

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

% **Date of order: 4th May, 2023**

+ **O.M.P. (COMM) 82/2019 & I.A. 2798/2019**

M/S C.P.& ASSOCIATES PVT LTD. Petitioner

Through: Appearance not given

versus

DELHI METRO RAIL CORPORATION LTD Respondent

**Through: Mr. Tarun Johri and Mr. Ankur
Gupta, Advocates**

CORAM:

HON'BLE MR. JUSTICE CHANDRA DHARI SINGH

ORDER

CHANDRA DHARI SINGH, J (Oral)

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

- “a) Set aside the impugned Award dated 28.09.2018 passed by the Ld. Arbitral Tribunal to the extent that it disallow the claims of the Petitioner;*
- b) allow the Claims of the Petitioner;*
- c) Pass any other order/s, which may be deemed fit and proper in the facts and circumstances of the present case and in the interest of justice.”*

FACTUAL MATRIX

2. The petitioner is a private limited company, carrying on the business of construction and development.

3. The respondent is a limited corporation and a joint venture by the Govt. Of India and Govt. Of NCT of Delhi carrying on development of the metro rail in the NCT of Delhi.
4. The respondent released a tender for 'Architectural finishing works at 7 elevated stations (Inderlok, Ashok Park Main, Punjab Bagh East, Shivaji Park, Madipur, Patel Nagar-II, Kirti Nagar-II), on Inderlok Mundka line of Phase-II of Delhi MRTS Project'. The contract was awarded to the petitioner herein above and was further termed as 'Contract BA-7G'.
5. The Contract Agreement was executed between the parties on 14th October 2008 for a sum of Rs. 33,76,81,216.12/-. The work was to be completed within 14 months of the issue of the Letter of Acceptance (LoA) dated 18th August 2008. The payments were to be made as per Bill of Quantities (BOQ).
6. The respondent being unsatisfied with the delay in execution of the work, issued a termination notice to the petitioner on 21st May 2010 and followed with the termination letter on 4th June 2010, asking the petitioner to withdraw their labour and material from the sites and clear their accounts after joint measurement of work carried out so far in the bill to be considered as last bill. After termination of the contract, there were disputes with regard to the joint measurement.
7. On 11th May 2013, petitioner issued a communication under clause 20 of the General Condition of Contract (GCC) and referred the claims to the engineer nominated by the respondent. On 7th June 2013, the Engineer called upon the petitioner to submit the details in support of their claim,

accordingly petitioner submitted their documents. The engineer nominated by the respondent declined the claims of the petitioner due to it being false. On 27th August 2013, the petitioner further invoked clause 20.5 of the GCC for appointment of Arbitrator and then the Arbitral Tribunal came to be constituted.

8. On invocation of Arbitration by the Contractor *vide* letter dated 27th August 2013, the respondent rejected the same being time-barred several times. The cost settlement Bill was prepared by the respondent based on part measurements done jointly with the contractor and the balance measurements taken on their own by the respondent in the absence of the Contractor and made the last payment on dated 19th August 2013. The Arbitrator panel was formed through nominations.

9. Finally, on 28th September 2018, the impugned Arbitral Award was passed.

10. Hence, on being aggrieved by the impugned Award dated 28th September 2018 the Petitioner has approached this Court with the instant petition under Section 34 of the Act, 1996 seeking the aforesaid reliefs.

SUBMISSIONS

(On behalf of the petitioner)

11. Learned counsel for the petitioner submitted that the Impugned Award passed is patently illegal and not in accordance with the law.

12. Learned counsel for the petitioner further submitted that they were

responsible for executing architectural finishing works of the 7 elevated stations. The progress was slowed down due to the non-availability of work fronts caused by the main civil contractor. It is submitted that the said execution of the part of the work of the main civil contractor M/s. IDEB-SUCG (JV) was assigned to the petitioner after the expiry of the date of completion of its original completion schedule of the work allotted to it. The petitioner was executing the work in its scope to the satisfaction of the respondent. Further, there was also a delay on the part of the respondent in handing over the drawings.

13. It is further submitted that the respondent released a part payment of Rs. 413.38 lacs against the finished items as stage payment as per clause 26 of the Standard Conditions of Contract (SCC). Therefore, petitioner was not at fault as it was the respondent who failed to deliver the fronts up to 6th June 2010.

