



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

Date of decision: 18th July, 2023

IN THE MATTER OF:

+ **FAO(OS) (COMM) 45/2022 & CM APPL. 9296/2022**

NTPC LTD

..... Appellant

Through: Mr. Aman Lekhi, Sr. Advocate with
Mr. Adarsh Tripathi, Mr. Ritwiz
Rishabh, Mr. Vikram Singh Baid and
Mr. Ajitesh Garg, Advocates.

versus

L AND T - MHPS BOILERS PVT LTD

..... Respondent

Through: Mr. Dayan Krishnan, Sr. Advocate
with Mr. Dharendra Negi, Ms. Tanya
Tiwari, Mr. Rishabh Yadav and Mr.
Sukrit Seth, Advocates.

+ **FAO(OS) (COMM) 46/2022 & CM APPL. 9300/2022**

NTPC LTD

..... Appellant

Through: Mr. Aman Lekhi, Sr. Advocate with
Mr. Adarsh Tripathi, Mr. Ritwiz
Rishabh, Mr. Vikram Singh Baid and
Mr. Ajitesh Garg, Advocates.

versus

LARSEN AND TOUBRO LIMITED

..... Respondent

Through: Mr. Dayan Krishnan, Sr. Advocate
with Mr. Dharendra Negi, Ms. Tanya
Tiwari, Mr. Rishabh Yadav and Mr.
Sukrit Seth, Advocates.

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

JUDGMENT

1. The present Appeals have been filed under Section 37 (1)(c) of the



Arbitration and Conciliation Act, 1996 (“**A&C Act**”) read with Section 13 of the Commercial Courts Act, 2015, challenging the Judgement dated 26.11.2021 passed by a Ld. Single Judge of this Court in OMP (COMM) 560/2020 and the Judgement dated 29.11.2021 passed by a Ld. Single Judge of this Court in OMP (COMM) 567/2020 (“**Impugned Judgements**”).

2. Through the present Appeals, the Appellant has prayed that this Court sets aside the Impugned Judgements whereby the findings of the Ld. Arbitral Tribunals have been partially confirmed, and hold that the claims of the Respondent stand rejected.

3. Vide the Impugned Judgements, the Ld. Single Judge had partly allowed the Application of the Appellant herein, under Section 34 of the A&C Act, whereby it had challenged the awards of the Ld. Arbitral Tribunals constituted for adjudication of disputes emanating out of the contracts entered into between the parties herein. The Ld. Single Judge was pleased to partly set aside the arbitral awards dated 12.06.2020 in OMP (COMM) 560/ 2020, and 25.06.2020 in OMP (COMM) 567 / 2020 (“**Impugned Awards**”).

4. Since the present Appeals bear similar facts, points of law and are interconnected, this Court deems it fit to dispose them of vide this Common Judgement. For the sake of brevity, the facts leading up to FAO (OS) (COMM) 45/ 2022 are being referred. The brief facts of the case relevant for adjudicating the instant disputes are that –

- a. The Appeal in FAO (OS) (COMM) 45 / 2022 emanates from a tender which was awarded to the Respondent by the Appellant for setting up of Steam Generator, Tanda Thermal Power Project Stage – II (2x660 MW) located at Vidyut Nagar, District Ambedkar Nagar, Uttar Pradesh on EPC basis. The



Respondent had participated in the bidding process as per terms of the NIT floated by the Appellant for the aforesaid project, and emerged the successful bidder. As the works to be carried out were divided into three packages, the Appellant had issued three notifications of award in favour of the Respondent on 11.09.2014 pertaining to these. Thereafter, three contracts between the parties for the works to be carried out, were executed on 07.10.2014.

- b. Disputes between the parties arose with respect of works to be carried out by the Respondent in the third package, i.e., for ‘Inland Transportation including Port Clearance, Port Charges and Inland Insurance Charges for Plant and Equipment and Mandatory spares covered under the first and second contract, Installation Services of Steam Generator (SG) Package for Tanda Thermal Power Project, Stage II (2 x 660 MW), bearing Ref. No. CS-9562-102—2-TC-NOA-6212 (**“Tanda Contract”**).
- c. The crux of the dispute revolved around extra monies which accrued to workers/ labourers who had been engaged by the contractor/ Respondent/ L&T MHPS Boilers Pvt. Ltd on account of a notification dated 19.01.2017 published by the Ministry of Labour and Employment, Government of India, i.e., S.O. 188 (E), whereby the Ministry notified a revised and increased rate of wages to be paid to various categories of labourers. The Tanda Contract involved performance of various installation services, civil works and structural activities for which labour was deployed at the relevant site.



- d. On account of the aforesaid notification whereby the Ministry of Labour and Employment revised and increased minimum rate of wages to be paid to various categories of labourers, communications were sent by the Respondent herein requesting the Appellant to consider the financial impact on account of it and the economic viability of the project. The Respondent requested the Appellant to consider relevant provisions of the Tanda Contract i.e., Clause 26 of the Special Conditions of Contract (“SCC”) which replaced Clause 36.1 of the General Conditions of Contract (“GCC”), providing for reimbursement of additional cost or expenditure caused to the contractor, on account of enactment of new law, modification of existing act/statute as the same is not covered under the Price Adjustment provisions of the contract. The relevant provision of the SCC providing for effect of change in law is being reproduced hereunder for reference –

“26. Change in Laws and Regulations

If, after the date seven (7) days prior to the last date of Bid submission, in the country where the Site is located, any law, regulation, ordinance, order or bylaw having the force of law is enacted, promulgated, abrogated or changed (which shall be deemed to include any change in 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 direct transactions between the Employer and the Contractor/ Assignee of Foreign Contractor (if applicable). These adjustments shall not be applicable on procurement of raw materials, intermediary components etc. by the Contractor/Assignee of Foreign Contractor and shall also not be applicable on bought out items despatched directly from sub vendor works to site. 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 to the Contract Agreement.

Notwithstanding aforesaid, in the event of withdrawal of Deemed Export Benefits as per the extant Foreign Trade Policy of Govt of India, the impact of differential duty/tax liability shall be adjusted in Contract Price subject to documentary evidence. The adjustment in tax liability shall however be restricted to the value of CJF component declared in the Attachment-9 end ex-works value of Bought out item's declaration given in Attachment-13.

Further in the event of introduction of GST or any other tax in lieu of existing Excise Duty/ Service Tax and VAT / Sales Tax, etc., the impact of differential Tax liability, if any on the total Contract price including Bought Out Items (to be dispatched directly from sub-vendor's works to site) will also be adjusted in Contract Price subject to documentary evidence. The total differential Tax liability will be limited to the applicable increase/ decrease in Tax rate on the Contract price including sub-vendor items specified in the Bid in Attachment-13.



In case Attachment-13 duly filled is not submitted along with bid or is left blank or statement/ any declaration like 'later', 'to be furnished later', 'NA' etc. are indicated, in such cases contractor will not be eligible for. any adjustment in the event of withdrawal of Deemed export benefits & /or introduction of GST and no claim in this regard shall be entertained by the Employer.

The above adjustment however shall be restricted to schedule I date of dispatch or actual whichever is less."

