

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

% **Date of order : 11<sup>th</sup> April, 2023**

+ **ARB. A. (COMM.) 42/2022**

**M/S SATISH CHAND RAJESH KUMAR PVT. LTD**

**..... Appellant**

Through: **Mr. Avinash K. Trivedi and Mr.  
Anurag Kaushik, Advocates**

**versus**

**NEW DELHI MUNICIPAL COUNCIL & ANR..... Respondents**

Through: **Mr. Jitendra Kumar Tripathi and  
Mr. Tushar Sannu, Advocates for  
NDMC along with Mr. Sanjay  
Verma, Asst. Engineer**

**CORAM:**

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

**ORDER**

**CHANDRA DHARI SINGH, J (Oral)**

1. The instant appeal under Section 37(2) of the Arbitration and Conciliation Act, 1996 (hereinafter “the Act, 1996”) read with Section 151 of the Code of Civil Procedure, 1908 has been filed on behalf of the appellant seeking the following reliefs:

*“It is therefore most humbly and respectfully prayed that the Hon'ble Court may please admit the appeal and set aside the order dated 03.06.2022 and further hold that grant of provisional Extension of time, unilaterally to keep the contract alive that too reserving the right to recover compensation under clause 2 of an agreement is no Extension of time in the Eyes of Law.*

*It is further prayed that the Hon'ble Court may please set*

*aside the order dated 03.06.2022 and further allow the appellant to lift the balance material such as reinforcement after adjusting the balance secured advance, other material, such stores, bricks, tin sheets, angles and others as available at site in addition to the material allowed by ld. Arbitrator. Any other order or prayer which this Hon'ble Court may deems fit and proper in the facts and circumstances of the case."*

### **FACTUAL MATRIX**

2. The appellant is a company registered under the Companies Act and engaged in the business of civil contractors registered and having its office at Shop No.18, DDA Market, First Floor, Deepali Enclave, Pitam Pura Delhi -110034.
3. The respondent is the Municipal Council of New Delhi having its registered office at J6H8+766, Palika Kendra Parliament Street, New Delhi, 110001.
4. The respondents had called a tender for the work of Redevelopment of Bapu Samaj Sewa Kendra, Panchkuian Road, New Delhi. The appellant being the lowest bidder had got the contract awarded in his favour from the Respondent.
5. The work was awarded to the appellants *vide* acceptance letter dated 7<sup>th</sup> February 2018 with stipulated dates of start and completion as 22<sup>nd</sup> February 2018 and 21<sup>st</sup> August 2019, respectively, as the time stipulated to complete the work was 18 months to be reckoned from 15<sup>th</sup> day of the issue of letter of acceptance.
6. The value of work awarded was INR 24,66,00,633 and the performance guarantee at 5% of the tendered value for an amount of INR 1,23,30,032 valid up to 31<sup>st</sup> August 2019 was deposited in the shape of a

bank guarantee for the value of INR 1,23,30,032 from Punjab National Bank valid up to 8<sup>th</sup> November 2019 *vide* letter dated 13<sup>th</sup> February 2018.

7. However, *vide* letter dated 12<sup>th</sup> March 2018, the respondent informed the appellant that the value of the work has been modified to INR 24,54,00,633 and accordingly the performance guarantee was also reduced to INR 1,22,70,032 which was again submitted *vide* bank guarantee no. 0197OBG19000451 dated 7<sup>th</sup> January 2019 valid up to 2nd January 2020 from Kotak Mahindra Bank, Rohini Sector-8, New Delhi, 110085.

8. The appellant had approached the site to commence the work, but the site was occupied by a dispensary on one floor of the building and the dismantling work had to be paused till it was vacated, as the public parked their vehicles in the vicinity of the site. The NDMC staff resided in the building that had to be dismantled before the work commenced and such hindrances were hidden by the respondents while awarding the work to the appellants and the respondents had not gotten the site vacated.

9. The trees in the vicinity had to be removed before the work could commence and after the appellant raised this issue *vide* letter dated 29<sup>th</sup> March 2019 addressed to the respondents, the respondents subsequently removed the trees on 5<sup>th</sup> October 2018.

10. The respondents were supposed to provide drawings before 22<sup>nd</sup> February 2018, without which the work could not be started.

