial Number, chainage, and size of the bridges, and stating that



'any modification in the list shall be considered as a variation' is unequivocal. The Arbitral Tribunal diligently considered the contentions of both the parties and comprehensively documented the facts, circumstances and substantiating evidence before giving the aforementioned observations. With regards to a different interpretation of the clause 2.0(3), the Tribunal observed that the contract agreement lacks the term 'only,' and the petitioner's present inclination to introduce it as a means to foster an alternative interpretation is unwarranted. Furthermore, it was emphasized that the petitioner's argument seems evidently contrived, given the sanctity of the contract document.

59. The sub-clause 1.1.6.9 of the GCC as modified by the Particular Conditions of the Contract (PCC) provides for the definition of the term 'variation' in following manner:

"Variation means any change in the scope of works, design and specification and criteria for testing and performance of the completed works specified in Employer's Requirement."

60. On perusal of the aforesaid definition and its interpretation by the learned Tribunal, it is evident that the term 'variation' as provided in the contract itself has a wider scope and does cover the change in the size as a 'variation'. It is also clear that the said variation has occurred due to the factors which could not have been either foreseen or evaluated at the time of bidding. Therefore, the contention of the petitioner cannot be accepted and the findings of the learned Tribunal are found correct.

61. Regarding issues ii), iii), and iv), the Tribunal revisited Sub clause 2.0(3) along with clauses 18(2), 18(4), and 1.1.6.9 of the Contract. It conclusively determined that the entirety of the items enumerated in the



list during the initial phase must be unequivocally regarded as definitive, and any subsequent alterations emerging at a subsequent stage would be categorized as variations. The relevant paragraphs of the Tribunal's findings are reproduced below:

“3.3.1 Claimant argued that Clause 2.0 (3) states that various information provided in the contract are indicative. However, list of bridges, level crossings, ROBs, RUBs and chartered utilities are firm and any change will be treated as variation. The relevant sentence in the above-said Clause starts with the word " However" which means exception to the main rule. In other words, everything contained in the said list is firm and any change there from would be treated as variation. The Respondent is wrong in interpreting the wordings of the clause to suggest that the list "only" of the bridges, ROBs, RUBs, level crossings, chartered utilities are firm and the rest of the information in the list is indicative. To assume or add the non-existent word "only" to the language of the contract clause is impermissible

3.3.2 'The JV's Financial proposal while bidding for the contract was based on the scope of Works as defined in the Tender Documents with the span arrangements provided in the detailed list for Major and Minor Bridges as per CA (Page no. 1849 to 1856). Accordingly, the bids by different parties became comparable. Incidentally, even as the process for second stage bidding was underway, DFCCIL was in discussions with PWD with regard to the sizes of the structures. This goes to prove that the Respondent was aware of the possibility of such changes and, thus, consciously kept provision in the Contract under sub-clause 2.0 (3) to treat as variation any change in the list of structures provided in the Bid documents. Variation is provided under Clause 13 of the GCC/PC and defined under Clause 1.1.6.9 of the PCC. In the background of these contractual conditions, the Respondent was persuading the concerned Govt. departments to fix the size/type of structures. These efforts finally culminated in the sizes of



structures having to undergo substantial variations from the details given in the list. The Respondent vide his letter dated 27.11.2013 (CD-71) advised the Claimant to proceed with the finalisation of the alignment, profile, design etc., as proposed by the Claimant in his letter dated 23.11.2013. This tantamounts to variation instructed by the Employer within the meaning of Clause 13, thereby entitling the Claimant to compensation, as a consequence.

xxx xxx xxx

3.3.11 The Tribunal finds that Respondent's case in rejecting the claim for additional earth work on account of sizes of structure having undergone a change rests on the contention that (i) number of structures given in the list.

