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

Pronounced on : 11.07.2023.

+ **FAO(OS) (COMM) 90/2022, CM APPL. 19636/2022 & CM APPL. 24671/2023**

HARYANA STATE INDUSTRIAL AND
INFRASTRUCTURE DEVELOPMENT CORPORATION
LTD Appellant

versus

IDBI BANK LIMITED AND ANR Respondents

+ **FAO(OS) (COMM) 105/2022**

M/S KMP EXPRESSWAYS LIMITED Appellant

versus

IDBI BANK LIMITED & ANR. Respondents

Through: Mr. Sudhir Nandrajog, Sr. Advocate with Mr. Lokesh Sinhal, Addl. AG for HSIIDC with Mr. Parvinder Chauhan, and Mr. Nikunj Gupta, Advocates for HSIIDC.

Mr. P. Chidambaram, Mr. Salman Khurshid, Sr. Advocates with Mr. Deepak Khurana and Ms. Nishtha Wadhwa, Advocates for KMP Expressway.

Dr. Abhishek Manu Singhvi and Mr. Gopal Jain, Sr. Advocates with Mr. Raunak Dhillon, Ms. Madhavi Khanna, Ms. Ananya Dhar Chaudhary,



Ms. Isha Malik and Ms.
Niharika Shukla, Advocates for
IDBI Bank Ltd.

CORAM:
HON'BLE MR. JUSTICE NAJMI WAZIRI
HON'BLE MR. JUSTICE VIKAS MAHAJAN

J U D G M E N T

NAJMI WAZIRI, J

1. This appeal under section 37 of the Arbitration and Conciliation Act, 1996 ('the Act') impugns the order dated 29.03.2022 of the learned Single Judge dismissing the appellant/HSI IDC appeal in FAO(OS) (COMM) 90/2022 under section 34 of the Act against the Arbitral Award dated 24.03.2020. The Arbitral Award was delivered by a three-member Arbitral Tribunal comprising a former Chief Justice of India and two former judges of the Supreme Court.
2. For developing the Kundli-Manesar-Palwal ('KMP') Expressway, HSI IDC/appellant had appointed M/s. KMP Expressway Limited (KMPEL)/R-2 as the concessionaire. Monies were borrowed from the banks/Senior Lenders, which were represented by IDBI/R-1 as a lenders' agent. HSI IDC terminated the contract and appointed two concessionaires on terms that were different from KMPEL's. Referring to the Substitution Agreement dated 08.01.2007, IDBI claimed that the appointment of the concessionaires by the appellant had prejudiced the interest of the Senior Lenders, therefore, it be awarded damages.
3. Finding the issues in favor of the IDBI, the Arbitral Tribunal awarded damages of a sum of Rs.1,737.11 crores along with future



interest at the rate of 9% *per annum* from the date of the impugned award in favour of the IDBI and against the HSIIDC. Interestingly, it also noted that pursuant to proceedings initiated by the IDBI, before the DRT against KMPEL, HSIIDC would be entitled to reimbursement of such amounts as may be recorded through DRT.

4. Mr. Sudhir Nandrajog, the learned Senior Advocate for HSIIDC submits that the impugned judgment is vitiated primarily because: (i) the Arbitral Tribunal's findings suffer from perversity, ii) for the Award to hold that the appellant was in breach of the Substitution Agreement is erroneous and contrary to the records; iii) it disregards the fact that on 13.08.2013, a notice of default followed by a substitution notice dated 13.01.2014, was issued by IDBI itself and the latter being aware of the 120 days time window, ought to have nominated another entity in lieu of KMPEL. It did not do so, therefore, the appellant issued a cure notice dated 28.01.2015, especially when IDBI had already issued the afore-noted two notices; (iv) it was always open to IDBI to nominate another concessionaire but it failed to do so, therefore, in the larger public interest, the appellant was compelled to issue a cure notice dated 28.01.2015.