11. After several barriers and hindrances as alleged by the appellant, the appellant submitted the bill of INR 6,71,83,639 along with measurements on 21<sup>st</sup> September 2019.

12. Accordingly, the appellant invoked the Arbitration Clause 25 of the

Agreement on 21<sup>st</sup> November 2019 and asked the Chief Engineer to appoint an Arbitrator to which the respondent's executive engineer admitted that the appointment of an Arbitrator is under examination.

13. The appellant filed an Arbitration Petition on or about 17<sup>th</sup> March 2020 for the appointment of an Arbitrator which was allowed and *vide* Order dated 10<sup>th</sup> February 2022 by this Court.

14. The appellant also filed Writ Petition assailing the Order dated 4<sup>th</sup> August 2020 taken by the NDMC debaring the appellant for three years from participating in the tenders of several departments of the Government of NCT of Delhi in which the Court passed the Order dated 29<sup>th</sup> April 2022 against which the appellant filed an appeal on 2<sup>nd</sup> May 2022.

15. Further, against the Judgment dated 29<sup>th</sup> April 2022, the appellant filed an application under Section 17 of Arbitration and Conciliation, 1996 before the Learned Arbitrator on 12<sup>th</sup> May 2022 which was dismissed by the Learned Arbitrator *vide* Order dated 3<sup>rd</sup> June 2022.

16. Hence, the present Appeal.

### **RELEVANT CLAUSES OF THE AGREEMENT**

#### **CLAUSE 2**

##### ***"Compensation for Delay***

*If the contractor fails to maintain the required progress in terms of clause 5 or to complete the work and clear the site on or before the contract or extended date of completion, he shall, without prejudice to any other right or remedy available under the law to the Government on account of such breach, pay as agreed compensation the amount calculated at the rates stipulated below as the authority specified in schedule 'F' (whose decision in writing shall be final and binding) may decide on the amount of tendered*

*value of the work for every completed day/month (as applicable) that the progress remains below that specified in Clause 5 or that the work remains incomplete. This will also apply to items or group of items for which a separate period of completion has been specified.*

*(i) Compensation @ 1.5 % per month of delay for delay of work to be computed on per day basis*

*Provided always that the total amount of compensation for delay to be paid under this Condition shall not exceed 10% of the Tendered Value of work or of the Tendered Value of the item or group of items of work for which a separate period of completion is originally given. The amount of compensation may be adjusted or set-off against any sum payable to the Contractor under this or any other contract with the Government. In case, the contractor does not achieve a particular milestone mentioned in schedule F, or the re-scheduled milestone(s) in terms of Clause 5.4, the amount shown against that milestone shall be withheld, to be adjusted against the compensation levied at the final grant of Extension of Time. With-holding of this amount on failure to achieve a milestone, shall be automatic without any notice to the contractor. However, if the contractor catches up with the progress of work on the subsequent milestone(s), the withheld amount shall be released. In case the contractor fails to make up for the delay in subsequent milestone(s), amount mentioned against each milestone missed subsequently also shall be withheld. However, no interest, whatsoever, shall be payable on such withheld amount."*

### **CLAUSE 3A**

*"In case, the work cannot be started due to reasons not within the control of the contractor within 1/8th of the stipulated time for completion of work or one month whichever is higher, either party may close the contract. In case contractor wants to close the contract, he shall give notice to the department stating the failure on the part of department. In such eventuality, the Performance Guarantee of the contractor shall be refunded within following time*

*limits:*

*(i) If the Tendered value of work is up to Rs. 45 lacs: 15 days.*

*(ii) If the Tendered value of work is more than Rs. 45 lac and up to Rs. 2.5 Crore: 21 days.*

*(iii) If the Tendered value of work exceeds Rs. 2.5 Crore: 30 days. If Performance Guarantee is not released within prescribed time limit, then a simple interest @ 0.25% per month shall be payable on Performance Guarantee amount to the contractor from the date of expiry of prescribed time limit. A compensation for such eventuality, on account of damages etc. shall be payable @ 0.25% of tendered amount subject to maximum limit of Rs. 10 lacs."*