- e. It is stated that vide various letters, in response to the stance of the Respondent, the Appellant herein informed the Respondent that any change in cost of labour is already accounted for in terms of the Price Adjustment formula provided for under Appendix 2 of the Tanda Contract, without any ceiling, and no separate claim is admissible on account of additional cost or expenditure if any, on account of hike in minimum wages. The relevant Price Adjustment formula as provided for under Appendix 2 of the Tanda Contract is also reproduced hereunder for reference —:

"11. Appendix-2 to the Contract Agreement contained a formula for revision in the price component for civil works, structural works, installation, testing and commissioning. The said formula for the Indian Rupee portion for the Installation Services is set out below:-

"For Installation Price Component (excluding Civil Works and Site Fabricated Structural Works component) of the contract:

- i) It is understood that the price component for*



erection portion of Installation Services comprises a fixed portion and variable portion linked with the index of labour (description and co-efficient as enumerated).

ii) The monthly price adjustment amount for the erection portion of Installation Services component will be computed as per the formula given below:

a) Indian Rupee Portion of the Installation Services

$$ER = ER1 - ER0$$

ER1 will be computed as follows:

$$ER1 = ER0 (0.15 + 0.85 FI)$$

$$\frac{\text{-----}}{Fo}$$

Where :

ER = Adjustment to Erection portion of Installation Services component of contract price expressed in Indian Rupees payable to the contractor for each billing.

ER1 = Adjustment amount of Erection portion of Installation Services component of contract price expressed in Indian Rupees payable to the Contractor.

ER0 = Value of the Erection work done in the billing period, which shall be calculated as under:

For the purpose of computing ER0, each Erection bill (which is excluding initial Advance and amount payable on completion bill (which is excluding initial Advance and amount payable on completion of the Facilities and on



successful completion of Guarantee test) during the Erection period upto the 'Completion of the Facilities' shall be divided by a factor as indicated below:

Erection portion of Installation – Services component of the Contract Price [Initial Advance amount + Erection Portion of Installation Services component of the Contract Price payable on completion of the Facilities + Erection Portion of Installation Services component of the Contract Price payable on successful completion of Guarantee test]”

- f. As no amicable conclusion could be reached between the parties with respect to the rights, obligations and payments due in light of the S.O. of the Ministry of Labour and Employment, the Respondent herein, in accordance with the mechanism for dispute resolution as provided for under the Tanda Contract, referred the present dispute to the Ld. Adjudicator.
- g. An Adjudicator was appointed in the matter. The Ld. Adjudicator, after perusing the material on record and the arguments propounded, held that the Notification dated 19.01.2017 is a change in law within the meaning of Clause 26 of the SCC. It was thus held, that the Respondent herein was entitled to reimbursement/ compensation in terms of Clause 26 of the SCC to the extent of real difference in the additional cost/ expenditure incurred by the Respondent in complying with the mandate of Notification dated 19.01.2017.
- h. Upon receipt of the aforesaid Order of the Ld. Adjudicator, the Appellant herein, being dissatisfied with the same, invoked



arbitration as per the next line of the dispute resolution mechanism envisaged under Clause 6.2.1 under the Tanda Contract.

- i. An Arbitral Tribunal consisting of three retired Judges of the Apex Court was constituted and an award was passed on 25.06.2020. The Ld. Arbitral Tribunal relying on the notification dated 19.01.2017 issued by the Ministry of Labour and Employment by majority partially allowed the Respondent's claim of Rs.38,30,42,225.76/- inclusive of interest in respect of reimbursement due to it. The Ld. Arbitral Tribunal awarded Rupees 7.104 crores with interest at the rate of 10 % per annum till the date of payment to the Respondent, along with Rs. 50,00,000/- as costs towards pursuing the arbitration to be paid within a period of six weeks by the Appellant herein.
- j. After perusing the relevant material on record and hearing arguments with respect to applicability of Clause 26 of the SCC / Appendix 2 of the Tanda Contract, the Ld. Tribunal was pleased to rule in favour of the Respondent and held that Clause 26 of the SCC would be attracted in light of coming into effect of the notification of the Ministry of Labour and Employment dated 19.01.2017 as the same amounts to a change in law.
- k. The reasoning propounded by the Ld. Tribunal for awarding the said amount was that the same had been admitted by the Appellant herein before the Ld. Arbitral Tribunal in its written submissions. It was held by the Ld. Tribunal that with respect to the Respondent's claim of Rs. 38,30,42,225.76/- inclusive of



interest at the rate of 14 % per annum on account of increase in minimum wage rate vide notification dated 19.01.2017, no evidence at all was led to prove that the said expenditure was incurred. It held that no evidence at all was led by the Respondent herein to prove and establish that the said amount of money was actually paid to the labourers by way of enhanced minimum wages. Though no evidence was led, it was observed that due to the Appellant justifying certain amounts due to the Respondent herein by way of leading evidence and admitting it, monies to the tune of Rs.7.104 Crores have become due and payable.

1. The Ld. Tribunal also observed that the Respondent would be allowed further six weeks' time to prove that it had incurred an expenditure in excess of the said amount admitted by the Appellant. The Appellant and Respondent were directed to jointly examine the details regarding such an expenditure in excess to the amount awarded and the Appellant was directed to pay the amount so verified jointly, along with interest at the rate of 10 % per annum from the date of Statement of Claim till the date of payment. The Arbitral Tribunal further directed that in the event the parties were unable to agree on the amount payable, they would take the assistance of a Chartered Accountant, who would examine the documents furnished by the Respondent; determine the amount payable; and issue a certificate certifying the amount payable by the Appellant to the Respondent. The relevant portions of the Award of the Ld. Tribunal observing the aforesaid is reproduced hereunder for



reference:-

“40. It is therefore held that the revision of basic rates of the minimum wages falls within the ambit of change of law/statute. Therefore, this falls squarely within the purview of Clause 26 of SCC.

41. We also record a finding that from a plain reading of Clause 26 quoted at paragraph 16 above it would be clear that the Clause pertains to reimbursement of actual expenditure incurred, on grounds of change of a law/statute. We are of the opinion that actual expenditures incurred would only be liable to be reimbursed subsequent to notification dated 19.01.2017. The requirement of proof thereafter inevitably follow for a claim of reimbursement. We accept the Respondent's assertions at para 25 of their written arguments that for the sake of arguments but without admitting the same, if the Claimant is held to be entitled to some reimbursement due to additional cost/expenditure due to increase in minimum wages it should be reimbursed to the actual difference in additional cost/expenditure. The Claimant actually pays to its labour only the minimum wages and not the notional claim and therefore any award for payment of such notional claim would amount to unjust enrichment. We find force in the submissions of the Respondent that the additional compensation provided under clause 26 is to be defrayed by actual expenditure given the language of the clause. Thus the formula for a lump sum basis cannot be imported and employed for the purpose of compensating a onetime increase in basic wage part of the minimum wage as this increase does not find a corresponding increase in the CPI-IW. We are, therefore, of the considered opinion that increased compensation claimed cannot be based on the formula or Lump sum basis.

42. The claimant submitted that the documents relied upon by the respondent, cannot be relied upon to come to an accurate computation on ground of non-inclusion of other support staff and payments linked to rise in minimum



wage like Bonus, PF etc., the matter of total quantification is addressed by paragraph below.

43. In this connection, we have considered the submission of the counsel appearing for the respondent and also have gone through the written submissions filed by the respondent. The respondent has stated in paragraph 27 of their written submissions that the respondent along with its affidavit of evidence filed two sets of documents of which EXHIBIT R2(collectively) filed along with Affidavit of Evidence of RW1, Mr. R.K. Singh, AGM-ME of the Respondent, being the set of documents submitted by the claimant as proof of payment to its employees and employees of Its sub-contractor. The documents are as an example of the documentation available with the Respondent. In paragraph 27 of the Written Arguments, the respondent has stated that the respondent has also filed the chart showing the actual number of man-days occurring in the employment of the Claimant in the package under consideration.