"only" is firm and other details mentioned in the list are indicative and () the changes in the sizes of RUBs are on account of contractor's design process and not arising out of the external requirements where respondent was also involved. The AT, after hearing both parties and having carefully gone through the relevant correspondence finds that the contention of the Respondent is not acceptable for the following reasons

- (a) Sub-Clause 2.0 (3) is confined only to listed structures as being firm and "any change" would be treated as variation. Respondent's interpretation of adding "only" after list in Clause 2.0 (3) is contractually impermissible. It is also not possible for the Bidder to design a Vertical profile where structures are potentially required to undergo changes in scope/size/type over and above the said firm list. Post award of contract, the nature of some structures, for example, did change from major to minor as also changes were made to the span arrangements of some other bridges. It is inconceivable how a bidder is expected to factor in these variables at the time of bidding and still remain competitive.
- (b) The Claimant has rightly pointed out that the Respondent has not been able to find any lacunae in the methodology adopted by the Claimant wherein the



Claimant had prepared the design which was approved by the Engineer (PMC) and the Employer. Following this process, the Claimant has logically determined the hypothetical profile with the sizes of structures as given in the CA.

(c) There is enough evidence on record to suggest that substantial design changes were introduced by DFCCIL which were beyond the Original Scope of Employer's Requirements under the Firm list to cater to the requirements of PWD, Railways, NHAI, Irrigation Department, local public etc., and which had substantial cost and time implications. These implications could not have been contemplated in the Base-line schedule and in contract price. The Claimant has, however, been highlighting these issues from the very inception (2013) as borne out by correspondence on record (e.g., CD-15, CD-23, CD-27).

(d) The Respondent, vide his letter dated 15.10.2019, while claiming to comment on the submissions made by the Claimant, has submitted profiles which are designed afresh. These Profiles were not required as per directives of the Tribunal. Not only were these revised profiles unwarranted, these were submitted much after the pleadings were closed. It is, therefore, an after-thought and as such no cognizance can be given to the revised profile which, in any case is based on data and facts which were not known earlier. It also seems to be a post-facto and theoretical exercise to discover a model profile which may have incorporated the most cost-effective engineering solutions but which remains untested and unverified.

3.3.12 The Tribunal, thus, concludes that the Profiles developed by the Respondent vide his communication dated 15.10.2019 are not admissible. Incidentally, in case of Dispute-2, the Profiles have been finalized as claimed by the Claimant. Further, the Respondent or the PMC could not point out errors in the Claimant's Profile and



subsequent computation. In fact, as already mentioned above while checking the quantities, the PMC has reported the Claimant's quantities to be matching with sample calculations carried out by the PMC. As such, the Claimant's Profiles and Quantities are admissible for Earthworks, Turfings and C&G work.”

62. Upon perusal of the aforesaid findings rendered by the Tribunal, it is clearly established that the Tribunal undertook a comprehensive analysis of the contentions raised and the corresponding submissions put forth by the concerned parties, it also appreciated the material on record and passed an Award supported by sound reasons. The interpretation of the sub-clauses dealing with the definition of the term ‘variation’ and its application to the facts of the circumstances do not invite interference of this Court and therefore, the impugned Award cannot be termed as legally untenable.

63. After answering all the substantive issues in favor of the respondents/claimants, the only issue left for consideration before the Tribunal was issue v) where the Tribunal referred to the report submitted by the PMC and held as under:

“3.3.14 Impact of Dispute no. 3 on Dispute no. 2

The Profiles submitted by the Claimant clearly show the impact of Additional Structures (Dispute / Claim 2) and impact on Changes in Sizes of Structures (Dispute / Claim 3). The common area, wherein the impacts so overlap due to these two Variations, are clearly show through separation lines on profiles and also area is shaded by Blue/Red hatching as per Legend so as to demarcate the claim on account of Additional Structures) (Claim no. 2) and claim on account of changes in Size of Structures) under Claim no 3. The Claimant, in his Statement of Claim, has also explained in details under



"(B) COMPUTATION OF CLAIM™(Ref-Vol.I, SOC Page 37 to 42)the procedure for quantity evaluation along with sample calculations (Ref- Vol. II, Annexure-1 Colly Page 68 to 73), analysis of rates and claim computation.

The Claimant has also submitted cross sections and L-Sections to substantiate the same. The cross sections are prepared at 20, intervals for both Base/ Impacted and approved profiles keeping the jointly signed ground level data intact (Ref- Compact Disc marked as Annexure- 6 Colly Vol XVII.

The Claimant also explained the same while commenting on the PMC Reports in submission under the cover of letter dated 06.08.2019 (Annexure B) for Lot-102, wherein the common area in terms of chainages along the alignment are tabulated. Having separated the impacts of both the causes of change i.e. additional structures & changes in the sizes of structures) and computing the additional works separately for each of the Claim, the Claimant has covered the impacts of each cause under Claim 2 and Claim 3 individually and separately.