## **CLAUSE 5**

### ***Time and Extension for Delay***

*"The time allowed for execution of the Works as specified in the Schedule 'F' or the extended time in accordance with these conditions shall be the essence of the Contract. The execution of the works shall commence from such time period as mentioned in schedule 'F' or from the date of handing over of the site whichever is later. If the Contractor commits default in commencing the execution of the work as aforesaid, Government shall without prejudice to any other right or remedy available in law, be at liberty to forfeit the performance guarantee absolutely.*

*5.1 As soon as possible after the Contract is concluded, the Contractor shall submit a Time and Progress Chart for each mile stone and get it approved by the Department. The Chart shall be prepared in direct relation to the time stated in the Contract documents for completion of items of the works. It shall indicate the forecast of the dates of commencement and completion of various trades of sections of the work and may be amended as necessary by agreement between the Engineer-in-Charge and the Contractor within the limitations of time imposed in the Contract documents, and further to ensure good progress during the execution of the work, the contractor shall in all cases in which the time*

*allowed for any work, exceeds one month (save for special jobs for which a separate programme has been agreed upon) complete the work as per mile stones given in Schedule 'F'.*

*(a) Project Management shall be done by using project management software for works costing more than Rs. 5 Crore.*

*(b) The project management shall be done using M.S. Project software for works costing more than Rs. 5 Crore and up to Rs. 20 Crore. For works costing more than Rs. 20 Crore, project management shall be done using Primavera Software.*

### **PROGRAMME CHART**

*(i) The Contractor shall prepare an integrated programme chart in MS Project/Primavera software for the execution of work, showing clearly all activities from the start of work to completion, with details of manpower, equipment and machinery required for the fulfilment of the programme within the stipulated period or earlier and submit the same for approval to the Engineer-in- Charge within ten days of award of the contract. A recovery of Rs. 2500/- (for works costing up to Rs. 20 Crores) / Rs. 5000/- (for works costing more than Rs. 20 Crores) shall be made on per day basis in case of delay in submission of the above programme.*

*(ii) The programme chart should include the following:*

*(a) Descriptive note explaining sequence of the various activities.*

*(b) Network (PERT I CPM I BAR CHART).*

*(c) Programme for procurement of materials by the contractor. Programme of procurement of machinery / equipment's having adequate capacity, commensurate with the quantum of work to be done within the stipulated period, by the contractor. In addition to above, to achieve the progress of Work as per programme, the contractor must bring at site adequate shuttering material required for cement concrete and R.C.C. works etc. for three floors within one month from the date of start of work till the*

*completion of RCC work as per requirement of work. The contractor shall submit shuttering schedule adequate to complete structure work within laid down physical milestone.*

*(iii) If at any time, it appears to the Engineer-in-Charge that the actual progress of work does not conform to the approved programme referred above or after rescheduling of milestones, the contractor shall produce a revised programme within 7 (seven) days, showing the modifications to the approved programme to ensure timely completion of the work. The modified schedule of programme shall be approved by the Engineer in Charge. A recovery of Rs. 25001- (for works costing up to Rs. 20 Crores) / Rs. 50001- (for works costing more than Rs. 20 Crores) shall be made on per day basis in case of delay in submission of the modified programme.*

*(iv) The submission for approval by the Engineer-in-Charge of such programme or such particulars shall not relieve the contractor of any of the duties or responsibilities under the contract. This is without prejudice to the right of Engineer-in-Charge to take action against the contractor as per terms and conditions of the agreement.*

*(v) The contractor shall submit the progress report using MS Project/Primavira software with base line programme referred above for the work done during previous month to the Engineer-in-charge on or before 5th day of each month failing which a recovery Rs. 25001- (for works costing up to Rs. 20 Crores) / Rs. 50001- (for works costing more than Rs. 20 Crores) shall be made on per day basis in case of delay in submission of the monthly progress report.*

**5.2 If the work( s) be delayed by: -**

- (i) force majeure, or*
- (ii) abnormally bad weather, or*
- (iii) serious loss or damage by fire, or*
- (iv) civil commotion, local commotion of workmen, strike or lockout, affecting any of the trades employed on the work, or*

(v) delay on the part of other contractors or tradesmen engaged by Engineer-in- Charge in executing work not forming part of the Contract, or  
 (vi) non-availability of stores, which are the responsibility of Government to supply or  
 (vii) non-availability or break down of tools and Plant to be supplied or supplied by Government or  
 (viii) any other cause which, in the absolute discretion of the Engineer-in-Charge is beyond the Contractor's control. then upon the happening of any such event causing delay, the Contractor shall immediately give notice thereof in writing to the authority as indicated in Schedule 'F' but shall nevertheless use constantly his best endeavours to prevent or make good the delay and shall do all that may be reasonably required to the satisfaction of the Engineer-in-Charge to proceed with the works.