44. It has been submitted by the Respondent that the total implication of increase in cost of the contract price due 'to increase in minimum wages with reference to the employees of the Claimant amounts to about Rs. 7.104 crores as mentioned in page 1 of the said Exhibit R2 collectively filed along with Affidavit of Evidence RW1, Shri RK Singh, AGM-ME of the Respondent. The said Exhibit also gives the number of labour mandays as employed by various sub-contractors of the Claimant. When we are faced with the situation of making an assessment of the quantum payable in view of the revision, we find that no evidence at all is led by the Claimant to prove and establish as to what amount was paid by the Claimant (Contractor) to the labourers by way of enhanced minimum wages which is required to be reimbursed as stipulated in the agreement and consequently, it was not possible to make such an assessment and therefore, the claim of the Claimant for payment was found to be not proved. But fortunately, for



the Claimant, the Respondent has led some evidence justifying payment of such amount by way of reimbursement through placing on record Annexure-R1 and R2. The said evidence of the R1 and R2 is based on the records available with the Respondent indicating enhanced payment by the Claimant to the labourers by way of payment of revised minimum wages which is reimbursed by the Respondent. As discussed hereinbefore, there is no difficulty in relying upon and derive support from the said evidence as the said evidence is in the nature of admission towards obligation to pay by way of reimbursement. Consequently, we act upon such admission of the Respondent and assess the quantum of the amount of Rs. 7.104 crores as payable to the Claimant by way of reimbursement towards payment of revised wages. We also, in the interest of justice, grant one more opportunity and liberty to the Claimant, to prove and establish before the Respondent through production of reliable and cogent evidence that it is entitled to more amount than Rs. 7.104 crores by way of reimbursement of the amount paid by the Claimant to the labourers which is the amount assessed by us on the basis of the admission of the Respondent. We also make it clear that we are inclined to provide this one time opportunity to the Claimant as it could not and did not produce any evidence in the arbitration proceeding to justify assessment of the quantum by way of reimbursement in view of its own separate interpretation of the clause referred to hereinbefore, which we find illegal, unacceptable and baseless.

45. Additional payments on account of Bonus, PF etc. linkage to raised minimum wage are also claimed by the claimant. The claim has not been quantified. It is considered that such additionality on furnishing of strict proof of payment for number and category of labourers compiled at EXHIBIT R 2 (colly) shall be admissible to the claimant.

46. The claimant has also prayed at prayer (c) of the Statement of Claim for an Award directing the Respondent



to pay increased costs to the Claimant the amounts due on account of the Notification dated 19.01.2017 every month from 01 May 2019 onwards within 45 days of the receipt of the invoice till the completion of the Contract works on the same basis as mentioned in prayer (a) and in case of delay in payment, to pay such costs along with interest at the rate of 14% per annum on the amounts due every month till the date of payment. We are not aware of the contractual arrangements in terms of formalities and time on payments between the claimant and the respondent, hence we refrain from stipulating a time for ensuring payment and interest thereof. The Claimant has not quantified the claim, however the Respondent has not also opposed the same. We, therefore, determine that the claims after January 1, 2019' be paid in accordance with our decision on payment of claim due for the period 20.04.2017 to 29.04.2019, interest however may not be admissible.

47. Claim 1 & 2

The claims of the Claimant were to pass an award on account of increase in the costs resulting from the notification dated 19/01/2017 and interest thereof @ 14% against the respondent on monthly payments due from 20.04.2017 till 29.04.2019.

The claim as modified by the Claimant was Rs. 38,23,63,428.06 crores on account of revision of basic rate of the minimum wages till 29.04.2019 inclusive of interest thereof @ 14%.

The Claimant has further claimed for an award of interest at 14% on the monthly due payments from 30.04.2019 till the date of payment.

In consequence of the legal position present before us and issues as decided herein above, we hold that the claimant is entitled to receive an amount of Rs.7.104 crores as per the statement made by the Respondents



*themselves in their written submission. Therefore, this amount shall be paid by the Respondent to the Claimant along with an interest of 10% per annum from the date of filing of the claim before the Tribunal till date of payment. The Claimant has claimed that they have made other payments like PF, bonus etc. based on the enhanced minimum wage and there may well be other errors on behalf of the compilation referred above leading to a payment of Rs. 7.104 Crores. **The additional compensation on account of Bonus, PF etc. on account of increase of minimum wage shall be restricted to category and number employed at work site. It shall, however, be open to the claimant within six weeks from today to prove and establish through other and additional evidence on proof of payment that they had incurred and in fact paid more than this amount to their labourers either directly or through their subcontractors. This nature of additional evidence if any when produced by the claimant before the respondent within six weeks, the respondent shall examine the validity and legality of the said evidence and proof and give due weightage to such evidence and thereafter jointly arrive at an agreed figure. If the said figure is more than Rs.7.104 Crores the same shall be paid by the Respondents within six weeks thereafter. The additional amount, which is found due and payable, shall also be paid by the respondent to the claimant along with an interest of 10% per annum on the said amount also, from the date of filing of this claim till the date of payment.***

The evidence that is produced by the claimant in support of its further claim would be scrutinised by the claimants and respondents jointly and the amount arrived at after such mutual discussion shall be accordingly paid in the aforesaid manner and, if in case, no joint decision is arrived at, it shall be open to the parties to take help of a recognised and duly certified chartered accountant who shall compare the records and on the basis thereof certify an amount which is found due and payable, if any, to the Claimant in which case, the said amount shall be paid by



the Respondent within two months of such decision. The amount so determined by the chartered accountant as payable to the Claimant over and above payment already received by the Claimant on this count shall also carry an interest of 10% per annum from the date of the claim petition till the date of payment.”

5. Aggrieved against the Impugned Award, the Appellant and the Respondent herein filed cross-applications under Section 34 of the A&C Act before this Court following which the Impugned Judgements were passed. The Ld. Single Judge, while disposing of the applications under Section 34 of the A&C Act held that it cannot be construed that the Impugned Award is *ex-facie* contrary to the terms of the contracts entered into between the parties and therefore vitiated by patent illegality. It was held that the decision of the Ld. Tribunal with regards to the construction and interpretation of the contract was final and that the Court cannot supplant its view in place of that of the Ld. Tribunal. The scope of adjudication under Section 34 of the A&C Act is limited and that unless the Court finds that the Impugned Award is patently illegal on the face of it or fall afoul of the fundamental policy of Indian Law, the Impugned Award cannot be set aside.
6. The Ld. Single Judge also held the Indian Evidence Act, 1872 would not apply *stricto sensu* to the arbitral proceedings and thus, the decision of the Ld. Tribunal to draw an inference based upon material placed before it cannot be faulted. It was held that it cannot be construed that the Impugned Award was based on no evidence at all and that the Court under Section 34 of the A&C Act cannot reappreciate or re-evaluate evidence. The standards of examination under Section 34 of the A&C Act did not permit any interference with the conclusion of the Ld. Tribunal awarding monies.
7. Though the Ld. Single Judge did not find fault with the amount of



monies awarded by the Ld. Tribunal, on the direction given by the Ld. Tribunal for further mutual discussions to be held between the parties herein in order for the Respondent to prove its entitlement at a later date and for taking the assistance of a Chartered Accountant who would certify the quantum of amount which is required to be paid to the Respondent, the Ld. Single Judge found the same to be patently erroneous and set it aside.