5. He further submits that since because of a delay in completion of the project, on 30.01.2015 the Supreme Court directed the appointment of a new concessionaire within a period of two months; therefore the Concession Agreement was terminated on 19.03.2015. It was in view of the Supreme Court's strict timeline that the existing Concession Agreement became unworkable and impossible to follow



the timeline prescribed in clause 3.1(iii) of the Substitution Agreement of at least 120 days for IDBI to nominate its Selectee. Therefore, in view of the imperative directions of the Supreme Court, Tender Notice was issued on 20.02.2015. Fresh bids were accepted for two separate sections of the KMP Highway on 28.03.2015 for Manesar-Palwal section and on 31.07.2015 for Kundli-Manesar section. The appellant argues that with the termination of the Concession Agreement, IDBI's right to substitute came to an end. It is contended that when IDBI failed to nominate a Selectee, it was a deemed abandonment and waiver of rights of substitution. In any case, IDBI was aware of the issuance of the Tender Notice, which did contain a clause for taking over the liabilities of the previous concessionaire. Yet, it chose the new contractor as its Selectee.

6. HSIIDC further contends that damages were granted even in the absence of actual loss being caused, whereas the fundamental policy of Indian Law is to compensate an innocent party for breach of contract only to the extent of actual losses suffered by the said party. Award for such unfounded loss results in unjust enrichment and unjust enrichment is impermissible as it violates the principle of justice, equity and good conscience. Furthermore, it is argued that since IDBI had already initiated proceedings against KMPEL before DRT for recovery of monies lent to it, therefore, the arbitral proceedings were superfluous, redundant as the loss suffered by IDBI had not yet crystallised.

7. The appellants say that the impugned award has assumed a loss, which was yet to be proven and was pending adjudication before the



DRT. Should the DRT not find any basis for granting any relief or the extent of relief to IDBI, the amount awarded by the Arbitral Tribunal would become devoid of a substratum, therefore, the arbitral proceedings ought to have been kept in abeyance. It is argued that in a way arbitral proceedings have pre-judged an issue which was pending before the DRT.

8. It is argued that IDBI could not have a claim against HSIIDC. There is acquiescence by IDBI with respect to the Selectee because it deemed the new contractor as its own Selectee. It had, under the Doctrine of Election, estopped itself from seeking any adjudication before the Arbitral Tribunal¹.

9. HSIIDC contends that IDBI's sole case was that it was deprived of its valuable securities, i.e. Toll collection, that in terms of the Substitution Agreement, the Selectee of the Senior Lenders was entitled to the balance concession period on the same terms and conditions. IDBI had been offered to take over the expressway and run the same, subject to payment of costs incurred or to be incurred by HSIIDC; IDBI did not consent to it. If it had, it would have been able to seize control over the alleged security interest, i.e. toll collection. HSIIDC was not a party to the loan agreement and transactions between IDBI and KMP. Therefore, it could not lead any evidence in that regard and suffered from lack of requisite information.

10. The appellant contends that the clauses of the Substitution Agreement have been incorrectly interpreted and a conjoined reading

¹ *State of Punjab v. Dhanjit Singh Sandhu*, (2014) 15 SCC 14,4 para 26



of clauses 3.4 and 3.5 shows that HSIIDC would be under an obligation for taking over the liability of the Senior Lenders, only when HSIIDC appoints a concessionaire. Under the new agreements, a new concessionaire was not appointed. The two agreements were extended under which two parts of the KMP highway was constructed; i) the Manesar-Palwal section was on Item Rate Mode for which Rs.500 crores were spent by HSIIDC and ii) for Kundli-Manesar section, the highway was built on BOT project on Annuity basis. The new contractors had no stake in the Toll Collection, therefore, clauses 3.4 and 3.5 were not attracted for application and interpretation by the Arbitral Tribunal. Lastly, it is argued that the scheme of arrangement for payment of monies, to secure the interest of IDBI is unfair inasmuch as it has attempted to protect the claimant's interest at the cost of exchequer.

11. Dr. Abhishek Manu Singhvi, the learned Senior Advocate for IDBI refutes the aforesaid contention. He says that the scope of section 37 of the Act is narrower than section 34 and courts would not go on into the merits of the case. Reference is made to the following judgments:

a. Reliance Infrastructure Ltd. Vs. State of Goa, Civil Appeal No. 3615 of 2023

“... ”

13. Having regard to the contentions urged and the issues raised, it shall also be apposite to take note of the principles enunciated by this Court in some of the relevant decisions cited by the parties on the scope of challenge to an arbitral award under Section 34 and the scope of appeal under Section 37 of the Act of 1996.