**5.3 Request for rescheduling of Mile stones and extension of time, to be eligible for consideration, shall be made by the Contractor in writing within fourteen days of the happening of the event causing delay on the prescribed form to the authority as indicated in Schedule 'F'. The Contractor may also, if practicable, indicate in such a request the period for which extension is desired.**

**5.4 In any such case the authority as indicated in Schedule 'F' may give a fair and reasonable extension of time and reschedule the mile stones for completion of work. Such extension or rescheduling of the milestones shall be communicated to the Contractor by the authority as indicated in Schedule 'F' in writing, within 3 months or 4 weeks of the date of receipt of such request respectively. Non application by the contractor for extension of time/ rescheduling of the milestones shall not be a bar for giving a fair and reasonable extension/ rescheduling of the milestones by the authority as indicated in Schedule 'F' and this shall be binding on the contractor.”**

## **SUBMISSIONS**

### ***(On Behalf of The Appellant)***

17. Learned counsel appearing on behalf of the appellant submitted that the learned Arbitrator had failed to appreciate that agreement between the parties provided for a fair and reasonable extension of time and rescheduling of milestones for completion of work, however, the respondents had neither rescheduled the milestones nor had granted an extension of time till date of termination of contract agreement, despite admitting the delay on their part in the hindrance register maintained by them unilaterally.

18. It is submitted that the learned Arbitrator had further failed to appreciate the contents of aforementioned Clause 2, 3A, and 5 of the agreement, which provided that the time allowed for the execution of work as specified in the schedule F or the extended time in accordance with these conditions shall be the essence of the contract. In the present case, no such extension was granted by the respondents.

19. It is further submitted that the learned Arbitrator had failed to appreciate that the respondent had not granted a fair and just and reasonable extension of time as required under the aforementioned clause 5.4. The respondent had only extended the agreement granting a provisional extension of time with the only intention to keep the contract alive, and further reserve their right to levy compensation under clause 2 of an agreement while granting such provisional extension of time.

20. Further, the learned Arbitrator had failed to appreciate that there was no provision in the contract agreement which provides for the provisional extension of time and that too reserves the right to levy

liquidated damages unilaterally beyond the conditions prescribed in clause 5 of the agreement.

21. Further, learned Arbitrator had failed to appreciate that the contract is bilateral and the time should be extended with the consent of both the parties and not unilaterally.

22. It is submitted that the learned Arbitrator had failed to appreciate that schedule F provides for Rescheduling the milestones however the respondent had not rescheduled the milestones despite the request from the appellant but had withheld an amount of INR 24,54,006/- towards milestone from the 07<sup>th</sup> R/A bill of the appellant.

23. Further, the learned Arbitrator had failed to appreciate that the respondent had failed to fulfill their own reciprocal promises in as per the agreement such as to provide the peaceful and vacant site, which admittedly had been vacated on 17<sup>th</sup> March 2018 as against the date of start of work 21<sup>st</sup> February 2018.

24. It is further submitted that the learned Arbitrator had failed to appreciate that the drawings which were required to be provided on the date of start of work, were revised several times.

25. It is also submitted that the learned Arbitrator had wrongly appreciated the hindrances as the only hindrances on record in the hindrance register, and had failed to appreciate the hindrances as submitted by the Appellant during the execution of work and also admitted by the Respondent in their letters on record.

26. Further, the learned Arbitrator had failed to appreciate that the provisional extension of time is no extension in terms of agreement and therefore has no value in the eyes of the Law. Moreover, the extension

should be bilateral with the consent of both parties and not unilateral, and that too after reserving the right to levy liquidated damages.