8. Against the Impugned Judgements, the Appellant i.e., NTPC has come before this Court in the instant Appeals under Section 37 of the A&C Act stating that there have been errors committed by the Ld. Single Judge in the Impugned Judgements.

9. Mr. Aman Lekhi, Ld. Senior Counsel for the Appellant has submitted before us that the Ld. Single Judge committed an error by not going into the findings of the Ld. Arbitral Tribunal with respect to the applicability of Appendix 2. He submits that it is in fact Appendix 2 that applies to the present case and any increase in minimum wages pursuant to notification dated 19.01.2017 under the Minimum Wages Act, 1948 would be covered under Appendix 2. It is submitted that para (i) of Appendix 2 stipulates that the components of the contract price are subject to price adjustment during performance of the contract to reflect changes in the cost of labour and material components in accordance with other provision mentioned in Appendix 2. He submits that Appendix 2 is a complete clause in itself with respect to any change or modification in the contract price, and therefore, on a bare reading of the same when it is clear that it covers any change in cost of labour, the Arbitral Tribunal was not allowed to read into it with regard to the basic wages. He states that Appendix 2 being a special clause, will supersede all general clauses. The Appendix 2 in its form is exhaustive and therefore eliminates the possibility of any further price adjustment towards



labour component that is not covered in Appendix 2.

10. Mr. Lekhi submits that the Ld. Single Judge has erred by not appreciating the fact that Appendix 2 creates a specific provision expressly dealing with the subject of minimum wages and limits entitlement and thus, the parties cannot be subjected to a regime of rights and duties beyond the terms which have been specifically agreed upon. It is submitted that the Ld. Single Judge has erroneously upheld the observations of the Ld. Tribunal and has overlooked the fact that the entitlement is only in terms of Appendix 2 of the contract. It is submitted that change of law to the extent that it deals with minimum wages and the same being specifically and expressly provided in Appendix 2, would be excluded from Clause 26 of the SCC. Consequently, reliance by the Arbitrator on Clause 26 of SCC is an instance of patent illegality of award which the Ld. Single Judge has overlooked.

11. Mr. Lekhi submits that the applicability of Indian Evidence Act, 1872 in the manner found to be applicable by the Ld. Single Judge in paragraph 21 of the Impugned Judgement dated 29.11.2021, while dealing with submissions that the claim of the Respondent was not substantiated by evidence, ignores the principle that claims cannot be conceded in the absence of any evidence whatsoever and unless there is relevant and admissible evidence bearing out of the claim, there is no entitlement in law for the claim made.

12. Mr. Lekhi also submits that the Ld. Single Judge ignored the settled principle that contracts have to be construed and not constructed and in the guise of interpretation, the terms cannot be discarded or substituted. It is submitted that the Ld. Tribunal interpreted the relevant clauses in a manner which is unjustified by the terms / scheme under which the contract was drafted. The interpretation afforded by the Ld. Tribunal which the Single



Judge did not find perverse, was neither credible nor possible nor tenable and deserved interference under Section 34 of the A&C Act.

13. It is submitted by Mr. Lekhi that the Ld. Single Judge has erred by not assailing the fact that the Respondent has failed to provide any relevant or substantial documents or evidence to prove its claims. The Ld. Single Judge has erred in upholding the awards given by the Ld. Tribunals based on the documents of the Appellant. The Ld. Single Judge while stating that the Indian Evidence Act, 1872 will not apply *stricto sensu* has failed to appreciate that while the laws of the Indian Evidence Act, 1872 may not apply strictly to arbitration proceedings, the underlying principles are very much applicable. It is submitted that the same propounds that a party claiming something is required to prove its claims through substantial proof. The Respondent has admittedly failed to even provide any documents to substantiate the award of monies passed in its favour and the Ld. Single Judge has erred by not rejecting the same.

14. Mr. Lekhi has further submitted that the Ld. Single Judge, vide its Impugned Judgements ignores the fact that claims cannot be conceded in the absence of any evidence whatsoever and unless there is relevant and admissible evidence bearing out of the claim, there is no entitlement in law for the claim made. It has been submitted that the Ld. Single Judge erred in disregarding Section 28(3) of the A&C Act and not taking into account the terms of the contract while deciding upon entitlement of the Respondent to the claim made. It is submitted that disregard of contractual obligations would amount to patent illegality.

15. Mr. Lekhi, with regards to his point on evidence, has also submitted that the Ld. Single Judge has erred by overlooking the observations of the Ld. Tribunal whereby it has held that the Respondent has not been provided



with enough opportunity to prove its claim. The Respondent had from the very inception of the dispute, consciously and intentionally taken a stand that its claims are allowed notionally and that it does not have to prove the same. While the Respondent was allowed the opportunity to file his SOC, Rejoinder, Written Submission etc. and lead evidence, the Respondent intentionally chose to not bring on record any documents to substantiate its notional claims. Therefore, the Ld. Single Judge has erred in upholding the portion of the Ld. Tribunal's award whereby the Ld. Tribunal has awarded costs to the Respondent, such costs being unproved by the Respondent.

16. Mr. Lekhi has submitted that with respect to the finding by the Ld. Single Judge and the Ld. Tribunal on the Appellant making an admission with regards to its liability to pay monies to the Respondent, is erroneous. He submits that there was in fact never any admission made by the Appellant. It was submitted that there was no admission in a manner understood in law of any amount claimed by the Respondent for the Tribunal to justify award of that amount by the Tribunal and the Court was not called upon to re-appreciate or re-evaluate the material but only to see whether the material available justified the claim. There was, therefore, adequate cause for interference with the awards of the Tribunals.

17. It is submitted by Mr. Lekhi that the Ld. Single Judge has erroneously allowed the portion of the Ld. Tribunal's award which awards costs to the Respondent to the tune of Rs. 18.24 Crores vide Impugned Judgement dated 26.11.2021 and Rs. 7.104 Crores vide Impugned Judgement dated 29.11.2021 in the absence of any proof of incurring the said expenditure under the relevant contracts. It is submitted that proof of actual payment made being a legal requirement has been affirmed by the Judgements of the Hon'ble Supreme Court in the cases of Tarapore and Co. v. State of M.P.,



(1994) 3 SCC 521 and National Highways Authority of India v. ITD Cementation India Ltd., **(2015) 14 SCC 21**.

18. It is submitted by Mr. Lekhi that in assessing the quantum payable by the Appellant to the Respondent, the Ld. Tribunal treated as admission, that, which does not qualify as one. Neither the Affidavit nor the Written Submissions to which the reference is made by the Ld. Tribunal, according to him, can be construed as the Appellant conceding to any entitlement of the Respondent as to exempt the latter from the obligation to prove its entitlement, as observed in the Award and by the Ld. Single Judge in proceedings under Section 34 of the A&C Act. It is submitted that admissions, in order to be acted upon have to be clear and unequivocal. It cannot conceivably be held that the Appellant ever admitted the truth of the claim made by the Respondent or that the submission made by it rendered a judicial determination of Respondent's right. The Ld. Single Judge has also erred in appreciating the fact that the objections filed by the Respondent to the award of the Ld. Tribunal itself shows that the same was not accepted and as the submission made was without prejudice, the want of acceptance itself relegated the parties to the original position of contest.