13.1. In MMTC Limited (supra), this Court took note of various decisions including that in the case of Associate Builders (supra) and expounded on the limited scope of interference under Section 34 and further narrower scope of appeal under Section 37 of the Act of 1996, particularly when dealing with the concurrent findings (of the Arbitrator and then of the Court). This Court, inter alia, held as under: -

“11. As far as Section 34 is concerned, the position is wellsettled 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.”

13.2. In the case of Ssangyong Engineering (supra), this Court has set out the scope of challenge under Section 34 of the Act of 1996 in further details in the following words: -

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

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

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

40. The change made in Section 28(3) by the Amendment Act really follows what is stated in paras 42.3 to 45 in



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

41. What is important to note is that a decision which is perverse, as understood in paras 31 and 32 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , while no longer being a ground for challenge under “public policy of India”, would certainly amount to a patent illegality appearing on the face of the award. Thus, a finding based on no evidence at all or an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside on the ground of patent illegality. Additionally, a finding based on documents taken behind the back of the parties by the arbitrator would also qualify as a decision based on no evidence inasmuch as such decision is not based on evidence led by the parties, and therefore, would also have to be characterised as perverse.”

13.3. The limited scope of challenge under Section 34 of the Act was once again highlighted by this Court in the case of PSA SICAL Terminals (supra) and this Court particularly explained the relevant tests as under :-

“43. It will thus appear to be a more than settled legal position, that in an application under Section 34, the court is not expected to act as an appellate court and reappreciate the evidence. The scope of interference would be limited to grounds provided under Section 34 of



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

44. A decision which is perverse, though would not be a ground for challenge under “public policy of India”, would certainly amount to a patent illegality appearing on the face of the award. However, 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.

45. To understand the test of perversity, it will also be appropriate to refer to paragraph 31 and 32 from the judgment of this Court in Associate Builders (supra), which read thus:

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

(i) a finding is based on no evidence, or(ii) an Arbitral



Tribunal takes into account something irrelevant to the decision which it arrives at; or(iii) ignores vital evidence in arriving at its decision, such decision would necessarily be perverse.

32. A good working test of perversity is contained in two judgments. In Excise and Taxation Officer-cum-Assessing Authority v. Gopi Nath & Sons [1992 Supp (2) SCC 312], it was held : (SCC p. 317, para 7)

“7. ... It is, no doubt, true that if a finding of fact is arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant material or if the finding so outrageously defies logic as to suffer from the vice of irrationality incurring the blame of being perverse, then, the finding is rendered infirm in law.””

13.4. In Delhi Airport Metro Express (supra), this Court again surveyed the case-law and explained the contours of the Courts’ power to review the arbitral awards. Therein, this Court not only re-affirmed the principles aforesaid but also highlighted an area of serious concern while pointing out “a disturbing tendency” of the Courts in setting aside arbitral awards after dissecting and re-assessing factual aspects. This Court also underscored the pertinent features and scope of the expression “patent illegality” while reiterating that the Courts do not sit in appeal over the arbitral award. The relevant and significant passages of this judgment could be usefully extracted as under:

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“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 Rashtriya Ispat Nigam Ltd. v. Dewan Chand Ram Saran [Rashtriya Ispat Nigam Ltd. v. Dewan Chand Ram Saran, (2012) 5 SCC 306] .)

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 reappraise 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”.

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

42. The Division Bench referred to various factors



leading to the termination notice, to conclude that the award shocks the conscience of the court. The discussion in SCC OnLine Del para 103 of the impugned judgment [DMRC v. Delhi Airport Metro Express (P) Ltd., 2019 SCC OnLine Del 6562] amounts to appreciation or reappraisal of the facts which is not permissible under Section 34 of the 1996 Act. The Division Bench further held [DMRC v. Delhi Airport Metro Express (P) Ltd., 2019 SCC OnLine Del 6562] that the fact of AMEL being operated without any adverse event for a period of more than four years since the date of issuance of the CMRS certificate, was not given due importance by the Arbitral Tribunal. As the arbitrator is the sole Judge of the quality as well as the quantity of the evidence, the task of being a Judge on the evidence before the Tribunal does not fall upon the Court in exercise of its jurisdiction under Section 34. [State of Rajasthan v. Puri Construction Co. Ltd., (1994) 6 SCC 485] On the basis of the issues submitted by the parties, the Arbitral Tribunal framed issues for consideration and answered the said issues. Subsequent events need not be taken into account.”