27. Also, the learned Arbitrator failed to appreciate the provision of Section 53 to 55 of the Indian Contract Act, 1872, which provides that the contract becomes voidable at the instance of the party who was prevented from performing his part of the contract. It is admitted that the respondent had failed to provide the site drawings, revised the drawings from time to time, failed to remove the trees from the site, and thereby failed to fulfill their own reciprocal promises in an agreement.

28. Learned counsel for the appellant submitted that the scope of work was changed resulting in the revision of drawings, and an increase in depth of excavation from 3.5m to 6.8m. It resulted in the prolongation of the contract agreement, as the Raft drawings, plinth drawings, and columns drawings beam drawings will automatically change due to the additional depth of the foundation and basement floor.

29. Further, the Arbitrator had wrongly held in the impugned order dated 3<sup>rd</sup> June 2022 *"if the respondents levy Liquidated damages in future, the appellant should have contested the same"*, after completion of work. The learned Arbitrator had failed to appreciate that the respondent has to extend the contract considering fair, just, and reasonable hindrances as apprised by the appellant from time to time, however, the respondent had not extended the contract as per agreement.

30. Also, it was submitted that the learned Arbitrator had wrongly taken the note that the value of reinforcement had increased manifold, and therefore the appellant wanted to make money out of it, and hence wrongly rejected the prayer for lifting the reinforcement, which actually

belongs to the appellant in the agreement.

31. Therefore, it is submitted that the Court may set aside the order dated 3<sup>rd</sup> June 2022.

***(On Behalf of The Respondents)***

32. Learned counsel appearing on behalf of the respondent-NDMC submitted that the reply of the appeal has been filed *vide* Diary No. 1396741/2022 dated 10<sup>th</sup> April 2023 but the same is lying under objection.

33. During the arguments, learned counsel appearing on behalf of the respondent-NDMC handed over the reply before this Court which has been taken on record.

34. Learned counsel appearing on behalf of the respondent submitted that the learned Arbitrator considered the circumstances, status of work, and the capacity of the appellant while concluding that the hindrance was not a reason to abandon the work entirely.

35. Learned counsel for the respondent submitted that the extension was granted to the appellants well within the ambit of the Contractual provisions and that the extension was fair and reasonable in nature. Moreover, the respondent had only reserved their right to claim liquidated damages.

36. Learned counsel for the respondent submitted that the contentions raised by the appellants are contrary to Clause 5.4 of the Contract as it is clearly mentioned in Clauses 5.3 and 5.4 that request for extension of time should be in writing by the contractor and non-application by the contractor shall not be a bar for giving a fair and reasonable extension of the Contract and that would be binding upon the contractor.

37. Learned counsel for the respondent submitted that the respondent is entitled to claim compensation under Clause 2 of the Contract along with the liberty to re-schedule the milestone/time of completion as per Clause 5.4 of the Contract.

38. Learned counsel for the respondent submitted that the site was vacant for the appellant to conduct its work and the appellant failed to mobilize its manpower and machinery in terms of the Contract despite numerous reminders and several show cause notices and even suspended the work and forced the respondent to determine the Contract under Clause 3 of the Agreement *vide* letter dated 15<sup>th</sup> November 2019 and further informing the appellant that the security deposit and bank guarantee stood forfeited.

39. Learned counsel for the respondent submitted that the Contract empowers the Engineer-in-charge to change the scope of work and the appellant was under an obligation to do the changed work.

40. Learned counsel for the respondent submitted that the respondent has complied with reciprocal promises under the Contract and even extended the time, considering the status of the work.

41. Learned counsel for the respondent submitted that the completed site with all the drawings had been provided to the appellants and any extra work was duly paid for by the respondent.

42. Learned counsel for the respondent submitted that nothing related to the architect and letters alleged by the appellants are mentioned in the Statement of Claim in the proceeding before the Learned Arbitrator and hence new averments cannot be allowed in the present proceedings.

43. Learned counsel for the respondent submitted that the respondent

made timely payments as and when asked by the appellants and it is furthermore denied that the respondent has breached the agreement.

44. Learned counsel for the respondent submitted that the appellant has been blacklisted by the appellant *vide* respondent council's decision dated 4<sup>th</sup> August 2020 as per Clause 15 of the Special Conditions of the Contract.