19. It is further submitted by Mr. Lekhi that insofar as Paragraph 30 of the Impugned Judgement dated 26.11.2021 is concerned the Court ignored that on Tribunal's own reasoning the principle of finality of award was clearly violated, the basis of computation as to facilitate reconciliation remained indeterminate as the Tribunal while accepting the applicability of Clause 31.4.3 drew upon Appendix-2 for the purpose of commutation of amount under the former. It is submitted that the computation given by the Ld. Tribunal involved making of an altogether new contract between the parties. In these circumstances, the finding of the Ld. Single Judge that NTPC is



obliged to pay in terms of the decision of the Ld. Tribunal is manifestly erroneous.

20. It is submitted by Mr. Lekhi that the entire finding of the Ld. Tribunal was based on the documents provided by the Appellant and without any admission of any amounts payable. It has to be seen that the Respondent was specifically required to substantiate and prove its own claims. Nowhere had the Appellant submitted or conceded to the fact that the documents so submitted would constitute an admission of amounts due and payable to the Respondent from the Appellant. The entire finding of the Ld. Tribunal is based in the absence of any evidence by the Respondent who had burden to prove its case. The Ld. Single Judge has overlooked the patent illegality and perversity of the Ld. Tribunal by awarding such amount without the Respondent having proved so, as its stand was that it does not have to prove any amounts. Further, when there is a specific averment by the Respondent that it does not have to prove any amounts claimed even after getting sufficient opportunity by way of SOC, Rejoinder, Evidence, Written Submission etc. the Tribunal ought not to have overstepped its jurisdiction by reading into the documents of the Appellant to prove the claims for the Respondent when the Respondent itself was not interested to do so. The Ld. Single Judge ought to have allowed the objections of the Appellant on this ground alone. It is submitted that the findings of the Ld. Tribunal as well as the Ld. Single Judge are perverse on this count, as the entire principle of burden of proof has been diluted.

21. Mr. Lekhi further submitted that in so far as making observations regarding the portion of the awards pertaining to further opportunity being granted to the Respondent to prove its claims, the Ld. Single Judge made contradictory findings and disregarded the principle of law that a party is



precluded from raising any claim or issue which it could and should have in the first instance. Moreover, the principle of finality was violated as an award has to be a complete decision on the issues raised without leaving aspects to be dealt with subsequently by a third party.

22. Insofar as the observations of the Ld. Single Judge on the portion of the awards of the Ld. Tribunal regarding further opportunity granted to the Respondent to establish its claims is concerned, Mr. Lekhi submitted that the Ld. Single Judge has made contradictory findings. He submitted that the Ld. Single Judge noticed that the operative part of the award wherein the Ld. Tribunal concluded that the Respondent failed to establish the amount it had claimed on account of increased expenditure. He submits that the Ld. Single Judge also concluded that the Respondent had failed in its contention that the claims were required to be calculated on a notional basis. However, the Ld. Single Judge further went on to observe with respect to the submissions that the Tribunal could not issue further directions having found that L&T had failed to prove its claim to correctly conclude that the submission had merit and the direction of further opportunity was beyond the scope of reference of Arbitral Tribunal. It also found that the mechanism devised by the Tribunal for reference to the dispute to the Chartered Accountant as to quantify the claim to be patently erroneous. It is submitted that the Ld. Single Judge disregarded the principle of law that a party is precluded from raising any claim or issue which it could and should have brought in an earlier proceeding and for want of reasonable diligence to bring forward the points as would support the claim made would bar the subsequent raising of the points which it failed to argue in full earlier. Moreover, the principle of finality of award was violated as an award has to be a complete decision on the issues raised without leaving aspects of those issues to be subsequently



dealt with by a third party.

23. Mr. Lekhi, while concluding, clearly stated that that the Respondent did not succeed on its case as was pleaded and that the entitlement being upheld by the Ld. Single Judge was *ex-facie* wrong. It was submitted that on the case as pleaded by the Respondent herein, entitlement was absent.

24. *Per contra*, it is submitted by Mr. Dayan Krishnan, Ld. Senior Counsel for the Respondent that the scope of interference by the courts in an arbitration proceeding under Section 37 is even more narrow than the scope of interference under Section 34 of the A&C Act. To substantiate his submissions, Mr. Krishnan has relied upon the Judgement rendered by the Hon'ble Supreme Court in the case of MMTC Ltd. v. Vedanta Ltd. (2019) 4 SCC 163 and a Judgement of a Division Bench of this Court in Movie Time Cineplex Pvt. Ltd. v. MRG Developers Pvt. Ltd., Judgement dated 04.04.2022 in **FAO (OS) (COMM) 164/2017**. It is submitted that this Court in the Judgement of Movie Time (supra) has held that while entertaining appeals under Section 37 of the A&C Act, the Court is not actually sitting as a Court of Appeal over the award of the Arbitral Tribunal, and therefore the Court would not re-assess or re-appreciate evidence. The Court also stated that the Arbitral Tribunal is the final arbiter on facts as well as law, and even errors, factual or legal, which stop short of perversity, do not merit interference under Section 34 & 37 of the A&C Act.

25. Mr. Krishnan submitted that the Impugned Judgements are detailed and reasoned and there is no ground for interference by thus Court under Section 37 of the A&C Act.

26. It is submitted by Mr. Krishnan that the Ld. Tribunal's findings on the Respondent's entitlement are based upon a review and interpretation of the provisions of the contract, applicable legislations, notifications issued



thereunder and relevant Judgements. It is submitted that the view taken by the Ld. Tribunal is a plausible one and the Ld. Single Judge has rightly held in the Impugned Judgements that the case cannot be reviewed on merits under Section 34 of the A&C Act.

27. Mr. Krishnan has submitted that the award of monies under the Impugned Awards was based on the method specified by the Appellant itself. It is submitted that the material which was filed by the Appellant before the Ld. Tribunal was affirmed by its witness and based on the same the Ld. Tribunals gave the awards in favour of the Respondent. It is submitted that the Ld. Single Judge has rightly held that the award was based on relevant material and evidence, and no ground for interference under Section 34 was made out by the Appellant.

28. With respect to the contentions of Mr. Lekhi regarding further opportunity being granted to the Respondent to adduce evidence before the Appellant and the findings of the Ld. Single Judge in partly setting aside the awards of the Ld. Tribunals to the extent that the Respondent was allowed to adduce further evidence to prove its claim subsequent to the award being made; Mr. Krishnan has stated that he would not be pressing any arguments to counter the findings of the Ld. Single Judge to the extent that the said portion of the awards have been set aside by the Ld. Single Judge.

29. To buttress the statement made by the Ld. Senior Counsel Mr. Krishnan that he shall not be pressing the claim for additional monies due to the Respondent, short affidavits have come to be filed by the Respondent in the matters, stating that it is satisfied with the awards passed by the Ld. Tribunal. The Respondent vide affidavit has submitted that it is satisfied with the award of the Ld. Tribunal dated 25.06.2020 awarding monies to the tune of Rs. 7.104 crores for the period from 19.01.2017 to 29.04.2019 and



award dated 12.06.2020 awarding monies to the tune of Rs. 18.24 crores for the period from 19.01.2017 to 31.12.2018. The Respondent vide affidavit has stated that it is not making any additional claims in the instant proceedings for the aforesaid periods and that it has initiated the relevant procedure under the dispute resolution mechanism envisaged in the contracts entered into between the parties for periods subsequent to the aforesaid period. The relevant portion of the affidavit dated 11.04.2023 is reproduced and reads as under:-

“3. I say that the Respondent is satisfied with the award of Rs. 7.104 crores for the period from 19 January 2017 to 29 April 2019 by way of the Arbitral Award dated 25 June 2020.