14. It is submitted that while the work was under execution satisfactorily up to November 2009, the respondent paid their running accounts bill up to RA Bill No. 16 satisfactorily i.e., March 2010. But in the next bill, the respondent wrongfully and without any basis recovered payments made earlier by deleting the quantities already measured by the engineer.

15. It is submitted that the contract was illegally terminated after giving 14 days' notice on 21st May 2010 and a termination letter on 4th June 2010. Further, they were not allowed to jointly witness the measurements, as agreed in the terms of the contract, for the work already completed. The respondent in a completely arbitrary manner, started giving works to various

vendors ignoring the fact that the raw materials for the said works were lying with the Petitioner.

16. It is further submitted that the respondent unilaterally finalised the last bill and cut down the bill for work already executed and measured by them. Respondent further did not allow large numbers of extra items approved and executed by them.

17. It is submitted that the Arbitral Tribunal erred to appreciate that 1093.37 sqm cumulative quantity was paid in the 15th RA Bill, in the 16th RA Bill, and in the 17th RA Bill, but the quantity was reduced to 900.732 sqm without any reason or justification.

18. It is further submitted that the respondent made a number of recoveries from the last bill after encashing their performance security bank guarantee. Further, these recoveries included interest on stage payment, interest in negative escalation, recovery of partial work done, etc. The learned Counsel for the petitioner prays for payment of all works done by them, refund of recoveries and damages due to illegal termination of the contract by the respondent.

19. Hence, the petitioner submitted that the impugned award dated 28th September 2018 may be set aside under section 34 of the Act, 1996.

(On behalf of the respondent)

20. The learned Counsel for the respondent submitted that the slow progress in the petitioner's work execution was due to inadequate deployment of resources as per site conditions in spite of regular follow-up

and failing in commitments given by the petitioner. Further, this forced to first delete the balance work of two stations from the scope of petitioner's work and then to terminate the contract as per contract provision and assign the work to other agencies at the risk and cost of the petitioner.

21. It is further submitted that the payment made up to RA Bill no. 16 included 80% stage payment paid to the petitioner after brining the material to the site. Since the petitioner could not execute the works at available work fronts. This led to recovery of all the stage payment after termination of contract for the non-executed works.

22. It is submitted that since the Contract was terminated on 4th June 2010, hence the petitioner's plea for Arbitration which was submitted on 29th August 2010 was time barred.

23. It is further submitted that the petitioner's failure to depute their representative to associate with joint measurements forced to get the measurement done on their own. Further, when the petitioner approached the respondent's top management, another window of opportunity was given to them for joint measurement which again was a failure due to their non-cooperation and non-deployment of representatives for measurement.

24. It is submitted that the performance security of the petitioner was encashed on 14th January 2011 to recover the stage payment on account of material already paid to them against indemnity bond and other recoveries. Based on departmental measurements, the last Bill was paid to the petitioner on 19th August 2013. It is submitted that all the recoveries made from this last Bill and encashed bank guarantee were as per Contract provisions and

are thus justified.

25. Therefore, it is submitted that the instant petition is liable to be dismissed for being devoid of any merit.

FINDINGS AND ANALYSIS

26. Heard learned counsel for the parties and perused the record. I have also perused the impugned arbitral award as well as the entire arbitral record brought on record. I have also given thoughtful consideration to the submissions advanced by the parties.

27. The challenge to the impugned arbitral award *inter alia* has been made on the ground that the impugned Award dated 28th September 2018, is patently illegal and is liable to be set aside.

28. The law regarding a challenge to an arbitral award under the Act, 1996 is no more a *res integra*. The challenge of an award under Section 34 arising out of Arbitration proceedings must satisfy the tests laid down by virtue of the provisions of the Act, 1996, and the law settled by way of pronouncements by the Hon'ble Supreme Court.

29. As far as Section 34 of the Act, 1996 is concerned, the position is well-settled by now that the Court does not sit in appeal over the arbitral award and may not interfere on merits. The Court may only interfere on the limited ground provided under Section 34 of the Act, 1996 i.e. if the award is against the public policy of India. As per the legal position clarified through decisions of this Court that violation of Public Policy, in turn, includes a violation of the fundamental policy of Indian law, a violation of

the interest of justice of India, conflict with justice or morality, and the existence of patent illegality in the arbitral award. The concept of the fundamental policy of Indian law would cover compliance with statutes and judicial precedents, adopting a judicial approach, and compliance with the principles of natural justice and reasonableness.