13.5. In the case of Haryana Tourism Ltd. (supra), this Court yet again pointed out the limited scope of interference under Sections 34 and 37 of the Act; and disapproved interference by the High Court under Section 37 of the Act while entering into merits of the claim in the following words: -

“8. So far as the impugned judgment and order passed by the High Court quashing and setting aside the award and the order passed by the Additional District Judge under Section 34 of the Arbitration Act are concerned, it is required to be noted that in an appeal under Section 37 of the Arbitration Act, the High Court has entered into the merits of the claim, which is not permissible in exercise of powers under Section 37 of the Arbitration Act.

9. As per settled position of law laid down by this Court in a catena of decisions, an award can be set aside only if the award is against the public policy of India. The award



can be set aside under Sections 34/37 of the Arbitration Act, if the award is found to be contrary to: (a) fundamental policy of Indian Law; or (b) the interest of India; or (c) justice or morality; or (d) if it is patently illegal. None of the aforesaid exceptions shall be applicable to the facts of the case on hand. The High Court has entered into the merits of the claim and has decided the appeal under Section 37 of the Arbitration Act as if the High Court was deciding the appeal against the judgment and decree passed by the learned trial Court. Thus, the High Court has exercised the jurisdiction not vested in it under Section 37 of the Arbitration Act. The impugned judgment and order passed by the High Court is hence not sustainable.”

13.6. As regards the limited scope of interference under Sections 34/37 of the Act, we may also usefully refer to the following observations of a 3-Judge Bench of this Court in the case of UHL Power Company Limited v. State of Himachal Pradesh: (2022) 4 SCC 116: -

“15. This Court also accepts as correct, the view expressed by the appellate court that the learned Single Judge committed a gross error in reappreciating the findings returned by the Arbitral Tribunal and taking an entirely different view in respect of the interpretation of the relevant clauses of the implementation agreement governing the parties inasmuch as it was not open to the said court to do so in proceedings under Section 34 of the Arbitration Act, by virtually acting as a court of appeal.

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.”



13.7. The learned Attorney General has referred to another 3-Judge Bench decision of this Court in the case of *Sal Udyog Private Limited (supra)*, wherein this Court indeed interfered with the award in question when the same was found suffering from non-consideration of a relevant contractual clause. In the said decision too, the principles aforesaid in *Delhi Airport Metro Express, Ssangyong Engineering* and other cases were referred to and thereafter, this Court applied the principles to the facts of that case. We shall refer to the said decision later at an appropriate juncture.

13.8. Keeping in view the aforementioned principles enunciated by this Court with regard to the limited scope of interference in an arbitral award by a Court in the exercise of its jurisdiction under Section 34 of the Act, which is all the more circumscribed in an appeal under Section 37, we may examine the rival submissions of the parties in relation to the matters dealt with by the High Court.

... ”

b. *Haryana Tourism Ltd. v. Kandhari Beverages Ltd.*, (2022) 3 SCC 237

“ ...

8. So far as the impugned judgment and order [*Kandhari Beverages Ltd. v. Haryana Tourism Ltd.*, 2018 SCC OnLine P&H 3233] passed by the High Court quashing and setting aside the award and the order passed by the Additional District Judge under Section 34 of the Arbitration Act are concerned, it is required to be noted that in an appeal under Section 37 of the Arbitration Act, the High Court has entered into the merits of the claim, which is not permissible in exercise of powers under Section 37 of the Arbitration Act.