4. I say that the Respondent is not making any additional claim on NTPC Ltd. for the period from 19 January 2017 till 29 April 2019 on account of the increase in Minimum Wages by way of Notification dated 19 January 2017.”

30. We have carefully heard Ld. Senior Counsels for the parties and perused the material on record. At first, before giving our findings and decision, we find it pertinent to highlight the degree to which the Courts of Law can interfere with arbitral proceedings under Section 34 & 37 of the A&C Act.

31. It is no longer *res integra* that the scope of interference by the Courts in arbitration proceedings and arbitral awards is narrow. The Courts should be slow and circumspect in interfering with any award which is passed by an arbitral tribunal which has been appointed pursuant to an agreement between the parties to the dispute. Section 34 of the A&C Act outlines within it, only certain instances under which the Courts can interfere with any award



passed by arbitral tribunals and set it aside.

32. The submission of Mr. Lekhi that the learned Single Judge has failed to appreciate that the award suffers from the vice of ‘patent illegality’ under Section 34(2A) of the A&C Act cannot be accepted. It was canvassed before the learned Single Judge that the award suffers from ‘patent illegality’. However, apart from alleging patent illegality on the face of the award, a perusal of the application under Section 34 of the A&C Act of the Appellant would show that it had alleged that the interpretation given to the contract by the Ld. Tribunal was completely perverse, illegal and submitted that the awards were opposed to public policy, attempting to bring its arguments for setting aside of the Impugned Awards in line with the grounds of Section 34(2)(b).

33. The proviso to Section 34(2A) makes it aptly clear that awards cannot be set aside merely on the ground of an erroneous application of the law or by re-appreciation of evidence. Further, Explanation 2 of Section 34(2)(b) makes it clear that any allegation of contravention of public policy of Indian Law cannot entail a review on merits of the dispute. To elucidate upon the aforesaid terms and concepts as contained in Section 34, this Court would turn to the Judgement of the Hon’ble Supreme Court in the case of Delhi Airport Metro Express Pvt. Ltd. v. Delhi Metro Rail Corporation Ltd., **2021 SCC OnLine SC 695**. The relevant paragraphs of the same have been reproduced hereunder for reference –:

“24. An amendment was made to Section 34 of the 1996 Act by the Arbitration and Conciliation (Amendment) Act, 2015 (hereinafter “the 2015 Amendment Act”). A perusal of the Statement of Objects and Reasons of the 2015 Amendment Act would disclose that the amendment to the 1996 Act became necessary in view of the interpretation of the



provisions of the 1996 Act by Courts in certain cases which had resulted in delay of disposal of arbitration proceedings and increase in interference by Courts in arbitration matters, which had the tendency to defeat the object of the 1996 Act. Initially, the matter was referred to the Law Commission of India to review the shortcomings in the 1996 Act in detail. The Law Commission of India submitted its 176th Report, recommending various amendments to the 1996 Act. However, the Justice Saraf Committee on Arbitration constituted by the Government, was of the view that the proposed amendments gave room for substantial intervention by the court and were also contentious. Thereafter, on reference, the Law Commission undertook a comprehensive study of the amendments proposed by the Government, keeping in mind the views of the Justice Saraf Committee and other stakeholders. The 246th Report of the Law Commission was submitted on 5-8-2014. Acting on the recommendations made by the Law Commission in its 246th Report, amendments by way of the 2015 Amendment Act were made to several provisions of the 1996 Act, including Section 34.

25. The amended Section 34 reads as under:

“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 furnishes proof that—

(i) a party was under some incapacity, or



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

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

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

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

(b) the Court finds that—

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

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



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

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

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

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

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

(2-A) An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the Court, if the Court finds that the award is vitiated by patent illegality appearing on the face of the award:

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

26. *A cumulative reading of the Uncitral Model Law and Rules, the legislative intent with which the 1996 Act is made, Section 5 and Section 34 of the 1996 Act would make it clear that judicial interference with the arbitral awards is limited to the grounds in Section 34. While deciding applications filed under Section 34 of the Act, Courts are mandated to strictly act in accordance with and within the confines of Section 34, refraining from appreciation or reappreciation of matters of fact as well as law. (See Uttarakhand*



PurvSainikKalyan Nigam Ltd. v. Northern Coal Field Ltd. [Uttarakhand PurvSainik Kalyan Nigam Ltd. v. Northern Coal Field Ltd., (2020) 2 SCC 455 : (2020) 1 SCC (Civ) 570] , Bhaven Construction v. Sardar Sarovar Narmada Nigam Ltd. [Bhaven Construction v. Sardar Sarovar Narmada Nigam Ltd., (2022) 1 SCC 75] and RashtriyaIspat Nigam Ltd. v. Dewan Chand Ram Saran [RashtriyaIspat Nigam Ltd. v. Dewan Chand Ram Saran, (2012) 5 SCC 306] .)

27. For a better understanding of the role ascribed to Courts in reviewing arbitral awards while considering applications filed under Section 34 of the 1996 Act, it would be relevant to refer to a judgment of this Court in SsangyongEngg. & Construction Co. Ltd. v. NHAI [SsangyongEngg. & Construction Co. Ltd. v. NHAI, (2019) 15 SCC 131 : (2020) 2 SCC (Civ) 213] wherein R.F. Nariman, J. has in clear terms delineated the limited area for judicial interference, taking into account the amendments brought about by the 2015 Amendment Act. The relevant passages of the judgment in Ssangyong [SsangyongEngg. & Construction Co. Ltd. v. NHAI, (2019) 15 SCC 131 : (2020) 2 SCC (Civ) 213] are noted as under : (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 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 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.””



34. We find it difficult to accept the contentions of Mr. Lekhi wherein he has stated that the interpretation of the contract provided by the Ld. Arbitral Tribunal is contrary to the terms of the contract itself, or that the Impugned Awards were based on no material/ evidence at all. The Impugned Judgements and Awards make it aptly clear that the Ld. Tribunals had relied on the written submissions and statements of the witness of the Appellant to come to its conclusion with respect to quantification of claims. The relevant portion of the Impugned Judgement dated 26.11.2021 substantiating the Ld. Tribunal's reasoning is reproduced hereunder for reference –:

“21. This Court is unable to accept that the impugned award is ex-facie 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-facie erroneous and contrary to the plain language of the Contract Agreement.

22. The Arbitral Tribunal had awarded a sum of ₹7.104 crores in favour of L&T on the basis of material submitted by NTPC. It is apparent from a plain reading of the impugned award that the Arbitral



Tribunal had not only relied on the submissions made in the written submissions but on the affidavit filed by NTPC's witness viz. Mr. R.K. Singh, AGM-ME, NTPC Ltd., Tanda Thermal Power Station. The relevant extract of the said affidavit is set out below:

"17. I say that in any case, even if it is accepted for the sake of argument, but without admitting the same, that the Claimant is entitled to some reimbursement due to its incurring additional cost / expenditure due to increase in minimum wage than also the reimbursement has to be only of the actual expenditure and not on the basis of any theoretical percentage cost in each work price component.

18. I say that for claiming such reimbursement the Claimant should have placed the actual cost incurred by it due to the increased minimum wage rate. I say that every month the Claimant submits the record of payment received by each of its workmen, including the workmen employed by its sub-contractors, to the Respondent as required by the contract between the parties. I say that thus, the number of workers employed by the Claimant (directly or indirectly), the number of days worked by each of the workmen and the rate at which he is paid by the Claimant or its sub-contractors is mentioned in the proof of payments submitted to the Respondent by the Claimant.