30. It is pertinent to reiterate that the intention of the legislature while enacting the Act, 1996 was the expeditious and effective disposal of matters. The Act has been set forth with the intention to limit the interference of the courts in Arbitral Proceedings.

31. Arbitration has evolved over the years as the ideal tool for the resolution of disputes that saves the court's time and is largely instrumental in assisting the parties to resort to quick remedial measures. Every arbitration is based on insightful application of law and its evolution is proof of its significance in the actual proceedings. Thus, arbitration has emerged as the most preferred platform for quick resolution of disputes, especially in the industrial and corporate realms.

32. In order to facilitate this process and to maintain a check on it, a provision to set aside the Award was included. But even then, the Award may only be set aside if it fulfils certain criteria to qualify as being bad in law.

33. The Arbitrator empowered to resolve such a dispute, may do so only after careful consideration of the facts and evidence on record. The statement of claims and statement of defense is taken onto the record and the Arbitral proceedings are conducted according to the provisions set by

the Act, 1996.

34. Adjudication of the disputes should be in perfect harmony with the contract, which is the “birth-giver”, and the existing provisions of law.

35. An unfettered scope of intervention into the functioning of Arbitral Tribunal functioning would defeat the spirit and purpose of the Arbitration Act. Therefore, the Hon'ble Supreme Court has repeatedly reiterated that the Court's scope of intervention is limited in the cases of a challenge under Section 34.

36. The Hon'ble Supreme Court in ***Delhi Airport Metro Express (P) Ltd. v. DMRC, (2022) 1 SCC 131***, delved into the length and width of patent illegality, held as under:

“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 Ssangyong Engg. & Construction Co. Ltd. v. NHAI [Ssangyong Engg. & 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 [Ssangyong Engg. & 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.

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39. To elucidate, para 42.1 of *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 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.”

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

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”.”

37. It is thus lucid that patent illegality means an error of law that goes deep to the root of the matter. This error of law can mean inconsistency with common law, the constitution of the country, or a statutory provision, and it must be apparent on the face of the Award.

38. In ***UHL Power Co. Ltd. v. State of H.P., (2022) 4 SCC 116***, the Hon’ble Supreme Court reiterated the narrow scope under Section 34 of the Act, 1996 and held as under:

“16. As it is, the jurisdiction conferred on courts under Section 34 of the Arbitration Act is fairly narrow, when it comes to the scope of an appeal under Section 37 of the Arbitration Act, the jurisdiction of an appellate court in examining an order, setting

aside or refusing to set aside an award, is all the more circumscribed. In MMTC Ltd. v. Vedanta Ltd. [MMTC Ltd. v. Vedanta Ltd., (2019) 4 SCC 163 : (2019) 2 SCC (Civ) 293] , the reasons for vesting such a limited jurisdiction on the High Court in exercise of powers under Section 34 of the Arbitration Act have been explained in the following words : (SCC pp. 166-67, para 11)

“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 Ltd. 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.”

17. A similar view, as stated above, has been taken by this Court in K. Sugumar v. Hindustan Petroleum Corpn. Ltd. [K. Sugumar v. Hindustan Petroleum Corpn. Ltd., (2020) 12 SCC 539] , wherein it has been observed as follows : (SCC p. 540, para 2)

“2. The contours of the power of the Court under Section 34 of the Act are too well established to require any reiteration. Even a bare reading of Section 34 of the Act indicates the highly constricted power of the civil court

to interfere with an arbitral award. The reason for this is obvious. When parties have chosen to avail an alternate mechanism for dispute resolution, they must be left to reconcile themselves to the wisdom of the decision of the arbitrator and the role of the court should be restricted to the bare minimum. Interference will be justified only in cases of commission of misconduct by the arbitrator which can find manifestation in different forms including exercise of legal perversity by the arbitrator.””

39. Further in ***Ssangyong Engg. & Construction Co. Ltd. v. NHAI, (2019) 15 SCC 131***, the Hon’ble Supreme Court went on to say that reappreciation of evidence cannot be permitted under the ground of patent illegality in a Section 34 petition under Act, 1996. The relevant portion has been reiterated below:-

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 on the face of award.”

40. A reference to the above-stated pronouncements makes it clear that this Court while exercising its jurisdiction under Section 34 of the Act, 1996 shall not sit in appeal and/or re-examine the facts and evidence of the case.