9. As per settled position of law laid down by this Court in a catena of decisions, an award can be set aside only if the award is against the public policy of India. The award can be set aside



under Sections 34/37 of the Arbitration Act, if the award is found to be contrary to: (a) fundamental policy of Indian law; or (b) the interest of India; or (c) justice or morality; or (d) if it is patently illegal. None of the aforesaid exceptions shall be applicable to the facts of the case on hand. The High Court has entered into the merits of the claim and has decided the appeal under Section 37 of the Arbitration Act as if the High Court was deciding the appeal against the judgment and decree passed by the learned trial court. Thus, the High Court has exercised the jurisdiction not vested in it under Section 37 of the Arbitration Act. The impugned judgment and order [Kandhari Beverages Ltd. v. Haryana Tourism Ltd., 2018 SCC OnLine P&H 3233] passed by the High Court is hence not sustainable.

“ ...

c. *SAIL v. Gupta Brother Steel Tubes Ltd., (2009) 10 SCC 63*

“ ...

29. The legal position is no more res integra that the arbitrator having been made the final arbiter of resolution of disputes between the parties, the award is not open to challenge on the ground that arbitrator has reached at a wrong conclusion. The courts do not interfere with the conclusion of the arbitrator even with regard to construction of a contract, if it is a possible view of the matter. The words “no award shall be set aside” in Section 30 mandate the courts not to set aside the award on the ground other than those specified in Section 30. In a case such as this, where the arbitrator has given elaborate reasons that compensation Clause 7.2 is not attracted for the breaches for which the compensation has been claimed by the respondent and such view of the arbitrator is a possible view, we are afraid in the circumstances, award is not amenable to correction by the court.

... ”



12. The learned Senior Advocate for R-1 submits that the scope of interference, if any, would be confined to whether i) the Award is in conflict with the public policy of India and ii) the award is vitiated by patent illegality. Reference is made on the following judgments:

a. Associate Builders v. DDA, (2015) 3 SCC 49

“...

18. In Renusagar Power Co. Ltd. v. General Electric Co. [Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCC 644] , the Supreme Court construed Section 7(1)(b)(ii) of the Foreign Awards (Recognition and Enforcement) Act, 1961:

“7. Conditions for enforcement of foreign awards.—

(1) A foreign award may not be enforced under this Act—

(b) if the Court dealing with the case is satisfied that—

(ii) the enforcement of the award will be contrary to the public policy.”

In construing the expression “public policy” in the context of a foreign award, the Court held that an award contrary to

(i) The fundamental policy of Indian law,

(ii) The interest of India,

(iii) Justice or morality,

would be set aside on the ground that it would be contrary to the public policy of India. It went on further to hold that a contravention of the provisions of the Foreign Exchange Regulation Act would be contrary to the public policy of India in that the statute is enacted for the national economic interest to ensure that the nation does not lose foreign exchange which is essential for the economic survival of the nation (see SCC p. 685, para 75). Equally, disregarding orders passed by the superior courts in India could also be a contravention of the fundamental policy of Indian law, but the recovery of compound interest on interest, being contrary to statute only, would not contravene any fundamental policy of Indian law (see SCC pp. 689 & 693, paras 85 & 95).



...

Fundamental Policy of Indian Law

27. Coming to each of the heads contained in *Saw Pipes* [(2003) 5 SCC 705 : AIR 2003 SC 2629] judgment, we will first deal with the head “fundamental policy of Indian law”. It has already been seen from *Renusagar* [*Renusagar Power Co. Ltd. v. General Electric Co.*, 1994 Supp (1) SCC 644] judgment that violation of the Foreign Exchange Act and disregarding orders of superior courts in India would be regarded as being contrary to the fundamental policy of Indian law. To this it could be added that the binding effect of the judgment of a superior court being disregarded would be equally violative of the fundamental policy of Indian law.

... ”

b. Ssangyong Engg. & Construction Co. Ltd. v. NHAI, (2019) 15 SCC 131

“ ...

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] .

...

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

... ”

c. **Patel Engg. Ltd. v. North Eastern Electric Power Corpn. Ltd., (2020) 7 SCC 167**

“ ...

22. The present case arises out of a domestic award between two Indian entities. The ground of patent illegality is a ground available under the statute for setting aside a domestic award, if the decision of the arbitrator is found to be perverse, or, so irrational that no reasonable person would have arrived at the same; or, the construction of the contract is such that no fair or reasonable person would take; or, that the view of the arbitrator is not even a possible view.