The PMC in its report does not find any error/mistakes OR duplicity as to computation of quantities for Claim 2 and Claim 3. The Respondent also did not point out any duplicity of cleared quantities.

'The Tribunal finds explanations and substantiations of the Claimant on impacts of Claim 2 and Claim 3 as also computation of quantities to be fair and reasonable. There are some common chainages wherein Claim 2 overlaps with Claim 3. However, these have been dealt separately under Claim 2 and Claim 3.'

64. Hence, it is evident that the Tribunal had substantiated all the findings with the evidences on record and had duly accorded the findings of the PMC report while adjudicating the aforesaid issue.

65. Therefore, it is crystal clear that the learned Tribunal dealt with the said issue properly and provided reasoning to rebut the contentions made



by the petitioner. The Tribunal, while making extensive observations upon appreciating the terms of the agreement between the parties as well as the subsequent course of the events unfolded between the parties, had rightly concluded the proceedings by directing the petitioner to pay for the additional costs incurred by the respondent/claimant for completion of the project.

66. Now, coming to the aspect of violation of the principles of natural justice, the learned ASG submitted that the principles of natural justice were violated as the profiles developed and communicated to the Tribunal by the petitioner were rejected without affording an opportunity of hearing to the petitioner. It is well settled that the principle of *audi alteram partem* is one of the fundamental principles of natural justice and every party to an arbitral proceeding must be given a reasonable opportunity to present its case. The question of what constitutes reasonable opportunity was decided by the Hon'ble Supreme Court in ***Sohan Lal Gupta v. Asha Devi Gupta, (2003) 7 SCC 492*** whereby it was held that a party must be given an opportunity to explain its arguments and to adduce evidence in support of its case.

67. In the instant case, a bare perusal of the impugned Award can clarify the question of whether the petitioner was given a reasonable opportunity or not. The learned Tribunal has fairly commented on the submissions made by the petitioner and had then only decided the dispute. Therefore, the rejection of the profiles developed by the petitioner cannot be termed as a violation of the principle of natural justice as the same was taken into consideration by the Tribunal.



68. Hence, the petitioner's assertion of a breach of the aforementioned principle cannot be accepted by this Court, and consequently, the impugned Award cannot be set aside on the said grounds. Given the petitioner's inability to convince this Court regarding the stated contentions, it becomes apparent that none of the elements outlined under Section 34 of the Act can be substantiated against the impugned Arbitral Award.

69. At last, it is pertinent to look into the aspect of interest levied on the sum awarded to the respondent/claimant. The petitioner raised an objection to the interest levied by the Arbitral Tribunal submitting to the effect that the compound interest imposed by the Arbitral Tribunal on the amount to be paid by the petitioner is exorbitant and unreasonable and such interest rate is in contradiction of the terms of the agreement.

70. It is well known that the Arbitral Tribunal has the jurisdiction and power to make an award pertaining to interest. The said principle has been stated by the Hon'ble Supreme Court again and again and prevails as the settled principle of law. In ***Hyder Consulting (UK) Ltd. v. State of Orissa*, (2015) 2 SCC 189**, the Hon'ble Court reiterated the settled position and held as under:

“2. It is not possible to agree with the conclusion in S.L. Arora case [State of Haryana v. S.L. Arora and Co., (2010) 3 SCC 690 : (2010) 1 SCC (Civ) 823] that Section 31(7) of the Act does not require that interest which accrues till the date of the award be included in the “sum” from the date of award for calculating the post-award interest. In my humble view, this conclusion does not seem to be in consonance with the clear language of Section 31(7) of the Act.



3. Sub-section (7) of Section 31 of the Act, which deals with the power of the Arbitral Tribunal to award interest, reads as follows:

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

(b) A sum directed to be paid by an arbitral award shall, unless the award otherwise directs, carry interest at the rate of eighteen per centum per annum from the date of the award to the date of payment.”