45. Learned counsel for the respondent submitted that as per Clause 1 of the Contract, the performance guarantee was initially up to the stipulated date of completion plus 60 days beyond that. In case of an extension of the working period, the appellant was required to get the bank guarantee extended.

46. Learned counsel for the respondent submitted that *vide* letter dated 15<sup>th</sup> March 2018, it was communicated to the appellant that all the buildings were handed over to the appellants except the first floor of one building which was also handed over on 17<sup>th</sup> March 2018. Furthermore, it is submitted that at present there is no hindrance from the trees.

47. Learned counsel for the respondent submitted that the respondent *vide* letter dated 11<sup>th</sup> September 2018 informed the appellant that no excavation is held up due to the falling of the trees and that *vide* letters dated 15<sup>th</sup> March 2018 and 19<sup>th</sup> April 2018 duly asked the appellant to continue with the work.

48. Learned counsel for the respondent submitted that no obstruction with regard to the site was ever cited by the claimant at the time of tendering and any hindrances that occurred were duly recorded in the hindrance register and due benefits of the same were given to the appellants while calculating the milestones to be achieved.

49. Learned counsel for the respondent submitted that the Contract has made it clear that the bidders should inspect the site before bidding for the tender.

50. Learned counsel for the respondent submitted that the rates of extra items had to be finalized as per Clause 12 of the Agreement and quantities were to be paid as per the actual measurements. Furthermore, it is submitted that the appellant has been duly paid for all the extra work executed at the site from time to time, including the extra excavation.

51. Learned counsel for the respondent submitted that the structural drawings were provided as and when required by the appellant corresponding to the work to be carried out at the relevant stage.

52. Learned counsel for the respondent submitted that the respondent has timely provided details to the design mix but due to the failure of a sample, the second sample was sent to NCCBM. Furthermore, it is submitted that as per the terms of the Contract, the appellant is required to bear the cost of approval of the design mix.

53. Learned counsel for the respondent submitted that all the reasonable and legitimate hindrances which were brought to the attention of the respondent were noted and considered by the respondent while determining the extension of the Contract. Furthermore, it is submitted that the hindrances claimed by the appellants *vide* letter dated 5<sup>th</sup> July 2019 were perverse in nature and repugnant to the Contract itself.

54. Learned counsel for the respondent submitted that the Claims of the appellants are in contravention of the records and that due to virtue of counter-claims filed by the respondent, the respondent has also occurred huge losses due to the lapses by the appellant. Furthermore, it is

submitted that amounts so claimed by the appellant first need to be verified by the ongoing Arbitral proceedings and consequently need to be adjusted against the counter-claims so raised by the respondent before the Learned Arbitral Tribunal.

55. Learned counsel for the respondent submitted that the appellant despite being granted multiple extensions for the completion of work was continuously delaying the completion of the work and ultimately requested the respondent for closure of work *vide* letter dated 5<sup>th</sup> September 2019 and 9<sup>th</sup> September 2019 pursuant to which the Contract was determined by respondent. Furthermore, it is submitted that the appellant *vide* letter dated 16<sup>th</sup> September 2019, inter-alia, requested for an extension of work of 15 months for completion of work without levying any compensation.

56. Learned counsel for the respondent submitted that the appellant was issued Show-Cause Notice under Clause 3(a) and (b) of the Agreement and the appellant was also informed that action under the said Clauses would be taken if the appellant failed to satisfy its reasons for the suspension of work.

57. Learned counsel for the respondent submitted that the appellant raised false and frivolous claims for the Learned Arbitrator and due to various breaches and abandonment by the appellant, the appellant is liable to pay the counter-claims and losses suffered by the respondent.