19. I say that as a sample, the details submitted by the Claimant regarding the payments made by it or its sub-contractors to their respective workmen / labour in each category for the months of Jan 2017 to March 19 along with the details submitted in regard to atleast one sub-contractor for each month are being annexed hereto and marked as Exhibit R/1 (Collectively).

20. I say that the said data has been collated by



me personally from the records of the data submitted every month by L&T MHPS. I further say that based on the said collated data I have placed on record charts which is being annexed hereto and marked as Exhibit R/2 (Collectively) reflecting the actual quantity of man days in relation to increase in minimum wages has to be considered.

21. I say that as per the said calculations it is clear that even if it is accepted without admitting that the total increase in additional expenditure incurred by the Claimant would be far less than what is now claimed by the Claimant.”

23. It is apparent from the above that NTPC’s witness had affirmed that he had collated the records and data submitted by L&T and had produced the results of the same. The said affidavit clearly established that L&T had submitted documents and returns to NTPC indicating the number of man days in relation to which the increase in minimum wages was required to be considered. Undeniably, the tabular statements produced by NTPC did constitute material, which could be considered by the Arbitral Tribunal. The Indian Evidence Act, 1872 does not apply strictosensu to arbitral proceedings. Thus, the decision of the Arbitral Tribunal to rely on material placed before it and draw an inference cannot be faulted. This Court is unable to accept that the impugned award is based on no evidence / material at all. Thus, this Court is also unable to accept that the impugned award is liable to be interfered with.”

35. It is also settled law that the Courts cannot travel beyond the scope of Section 34 in an appeal under Section 37 from an Order of the Court in an application preferred by a party to set aside an arbitral award under Section 34 of the A&C Act. To substantiate, this Court would place reliance on the



case of MMTC Ltd. (supra) cited by Mr. Krishnan. The relevant portion of the Judgement in the case of MMTC Ltd. (supra) is reproduced hereunder for reference –:

“10. Before proceeding further, we find it necessary to briefly revisit the existing position of law with respect to the scope of interference with an arbitral award in India, though we do not wish to burden this judgment by discussing the principles regarding the same in detail. Such interference may be undertaken in terms of Section 34 or Section 37 of the Arbitration and Conciliation Act, 1996 (for short “the 1996 Act”). While the former deals with challenges to an arbitral award itself, the latter, inter alia, deals with appeals against an order made under Section 34 setting aside or refusing to set aside an arbitral award.

11. As far as Section 34 is concerned, the position is well-settled by now that the Court does not sit in appeal over the arbitral award and may interfere on merits on the limited ground provided under Section 34(2)(b)(ii) i.e. if the award is against the public policy of India. As per the legal position clarified through decisions of this Court prior to the amendments to the 1996 Act in 2015, a violation of Indian public policy, in turn, includes a violation of the fundamental policy of Indian law, a violation of the interest of India, conflict with justice or morality, and the existence of patent illegality in the arbitral award. Additionally, the concept of the “fundamental policy of Indian law” would cover compliance with statutes and judicial precedents, adopting a judicial approach, compliance with the principles of natural justice, and Wednesbury [Associated Provincial Picture Houses v. Wednesbury Corpn., (1948) 1 KB 223 (CA)] reasonableness. Furthermore, “patent illegality” itself has been held to mean contravention of the substantive law of India, contravention of the 1996 Act, and contravention of the terms of the contract.



12. It is only if one of these conditions is met that the Court may interfere with an arbitral award in terms of Section 34(2)(b)(ii), but such interference does not entail a review of the merits of the dispute, and is limited to situations where the findings of the arbitrator are arbitrary, capricious or perverse, or when the conscience of the Court is shocked, or when the illegality is not trivial but goes to the root of the matter. An arbitral award may not be interfered with if the view taken by the arbitrator is a possible view based on facts. (See Associate Builders v. DDA [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] . Also see ONGC Ltd. v. Saw Pipes Ltd. [ONGC Ltd. v. Saw Pipes Ltd., (2003) 5 SCC 705] ; Hindustan Zinc Ltd. v. Friends Coal Carbonisation [Hindustan Zinc Ltd. v. Friends Coal Carbonisation, (2006) 4 SCC 445] ; and McDermott International Inc. v. Burn Standard Co. Ltd. [McDermott International Inc. v. Burn Standard Co. Ltd., (2006) 11 SCC 181])

13. It is relevant to note that after the 2015 Amendment to Section 34, the above position stands somewhat modified. Pursuant to the insertion of Explanation 1 to Section 34(2), the scope of contravention of Indian public policy has been modified to the extent that it now means fraud or corruption in the making of the award, violation of Section 75 or Section 81 of the Act, contravention of the fundamental policy of Indian law, and conflict with the most basic notions of justice or morality. Additionally, sub-section (2-A) has been inserted in Section 34, which provides that in case of domestic arbitrations, violation of Indian public policy also includes patent illegality appearing on the face of the award. The proviso to the same states that an award shall not be set aside merely on the ground of an erroneous application of the law or by reappraisal of evidence.

14. As far as interference with an order made under



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

36. A Division Bench of this Court in the case of Movie Time (supra) has also proceeded to throw light on the scope of interference by this Court in Appeals under Section 37. The relevant paragraphs are reproduced hereunder for reference —:

“8. We have heard learned counsels for the parties. It is no longer res integra that the scope for interference in an appeal under section 37 (1) (c) of the Act is narrow. In order to succeed, the appellant must establish that the finding of the Arbitrator is based on no evidence or the Arbitrator has taken into account material which is irrelevant or has ignored vital evidence. The argument which has been raised before us is that the arbitral Tribunal was required to call for the completion plan, which was in the control and custody and possession of respondent No. 1. In this regard, the learned Single Judge as also the learned Arbitrator have observed that in the circumstances wherein Movie Times, after having taken possession of the area in question had occupied it for over two years before executing the Lease Deed and the Adherence Deed, then the onus to establish that the area in question is in fact less than what was stated in the Lease Deed falls squarely on Movie Times, and Movie Times failed to discharge the said burden. Further,



with regards to the arbitrator awarding CAM charges till the date of the award, it is not disputed that after October 2012, electricity was discontinued by the utility provider. The Learned arbitrator has also noted that Movie Times was using the genset, a property of ANM, for generation of electricity. MRG/ANM had installed elevators, escalators, common light fixtures, equipment, AHU, chiller plants that were necessary to provide these services. MRG/ANM could not be expected to continue incurring expenditure on electricity consumed by Movie Times. In the circumstances, the Learned Single Judge as also the learned arbitrator did not accept the plea that maintenance services were totally stopped. We do not find that these findings are in any manner perverse or unsustainable.

9. We may also note that it has been repeatedly held that while entertaining appeals under Section 37 of the Act, the Court is not actually sitting as a Court of appeal over the award of the Arbitral Tribunal and therefore, the Court would not re-appreciate or re-assess the evidence. The position of law stands crystallized today, that findings, of fact as well as of law, of the arbitrator/Arbitral Tribunal are ordinarily not amenable to interference either under Sections 34 or Section 37 of the Act. The scope of interference is only where the finding of the tribunal is either contrary to the terms of the contract between the parties, or, ex facie, perverse, that interference, by this Court, is absolutely necessary. The Arbitrator/ Tribunal is the final arbiter on facts as well as in law, and even errors, factual or legal, which stop short of perversity, do not merit interference under Sections 34 or 37 of the Act.