... ”

13. He further submits that the court should not interfere if the view taken by the Arbitral Tribunal is a plausible one. Reliance is placed on the following judgments:

a. **Dyna Technologies (P) Ltd. v. Crompton Greaves Ltd., (2019) 20 SCC 1**



“...

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

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

...”

b. South East Asia Marine Engg. & Constructions Ltd. (SEAMEC LTD.) v. Oil India Ltd., (2020) 5 SCC 164

“...

14. *However, the question in the present case is whether the interpretation provided to the contract in the award of the Tribunal was reasonable and fair, so that the same passes the muster under Section 34 of the Arbitration Act?*

...”

Arbitration not maintainable pending proceedings in DRT:

14. To the appellant’s contention that since IDBI had already



claimed their dues from KMPEL before the DRT, no loss can be said to be caused to IDBI, the Arbitral Tribunal found that the claim petition was distinct from the cause of action in the proceedings before the DRT. The latter was a case of recovery of dues from KMPEL under the Common Loan Agreement and even though the measure of damages for breach of HSIIDC is equivalent to the dues claimed before the DRT, it does not affect the maintainability of the arbitral proceedings. The impugned judgement found no infirmity in the decision of the Arbitral Tribunal in terms of the Substitution Agreement. It held that the HSIIDC was obliged to ensure that the Senior Lenders were granted the agreed period to find a substitute for KMPEL and to make suitable arrangement for repayment or take-over of the dues owed to the Senior Lenders. It had reasoned, *inter-alia*, as under:

“ ...

72. *The Arbitral Tribunal held that HSIIDC had taken a decision to substitute KMPL even prior to the order dated 30.01.2015 passed by the Supreme Court of India. The Arbitral Tribunal further held that although the Supreme Court had fixed timelines for award of the contract for completion of the balance works, it had not altered the procedure as contemplated under the Substitution Agreement. The Arbitral Tribunal concluded that HSIIDC had defeated the rights of substitution available to the Senior Lenders by issuing a Tender Notice on 20.02.2015 without allowing one month time to the Senior Lenders to invite, negotiate and procure offers for substitution of KMPEL in terms of Article 5.2 of the Substitution Agreement. The Arbitral Tribunal also found that HSIIDC had failed to comply with Clause 3.5(i) of the Substitution Agreement by not including a suitable condition for*



payment of the dues of the Senior Lenders by the new Concessionaire. The Tribunal found that the Tender Notice dated 20.02.2015 effectively extinguished the rights of the Senior Lenders. HSIIDC had also changed the scope of the concession by (i) changing the specification of the Expressway from a four lane Expressway to a six lane Expressway; and (ii) dividing the same into two different packages. The Kundli-Manesar Section of the KMP Expressway was to be developed and operated on a BOT Semi Annuity Basis and the Manesar-Palwal Section of the KMP Expressway was contracted on an Item Rate Mode.

73. It was contended on behalf of HSIIDC that the Substitution Agreement was over ridden by the order dated 30.01.2015 passed by the Supreme Court of India. The Arbitral Tribunal did not find any merit in the said contention and rejected the same.

74. In view of the above, the Arbitral Tribunal concluded that HSIIDC had committed a breach of the Substitution Agreement and IDBI's claim was maintainable. Issue Nos. 1 and 5 struck by the Arbitral Tribunal were decided accordingly.

75. The aforesaid conclusion of the Arbitral Tribunal is based on the construction of material clauses of the Substitution Agreement and on evaluation of the evidence and material placed before the Arbitral Tribunal. This Court finds no infirmity with the decision of the Arbitral Tribunal that in terms of the Substitution Agreement, HSIIDC was obliged to ensure that the Senior Lenders were granted the agreed period to find a substitute for KMPEL and to make a suitable arrangement for repayment or take-over of the dues owed to the Senior Lenders, in the contracts entered into with the new Concessionaire. In any view, the Arbitral Tribunal's conclusion in this regard is a plausible one and cannot be held to be patently illegal or opposed to public policy of India.

... ”

15. It found that the Arbitral Tribunal's conclusion in this regard



was a plausible one and cannot be held to be patently illegal or opposed to public policy of India.

16. This court too is not persuaded by the arguments of the appellant as the issue has already been duly addressed in the impugned judgment and nothing new has been contended in this regard before us.