4. Clause (a) of sub-section (7) provides that where an award is made for the payment of money, the Arbitral Tribunal may include interest in the sum for which the award is made. In plain terms, this provision confers a power upon the Arbitral Tribunal while making an award for payment of money, to include interest in the sum for which the award is made on either the whole or any part of the money and for the whole or any part of the period for the entire pre-award period between the date on which the cause of action arose and the date on which the award is made. To put it differently, sub-section (7)(a) contemplates that an award, inclusive of interest for the pre-award period on the entire amount directed to be paid or part thereof, may be passed. The “sum” awarded may be the principal amount and such interest as the Arbitral Tribunal deems fit. If no interest is awarded, the “sum” comprises only the principal. The significant words occurring in clause (a) of sub-section (7) of Section 31 of the Act are “the sum for which the award is made”. On a plain reading, this expression refers to the total amount or sum for the payment for which the award is made. Parliament has not added a qualification like “principal” to the word “sum”, and therefore, the word “sum” here simply means “a particular amount of money”.



In Section 31(7), this particular amount of money may include interest from the date of cause of action to the date of the award.

5. The Oxford Dictionary gives the following meaning to the word “sum”:

Sum, ‘if noun’.—A particular amount of money.

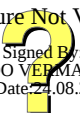
Sum, ‘if verb’.—The total amount resulting from the addition of two or more numbers, amounts, or items.

6. In Black's Law Dictionary, the word “sum” is given the following meaning:

“Sum.—In English law—A summary or abstract; a compendium; a collection. Several of the old law treatises are called ‘sum’. Lord Hale applies the term to summaries of statute law. Burrill. The sense in which the term is most commonly used is ‘money’; a quantity of money or currency; any amount indefinitely, a sum of money, a small sum, or a large sum. United States v. Van Auken [24 L Ed 852: 96 US 366 (1878)] and Donovan v. Jenkins [52 Mont 124: 155 P 972 at p. 973]”

7. Thus, when used as a noun, as it seems to have been used in this provision, the word “sum” simply means “an amount of money”; whatever it may include — “principal” and “interest” or one of the two. Once the meaning of the word “sum” is clear, the same meaning must be ascribed to the word in clause (b) of sub-section (7) of Section 31 of the Act, where it provides that a sum directed to be paid by an arbitral award “shall ... carry interest ...” from the date of the award to the date of the payment i.e. post-award. In other words, what clause (b) of sub-section (7) of Section 31 of the Act directs is that the “sum”, which is directed to be paid by the award, whether inclusive or exclusive of interest, shall carry interest at the rate of eighteen per cent per annum for the post-award period, unless otherwise ordered.

8. Thus, sub-section (7) of Section 31 of the Act provides, firstly, vide clause (a) that the Arbitral Tribunal may include interest while making an award for payment of money in the sum for which the award is made and further, vide clause (b)





that the sum so directed to be made by the award shall carry interest at a certain rate for the post-award period.

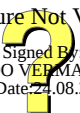
9. *The purpose of enacting this provision is clear, namely, to encourage early payment of the awarded sum and to discourage the usual delay, which accompanies the execution of the award in the same manner as if it were a decree of the court vide Section 36 of the Act.*

10. *In this view of the matter, it is clear that the interest, the sum directed to be paid by the arbitral award under clause (b) of sub-section (7) of Section 31 of the Act is inclusive of interest pendente lite.*

11. *At this juncture, it may be useful to refer to Section 34 CPC, also enacted by Parliament and conferring the same power upon a court to award interest on an award i.e. post-award interest. While enacting Section 34 CPC Parliament conferred power on a court to order interest “on the principal sum adjudged” and not on merely the “sum” as provided in the Arbitration Act. The departure from the language of Section 34 CPC in Section 31(7) of the 1996 Act is significant and shows the intention of Parliament.*

12. *It is settled law that where different language is used by Parliament, it is intended to have a different effect. In the Arbitration Act, the word “sum” has deliberately not been qualified by using the word “principal” before it. If it had been so used, there would have been no scope for the contention that the word “sum” may include “interest.” In Section 31(7) of the Act, Parliament has deliberately used the word “sum” to refer to the aggregate of the amounts that may be directed to be paid by the Arbitral Tribunal and not merely the “principal” sum without interest.*

13. *Thus, it is apparent that vide clause (a) of sub-section (7) of Section 31 of the Act, Parliament intended that an award for payment of money may be inclusive of interest, and the “sum” of the principal amount plus interest may be directed to be paid by the Arbitral Tribunal for the pre-award period. Thereupon, the Arbitral Tribunal may direct interest to be paid on such “sum” for the post-award period vide clause (b) of sub-section (7) of Section 31 of the Act, at which stage*





the amount would be the sum arrived at after the merging of interest with the principal; the two components having lost their separate identities.