10. While deciding an appeal it must be kept in mind that the Arbitrator/Tribunal is the final arbiter on facts as well as law, and even errors, factual or legal, which stop short of perversity, do not merit interference under Sections 34 or 37 of the Act. Hon'ble Supreme Court of India has consistently held that an arbitration



award should not be lightly interfered with. (See Renusagar Power Co. Ltd. v. General Electric, (1994) Supp. 1 SCC; ONGC v. Saw Pipes, (2003) 5 SCC 705, Hindustan Zinc Ltd. v. Friends Coal Carbonisation, (2006) 4 SCC 445; and Associate Builders v. DDA, (2015 3 SCC 49).

11. The scope of judicial scrutiny and interference by an appellate court under Section 37 of the Act is even more restricted, than while deciding a petition under Section 34 of the Act. Hon'ble Supreme Court in the decision reported as (2006) 11 SCC 181 McDermott International Inc. v. Burn Standard Co. Ltd. and Ors held as under:-

"The 1996 Act makes provision for the supervisory role of courts, for the review of the arbitral award only to ensure fairness. Intervention of the court is envisaged in few circumstances only, like, in case of fraud or bias by the arbitrators, violation of natural justice, etc. The court cannot correct errors of the arbitrators. It can only quash the award leaving the parties free to begin the arbitration again if it is desired. So, scheme of the provision aims at keeping the supervisory role of the court at minimum level and this can be justified as parties to the agreement make a conscious decision to exclude the court's jurisdiction by opting for arbitration as they prefer the expediency and finality offered by it.""

37. For the sake of comprehension, we are reproducing the relevant portion of the Impugned Judgement dated 26.11.2021 to understand the manner in which the Ld. Single Judge has dealt with the contentions of the parties and give its findings —:

"25. The first issue struck by the Arbitral Tribunal required the Arbitral Tribunal to determine whether



any amount was payable to L&T on account of increase in the rate of minimum wages in terms of the claims made in the Statement of Claims and if so, the amount and the period for which it would be payable. The Arbitral Tribunal had concluded that L&T had failed to establish the amount payable to it on account of its claim for increased expenditure. Thus, L&T's claim for a sum of ₹38,23,63,428.06 was rejected. Having held so, the first issue struck by the Arbitral Tribunal was required to be decided in the aforesaid terms. Issue no.3 was also required to be rejected.

26. However, the Arbitral Tribunal not only issued directions for L&T to further submit proof and evidence for claiming reimbursement but also directed NTPC to pay the same along with interest.

27. Having stated above, it is also material to note that L&T had succeeded in its claim that it was entitled to reimbursement of additional expenditure incurred on account of increase in the basic minimum wage rate. However, it had failed in its contention that the said amount was required to be determined on a notional basis. In the given facts, it may have been possible for L&T to otherwise claim additional expenditure on the basis of the findings that it is entitled to reimbursement of additional expenditure. This claim could be considered by NTPC as and when the same was quantified. NTPC would also be entitled to oppose the claim on such grounds as may be available in law. But that would be a separate dispute required to be addressed as and when the same matured. The decision of the Arbitral Tribunal to issue a blanket award directing NTPC to pay the amount as verified with interest from the date of the Statement of Claims and in the event of dispute, to pay the amount as certified by the Chartered Accountant along with interest, amounts to making an award in respect of a possible dispute that was not before the Arbitral Tribunal.



28. This Court is also unable to accept that any interest could be awarded on the amount that may be determined in future from the date of the Statement of Claims. L&T had founded its claim on the interpretation of Clause 26 of the SCC, which the Arbitral Tribunal found was illegal, unacceptable and baseless. Clearly, in this view, the award of interest from the date of Statement of Claims is patently erroneous and unsustainable.

29. L&T had also assailed the impugned award. According to L&T, the impugned award is patently illegal as the Arbitral Tribunal has ignored the expert opinion. The expert witness examined by L&T had deposed that in contracts of similar nature, increase in wages is compensated by notional formulas and not on the basis of actual reimbursement as a contractor could execute the works by various methods. The contractor has the option to deploy a higher work force and use mechanical means to a lesser degree. Alternatively, he may deploy higher number of machines and use a lean labour force. Thus, the compensation is required to be made for increase in costs.

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.

31. In Delhi Airport Metro Express Pvt. Ltd. v. Delhi Metro Rail Corporation Ltd.: 2021 SCC OnLine SC 695, the Supreme Court had once again explained the scope of the ground of patent illegality as under:

“24. 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.

25. 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 re-appreciate 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'.

26. 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. In Ssangyong (supra), 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. In Renusagar (supra), 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.

27. In light of the principles elucidated herein for interference with an arbitral award by a court in



exercise of its jurisdiction under Section 34 of the 1996 Act, we proceed to consider the questions that arise in these Appeals as to whether the Division Bench of the High Court was right in setting aside the award of the Arbitral Tribunal dated 11.05.2017.”

32. L&T’s contention that the impugned award is patently illegal does not fall within the scope of concept of patent illegality as explained by the Supreme Court in the aforesaid decision.

33. The Arbitral Tribunal had rendered an arbitral award in similar term [Arbitral Award dated 12.06.2020] in respect of a similar dispute raised in connection with the contract for supply and erection including civil works of EPC Package, Khargone Super Thermal Power Project. NTPC and L&T had challenged the said award by filing petitions under Section 34 of the Act being OMP(COMM) No.560/2020 captioned NTPC Ltd. v. Larsen and Toubro Ltd. and OMP(COMM) No.524/2020 captioned Larsen and Toubro Ltd. v. NTPC Ltd. The said petitions were heard along with the present petitions and the same have been disposed of by a judgment rendered on 26.11.2021. The reasons stated in the said decision may also be read as part and parcel of the present petitions.

34. In view of the above, the impugned award to the extent it directs NTPC to examine L&T’s claim once again and pay the same along with interest at the rate of 10% per annum or pay the amount as certified by the Chartered Accountant along with interest at the rate of 10% per annum, is set aside.

35. Accordingly, NTPC’s petition [O.M.P. (COMM) 567/2020] is partly allowed to the aforesaid extent and L&T’s petition [O.M.P. (COMM) 535/2020] is dismissed. All the pending applications are also



disposed of.”

38. In view of the law laid down by the Apex Court that scope of judicial scrutiny and interference by an appellate court under Section 37 of the Act is even more restrictive than Section 34 of the Act and that in entertaining appeals under Section 37 of the Act, the Court is not actually sitting as a Court of appeal, this Court does not find that the Order of the Tribunal, as confirmed by the learned Single Judge, is so perverse or suffers from patent illegality which requires interference.

39. The Ld. Single Judge has rightly also stated that the Indian Evidence Act, 1872 would not apply *stricto sensu* to arbitral proceedings and that it is only the principles of evidence which shall be applicable to the proceedings. It is not as if no prudent person could arrive at the conclusion which the Ld. Tribunals have arrived at. The Ld. Single Judge has rightly held that the decision of the Ld. Tribunals to draw an inference from the material placed before it, cannot be faulted. It is not as if the Ld. Tribunals have taken a view which is not even possible, or interpreted the contract in a manner which no fair minded or reasonable person could have or based their decision off of no evidence at all.

40. In light of the aforesaid discussion, the Appeals filed by NTPC Ltd. are dismissed along with any pending application(s), if any.

SATISH CHANDRA SHARMA, C.J.

SUBRAMONIUM PRASAD, J

JULY 18, 2023/Dan/R