Breach of Substitution Agreement by HSIIDC:

17. The Tribunal found that by way of the Tender Notice dated 20.02.2015, HSIIDC effectively extinguished the rights of the Senior Lenders, changed the scope of the Concession Agreement, and committed breach of the Substitution Agreement, therefore, IDBI's claim was maintainable. This is a plausible view. The impugned judgment found no infirmity with the said conclusion. Nor do we.

18. In a Settlement meeting dated 15.04.2014 before the EPCA, the Senior Lenders themselves had proposed a change of the project from four lanes to six lanes, however, by unilaterally changing the nature and scope of the project, HSIIDC had defeated the right of the Lenders under the Substitution Agreement. Therefore, HSIIDC had committed a breach of the said agreement.

Failure of IDBI to appoint a Selectee:

19. The next argument is that IDBI failed to exercise its power/perform its duty to appoint its Selectee under the Substitution Agreement. The Tribunal found that despite IDBI diligently pursuing its options under the Substitution Agreement, its rights were breached by HSIIDC; the latter was obliged to ensure that Senior Lenders were granted the agreed period to find a substitute for KMPEL and to make



arrangement for repayment of the dues that was owed to the Senior Lenders. As noted hereinabove in paragraph 75 of the impugned judgment, the view of the Tribunal in this regard too was found to be a plausible one, it calls for no interference under a section 37 appeal.

Senior Lenders' interest:

20. As regards the HSIIDC's argument that it was under no obligation to ensure the new Selectee or new Concessionaire was put to notice and obligation that it would be liable the Senior Lenders for such dues or claims, the Arbitral Tribunal found that the aforesaid Tender Notice was in complete disregard of the Senior Lenders rights under the Substitution Agreement; that it was incumbent upon HSIIDC to include a suitable condition for payment or takeover of the Senior Lender's dues. The impugned judgement has found no infirmity with the finding of the Arbitral Tribunal as it was a plausible view and cannot be held to be patently illegal or opposed to public policy of India.

21. Apropos the above, the Arbitral Tribunal has referred to the relevant documents, including a letter dated 05.03.2015, whereby IDBI had communicated a conditional consent to HSIIDC for ceding their substitution rights under the Agreement, i.e. only if HSIIDC ensured that the new concessionaire took over the liability towards or paid the Senior Lenders their dues. This was not ensured by HSIIDC, therefore, the rights of IDBI were affected and it was so found by the Arbitral Tribunal. The claim of damages was assessed and awarded. The impugned judgment has found the same to be a plausible view which is not a patent illegality or opposed to public policy of India.



This court too finds no reason to interfere with the same.

As to the other remedies available with Senior Lenders:

22. Apropos the monies which could have been recovered by IDBI from DRT, the impugned judgement has found that it was a novel method evolved by the Arbitral Tribunal for awarding the entire dues owed by KMPEL to the Senior Lenders, with the direction that whatever is recovered from KMPEL would be handed over to HSIIDC. Evidently, the proceedings before the DRT had to be initiated in terms of the statutory imperatives and the same could not be left to be whittled away or barred by limitation. Under Article 7(10) of the Substitution Agreement, the Senior Lenders were not required to enforce or exhaust other remedy(ies) available to them before invoking the provision of the Substitution Agreement. Article 7(10) reads as under:

“...
 7.10. It shall not be necessary for the Senior Lenders of the Lenders' Agent to enforce or exhaust any other remedy available to them before invoking the provisions of this Agreement.
 ...”

23. A lender is the best judge of the manner in which it should seek recovery of its dues; and is not obliged to necessarily invoke corporate guarantee(s) as a first step before claiming damages, unless the agreement stipulates a predetermined sequence of steps to be followed. In the present case, no such predetermined steps have been found either by the Arbitral Tribunal or in the impugned judgement to curtail the rights of IDBI- Senior Lenders. According to IDBI, under



Article 3.1 of the Loan Agreement, dues towards Senior Lenders were secured by a *pari-passu* charge over all Toll receivables.