41. Now, the Court has to examine the facts of the instant case in light of the foregoing discussions on the law.

42. A relevant portion of the impugned Arbitral Award has been reproduced hereinbelow:

“5.3 Claim No-C: Wrongful penalisation by Respondent by way of forfeiture of performance security on termination of contract

5.3.1 The Claimant have argued that their scope of the work was to execute the finishing works which depended entirely on civil contractor's progress. Since fronts were not available due to slow progress of main civil Contractor, they could not complete the work on scheduled time and reasons for delay had been explained to the Respondent from time to time. They have cited the chain of correspondence in their presentation showing lack of work fronts available for executing the work. The respondent argued that the Claimant failed to mobilise the sufficient resources to complete the work as per scheduled date of completion. They have submitted correspondence about Claimant's failures in abiding by commitments made by them in meeting the completion dates. They stated that when the Contractor failed to mobilise sufficient resources they had to engage other agencies firstly to complete the balance work of some stations and later on had to terminate the contract and get the balance work of all stations executed by other agencies.

5.3.2 The Tribunal heard both sides and examined the supporting documents submitted by them. It is seen that the correspondence from the Claimant regarding hindrances and non-availability of work front was made up to November 2009 (CD-112). This might have been due to slow pace of work front made available by the other agencies Pace of work fronts picked up thereafter necessitating the Contractor to complete the balance works. From the correspondence made available it is apparent that there were detailed interface meetings between the two parties setting out daily targets and commitments in the face of upcoming commissioning of the line. [Respondents letter dated-19.01.2010 (RD-37(C))]. The Respondent complained about Contractors diverting man power and machinery to other work sites adversely affecting the committed target dates [dated- 19.01.2010 RD-37(0)] Further. the Respondent gave 7 days notice for completing balance work of Ashok Park and Shivaji Park stations failing which the work would be got done by engaging other agencies under clause 12.1 (b) of GCC [letter dated-03.02.2010 RD-37(D)]. Eventually. the Respondent deleted the work of two stations from the scope assigning it to other agencies [letter dated –

18.02.2010]. On 21.05.2010 the Respondent gave 14 days notice as per GCC clause 11.4.2(b), (g) and (i) for termination of the contract [RD-37(i)] and issue termination letter on 04.06 2010 giving two days notice to remove plant and machinery from the work site.

5.3.3 From the above it is apparent that the Respondent's Engineer was faced with slow progress of work due to deployment of inadequate additional resources by the Claimant. As argued by the Respondent the rate of progress was slow and adequate steps were not taken by the Claimant in this regard. This being a fast track project commitment to time schedules was of utmost importance. GCC clause 11.4.2 on contract termination due to Contractors default reads as follows:-

"11.4.2- Conditions leading to termination of contract

The Employer shall be entitled to terminate the contract if the Contractor or anyone of its constituent.

.....

(b) Abundance or repudiates the contract

.....

(g) Fails to adhere to the agreed programme of the work by margin of 10% of the stipulated period or 21 days whichever IS earlier. or fails to complete the works or part of the work Within tile stipulated or extended period of completion or is unlikely to complete the whole work or part thereof within time because of poor record of progress or

(i) Fails to take steps to employ competent and/or additional staff and labour

.....

In anyone of these events or circumstances, the Employer may upon giving 14 days notice to the Contractor, terminate the contract and expel the Contractor from the site. The Employer shall give two days notice to the Contractor towards the end of this 14 days period following which the Contractor shall remove all his plants and machinery from the site within these 2 days failing which liquidated damages shall be levied on the Contractor.

5.3.4 On going through the above Contract provisions and relevant documents submitted by Respondent, the Tribunal IS convinced that the contract termination has been done by the Respondent following appropriate contract conditions. Further, this being fast track project and in view of condition provided in GCC clause 10.9 and 10.6.1, the Claimant was obliged to deploy additional resources as per requirements of site to meet the conditions. No Engineer would like a change of Contractor mid-course at the peak of activities of the project unless forced to do so due to inadequate resources mobilisation by the Contractor. We, therefore, hold the contract termination as logical and valid as per circumstances prevailing at that time and thus making the Claimant liable to bear the consequences of the same as per contract conditions.

5.3.5 GCC clause 11 4.2 provides for forfeiting the whole or such portion of the performance security amount as deemed fit by the Employer. As such we find no ground of relief in the claim of the Claimant regarding refund of forfeiture of performance security and reject it."