14. In fact this is a case where the language of sub-section (7) clauses (a) and (b) is so plain and unambiguous that no question of construction of a statutory provision arises. The language itself provides that in the sum for which an award is made, interest may be included for the pre-award period and that for the post-award period interest up to the rate of eighteen per cent per annum may be awarded on such sum directed to be paid by the arbitral award.”

71. The aforesaid reasoning was also reiterated by the Hon’ble Supreme Court in ***Delhi Airport Metro Express (P) Ltd. v. DMRC, (2022) 9 SCC 286*** and it was held that the Arbitral Tribunal has discretion to provide for interest on the sum awarded to the party. The relevant paragraph is reproduced hereinbelow:

“20. If clause (a) of sub-section (7) of Section 31 of the 1996 Act is given a plain and literal meaning, the legislative intent would be clear that the discretion with regard to grant of interest would be available to the Arbitral Tribunal only when there is no agreement to the contrary between the parties. The phrase “unless otherwise agreed by the parties” clearly emphasises that when the parties have agreed with regard to any of the aspects covered under clause (a) of sub-section (7) of Section 31 of the 1996 Act, the Arbitral Tribunal would cease to have any discretion with regard to the aspects mentioned in the said provision. Only in the absence of such an agreement, the Arbitral Tribunal would have a discretion to exercise its powers under clause (a) of sub-section (7) of Section 31 of the 1996 Act. The discretion is wide enough. It may grant or may not grant interest. It may grant interest for the entire period or any part thereof. It may also grant interest on the whole or any part of the money.”



72. Hence, it is clearly established that the Tribunal had the jurisdiction and the power to grant and bestow an interest while passing the Award, given the absence of any preceding agreement between the parties concerning said interest.

73. The course of the procedure taken by the Tribunal as well as the findings as reproduced above are evidently not in contravention of any provisions under the Act or even any substantive law. There is nothing in the observations in the impugned Award to suggest that the Tribunal contravened or went beyond the terms of the agreement executed between the parties. The Tribunal provided reasons for the findings delivered and there is no perversity which is either apparent on the face of the record or which goes to the root of the matter. Therefore, the impugned Award cannot be said to be patently illegal. Furthermore, there is nothing in the Award, even to the aspect of interest, which would lead this Court to take the view that there is any gross illegality which goes to the root of the matter or error apparent on the face of the record which would render the Arbitral Award patently illegal.

CONCLUSION

74. It is settled law that the ground of patent illegality gives way to setting aside an Arbitral Award with a very minimal scope of intervention. A party cannot simply raise an objection on the ground of patent illegality if the Award is against them. Patent illegality requires a distinct transgression of law, the clear lack of which makes the petition a



pointless effort of objection towards an Award passed by a competent Arbitral Tribunal.

75. A reading of the precedents cited and its application on the impugned award, it proves that under the limited scope of Section 34 of the Act, the present case does not warrant the interference of this Court, as the grounds stated by the petitioner in the instant petition do not fall within the scope of this section. In the instant case, the petitioner claimed that the Arbitrator misappreciated the evidence on record and wrongly interpreted the relevant clauses of the contract agreement, but a careful reading of the Award shows that the Arbitrator has rightly relied on relevant evidence to adjudicate and had fairly interpreted the clause dealing with the term 'variation'. Accordingly, with reference to the aforesaid judgments and the impugned Arbitral Award, the petitioner cannot have the benefit of the ground of 'patent illegality' to assail the impugned Arbitral Award under Section 34 of the Act.

76. In view of the above discussion of facts and law, the conclusion drawn and findings given by the Arbitral Tribunal are not of the nature that would shock the conscience of this Court. Therefore, this Court finds no reason to set aside the impugned Arbitral Award.

77. The petition is, accordingly, dismissed along with pending applications, if any.

78. The judgment be uploaded on the website forthwith.

(CHANDRA DHARI SINGH)
JUDGE

AUGUST 24th 2023
SV/AV

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