24. This was in terms of the existing trade practices and infrastructure projects and the RBI's Master Circular, dated 01.07.2014 on "Prudential norms on Income Recognition, Asset Classification and Provisioning pertaining to Advances", while designating Toll as a primary security for the loan. The Senior Lenders found it most prudent to seek security of the Toll receivables which according to them was taken away by breach of Article 3.1 of the Substitution Agreement. IDBI argued that if HSIIDC had incorporated in the agreement with the new concessionaire or contractor, that the dues of the lender had to be secured, there would possibly have been no occasion for any dispute. The Arbitral Tribunal found that the HSIIDC had altered the nature of the Concession Agreement under which monies were lent by the Senior Lenders and two different types of contracts were entered into, i.e. Item-Rate Basis and Semi-Annuity Basis. While this may have been as per the convenience of HSIIDC but it could not be to the detriment of IDBI/Senior Lenders. Their interest was to be secured in terms of clause 3.5 of the Substitution Agreement. The Arbitral Tribunal has found so and awarded damages. The impugned judgment has found no reason to interfere with the Award because its view is a plausible view. No patent illegality is shown to us. There is no occasion to interfere with a plausible view. The appeal is without merit and accordingly dismissed.

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25. Mr. Chidambaram, the learned Senior Advocate for KMPEL



submits that once the highest authority of HSIIDC had accepted on the basis of various valuations done, that Rs.1300 crores was a reasonable amount to be paid to the Senior Lenders, there could be no question of any other amounts being claimed by the Senior Lenders from KMPEL. For breach of the loan agreement, proceedings have been initiated before the DRT and therefore KMPEL has *locus standi* and an interest in the proceedings.

26. It is because of the breach of the terms of the contract that the Senior Lenders preceded with Arbitration proceedings against HSIIDC. The claim was for Rs. 1737 crores against HSIIDC, yet KMPEL was arrayed as a party in Arbitral proceedings even after the substitution by new entities. The Arbitral Tribunal rejected KMPEL's counterclaims on the ground that it was not covered under the Concession Agreement and was filed late. This finding was rejected by this Court. Senior Lenders have already said that they have no other claim against KMPEL but for recovery of loan amount.

27. Interestingly, since no relief was sought by IDBI against KMPEL in the arbitral proceedings, the award could not have made any observations against KMPEL but it does, despite the fact that no issue was framed regarding the defence of KMPEL. In the operative part of the award, HSIIDC gets a benefit which it did not even seek against KMPEL.

28. The learned Senior Advocate submits that para. 4 of the operative part of the Award can be severed from the rest because it assumes that some amount would be recovered by IDBI from KMPEL towards outstanding dues, and to this recovered amount, HSIIDC will



be entitled.

29. These questions do not arise for consideration in the present appeal, because the scope of interference and examination is limited under Section 37, and these were already considered by the learned Single Judge, who reasoned that the methodology devised by the Arbitral Tribunal is an integral part in calculating the quantum of damages. In any event, the concerns of KMPEL are adequately protected by the learned Single Judge, who has reasoned as under:

“49. In this regard, it is relevant to note that the Arbitral Tribunal had clarified that the impugned award was only in respect of disputes arising from the Substitution Agreement and not disputes arising from the Concession Agreement. It was further clarified that the findings recorded in the impugned award would have no bearing in the arbitral disputes between KMPEL and HSIIDC.

50. In view of the above, no clarifications in this regard are necessary. The impugned award does not in any manner prejudice KMPEL's right to pursue its claims against HSIIDC in respect of the Concession Agreement. In respect of IDBI's claim is concerned, it is necessary to note that KMPEL had supported the impugned award against HSIIDC and in favour of IDBI. The measure of damages as awarded to IDBI is premised on the outstanding amount payable against the loan advanced by the Senior Lenders to KMPEL. Thus, to that extent, the findings are binding on KMPEL. KMPEL is not precluded from raising any defence against IDBI / Senior Lenders as may be advised in the recovery proceedings instituted by IDBI / Senior Lenders before the Debts Recovery Tribunal save and except the quantum of amount outstanding against the loan advanced by the Senior Lenders”.



30. The above, in our view, sufficiently addresses the concerns of KMPEL. There is no merit in this present appeal as well. Accordingly, it is dismissed.

NAJMI WAZIRI, J

VIKAS MAHAJAN, J

JULY 11, 2023/ss