43. The Award with regard to Claim no. C does not warrant the interference of this Court on being within the lines of the Contract and for not satisfying the ground of patent illegality.

44. Further, the Award with respect to claim no. D is reproduced below:

"5.4 Claim No-D: Loss on Account of wrongful recoveries towards stage payment made

5.4.1 Claimant has claimed for payment of recoveries made by the Respondent from payment made earlier up to RA 16 bill in Last Bill. They have argued that they had brought material to site which was measured and paid for up to RA 16 but recovered later on. They have further argued that as processed materials for which payment was released by the Respondent during the execution of work became Respondent's property, the payment made earlier was not recoverable. The Respondent stated that the stage payment was made in accordance with SCC clause 26. The material brought to the site was taken

away by the Claimant even before recovery could be affected. Since the material procured by the Claimant against which stage payment was made could not be used in the work by the Claimant, the amount paid was recovered in the Last Bill.

5.4.2 The Tribunal considered the Respondent's argument and hold that the material at site 1s in possession of the Contractor and hence no cost of unused material is liable to be paid by the Respondent. Claimant's argument of the material becoming Respondent's property is not tenable. The 80% payment against BOQ item is to be treated as stage payment intended to ease cash flow of the Contractor. Further, SCC clause 26 stipulates that any stage payment shall be limited to one month's requirement of the Contractor as decided by the Engineer. Non-completion of the work at site obviously cannot make the Contractor eligible for walking away with the payment received by him for the material supplied at site. We therefore, consider the recoveries made by the Respondent towards stage payment as valid and reject the claim on this account."

45. The Award with regard to Claim no. D does not warrant the interference of this Court as the learned Arbitrator has clearly considered the facts of the instant matter to adjudicate the claim along the lines of the Contract.

46. Further, the Award with respect to claim no. H is reproduced below:

"5.8 Claim no-H: Refund of amount recovered from House keeping

5.8.1 Respondent at various points of time had pointed out to the claimant about inadequate housekeeping of work site done by them and on failure of the claimant to maintain the site recovered an amount of Rs 5 lakh to clear the site at risk and cost of the Contractor. Claimant have claimed for refund of this amount stating that they had deployed sufficient man power to maintain the housekeeping work and denied the allegation for bad housekeeping. Respondent in their argument have cited letter dated- 12.03.2010 (R-27 of RD-22) and dated-

27.03.2010 (RD-21) regarding failure of the Contractor to maintain work site. GCC Clause 4.31 has been cited by the Respondent empowering the Engineer to clear the site through any other agency at the expense of the Contractor in the event of Contractors failure to comply within 7 days after receiving notice.

5.8.2 Maintenance of work sites in clean condition is paramount responsibility of the Contractor and as brought out by the Respondent. the claimant repeatedly failed to maintain the work site properly The Respondent, therefore, exercised his option as per GCC Clause 4.31 to get the site cleared for housekeeping. We, therefore, see no merit in the claim of the claimant and reject it.”

47. The Award with regard to Claim no. H does not warrant the interference of this Court on being within the lines of the Contract and for not satisfying the ground of patent illegality. The learned Arbitral tribunal has given thoughtful consideration to reach the conclusion and adjudicate the claim.

48. Further, the Award with respect to claim no. I is reproduced below:

“5.9 Claim no. I: Refund of amount recovered by the Respondent for BSES cable damage.

5.9.1 During execution of work damage to a utility cable of M/s BSES took place. The Engineer got the damaged cable repaired and recovered the charges of Rs. 1.42 lakhs from the Contractors bill The claimant have demanded refund of this amount mentioning that the work was being done mostly during night and no plan having utility services passing through the parking area was provided to them by the Respondent. In such situation happening like damage of cable was obvious for which claimant cannot be held responsible making them entitled for the refund of Rs. 1.43 lakhs. Respondent during arguments cited Clause 47 16 of

safety, health and environment conditions of contract that it is Contractor's duty to protect the utilities and in case of Contractor's failure, the Engineer is empowered to get the work done at the risk and cost of the Contractor.

5.9.2 Clause 47.16 of SHE of contract reads as follows:-

47.16 "The Contractor shall protect structures, utilities, pavements, roads and other facilities from its disfiguration and damage as a result of his activities. Where this is not possible the Contractor shall restore the structures, utilities, pavements, roads and other facilities to their original or better, failing which the rectification/restoration work shall be carried out at the risk and cost of the Contractor."

As is clear from the above clause, even in cases where it is not possible to protect the utilities, the responsibility to restore the utilities lied with the contractor. Hence, the claimant's argument that no plan for utilities were provided by the claimant and hence they are not liable to pay for the restoration is not tenable. Hence, the claim is rejected."

49. Thus, the Award with respect to claim no. I does not warrant the interference of this Court. The learned Arbitral Tribunal has clearly taken a judicial approach in adjudicating the instant claim by deciding it along the lines of the Contract.

50. Further, the Award with respect to claim no. Q is reproduced below:

"5.17 Claim No-Q: Loss of Profit

5.17. 1 The claimant has sought compensation for loss of profitability due to illegal and arbitrary termination of the contract by the Respondent.

*As the termination of contract has been held as lawful and as per provisions of contract (Para-5.3), the question of compensation on account of loss of profitability does not arise Hence the claim is **rejected.**"*

51. Thus, the Award with respect to claim no. Q does not warrant the interference of this Court. The Learned Arbitrator has not erred in adjudication of the instant claim and has thoughtfully considered the relevant provisions of the Contract to decide the same.

52. Further, the Award with respect to claim no. R is reproduced below:

“5.18 Claim No-R: Loss suffered on account of idle labour and machinery

5.18.1 Claimant has claimed compensation for loss suffered due to idle labour and machinery which was suffered by him due to non clearance of front by other agency and further due to illegal and arbitrary termination of contract.

5.18.2 GCC Clause 10.3.3 dealing with failure by the Employer to provide access is reproduced below:-

"10.3.3 If the Contractor suffered delay or incurred extra cost due to failure by the Employer to give such possession within such time. then the Contractor shall be entitled to extension of time if completion will be delayed due to this. No such extra payment shall be payable to the Contractor in this regard."

5.18.3 As is clear from above, idling of labour and machinery due to non clearance of front by the other agency cannot be a cause of compensation to the claimant. Further, idling of labour and machinery after termination of contract is not logical as the claimant was free. and obliged. to clear the work site of its labour and machinery after termination. Hence, the claim is rejected.”

53. Thus, the Award with respect to claim no. R does not warrant the interference of this Court. The learned Arbitrator has clearly taken a judicial approach while adjudicating the instant claim, along with the other claims that were raised by the petitioner during the Arbitral process.

54. A relevant portion of the Award is reproduced hereinbelow:

“6.2: Summarizing the Tribunals decision. the Respondent shall pay to the Claimant Rs.1,75,56,705 being the net amount awarded by the Tribunal. This amount should be paid within 30 days of declaration of this award. After that it will attract payment' of Simple Interest @ 10.5% per annum till the date of payment on the unpaid amount balance.”

55. Thus, the Award has clearly been in consideration of the facts and submissions on record. The learned Arbitral Tribunal had taken the contractual clauses into consideration which adjudicating upon the claims laid down by the claimant.

56. Following the triple test of perversity, it is evident that the Arbitrator, being a creature of the contract, has rightfully stayed between the lines of the Contract to adjudicate the dispute. The facts of the matter have been harmoniously applied with the parallel reading of the Contractual clauses.

57. The learned Arbitral Tribunal has clearly adopted a judicial approach and adjudicated the dispute whilst keeping the principles of jurisprudence and natural justice alive.

58. Thus, the learned Sole Arbitrator has considered the positions of the parties and adjudicated the dispute in the most appropriate manner.

CONCLUSION

59. In light of the facts, submissions, and contentions in the pleadings, this Court finds that the Petitioner has failed to corroborate with evidence how the Learned Arbitrator had erred in adjudicating the dispute.

60. The law which has been settled by the Hon'ble Supreme Court is that

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

61. In the instant petition, it was argued that the impugned Award was patently illegal and thus liable to be set aside. As stipulated by the aforementioned precedents, it is essential that there be illegalities or deficiencies at the face of the Award and/or shock the conscience of the Court in order for it to qualify to be set aside by an act of this Court.

62. The petitioner has failed to make out such a case and was unable to show that the Award is patently illegal on the face of it.

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

64. The petitioner has failed to show that any grounds that are stipulated under Section 34 of the Arbitration Act are being met.

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

66. Accordingly, the instant petition stands dismissed along with pending

applications, if any.

67. The order be uploaded on the website forthwith.

CHANDRA DHARI SINGH, J

MAY 4, 2023

gs/as

Click here to check corrigendum, if any