58. It is thus submitted by the learned counsel of the respondents that the instant petition may be dismissed.

### **FINDINGS AND ANALYSIS**

59. The first question to be considered in the light of these submissions

is with regard to the scope of this Court's jurisdiction under Section 37(2) of the Act. Before delving into the judicial decisions, it is pertinent to reproduce the relevant portion of Section 37(2) of the Act, 1996:

*37. Appealable orders.—*

*(2) An appeal shall also lie to a Court from an order granting of the arbitral tribunal.—*

*(a) accepting the plea referred in sub-section (2) or sub-section (3) of section 16; or*

*(b) granting or refusing to grant an interim measure under section 17.*

60. In ***Dinesh Gupta v. Anand Gupta, 2020 SCC OnLine Del 2099***, this Court considered the matter with reference to Section 5 of the Act and the generally limited nature of the Court's power in arbitration proceedings, to conclude as follows:

*"60. In the opinion of this Court, another important, and peculiar, feature of the 1996 Act, which must necessarily inform the approach of the High Court, is that the 1996 Act provides for an appeal against interlocutory orders, whereas the final award is not amenable to any appeal, but only to objections under Section 34. If the submission of Mr. Nayar, as advanced, were to be accepted, it would imply that the jurisdiction of the Court, over the interlocutory decision of the arbitrator, would be much wider than the jurisdiction against the final award. Though, jurisprudentially, perhaps, such a position may not be objectionable, it does appear incongruous, and opposed to the well settled principle that the scope of interference with interim orders, is, ordinarily, much more restricted than the scope of interference with the final judgment.*

*61. Here, yet another peculiar dispensation, in the 1996 Act, apropos the scope of interference with the decision of the arbitrator, manifests itself. The proviso to Section 36(3) ordains that the Court, while considering an application for grant of stay of a final arbitral award for payment of money,*

*shall “have due regard to the provisions for grant of stay of a decree under the provisions of the Civil Procedure Code, 1908”. By reference, therefore, Order 41 Rule 5 of the CPC, which deals with stay, by the appellate court, of original decrees, stands incorporated into Section 36(3) of the 1996 Act. Though, therefore, the final arbitral award is not made amenable to appeal, by the 1996 Act, any prayer for stay of the arbitral award, that accompanies objections under Section 34, is required to be examined in the light of the provisions, in the CPC, governing stay of original decrees, in exercise of appellate jurisdiction. Though, for the purposes of this judgment, it is not necessary to psychoanalyse the legislative intent in providing for such a peculiar dispensation, the fact that applications for stay of final arbitral awards, are required to be considered on the basis of the principles governing stay, by appellate courts, under Order 41 Rule 5 of the CPC, indicate, to an extent, that the principles of Order 41 are also required to be borne in mind, while exercising appellate jurisdiction, under Section 37.*

*62. The 1996 Act is, preambularly, a fallout of the United Nation's Commission on International Trade Law (UNCITRAL), adopted in 1995 as the Model Law on International Commercial Arbitration. The Statement of Objects and Reasons, preceding the 1996 Act, stipulates, in paras 2 to 5 thereof, as under, in this respect:*

*“2. The United Nations Commission on International Trade Law (UNCITRAL) adopted in 1985 the Model Law on International Commercial Arbitration. The General Assembly of the United Nations has recommended that all countries give due consideration to the said Model Law, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practise. The UNCITRAL also adopted in 1980 a set of Conciliation Rules. The General Assembly of the United Nations has recommended the use of these Rules in cases where the disputes arise in the context of international commercial*

*relations and the parties seek amicable settlement of the disputes by recourse to conciliation. An important feature of the UNCITRAL Model Law and Rules is that they have harmonized concepts on arbitration and conciliation of different legal systems of the world and thus contains provisions which are designed for universal applications.*

*3. Though the said UNCITRAL Model Law and Rules are intended to deal with International Commercial Arbitration and Conciliation, they could, with appropriate modifications, serve as a model for legislation on domestic arbitration and conciliation. The present Bill seeks to consolidate and amend the law relating to domestic arbitration, international commercial arbitration, enforcement of foreign arbitral awards and to define the law relating to conciliation, taking into account the said UNCITRAL Model Law and Rules.*

*4. The main objectives of the Bill are as under:—*

- a. to comprehensively cover international and commercial arbitration and conciliation as also domestic arbitration and conciliation;*
- b. to make provision for an arbitral procedure which is fair, efficient and capable of meeting the needs of the specific arbitration;*
- c. to provide that the arbitral tribunal gives reasons for its arbitral award;*
- d. to ensure that the arbitral tribunal remains within the limits of its jurisdiction;*
- e. to minimize the supervisory role of the courts in the arbitral process;*
- f. to permit an arbitral tribunal to use mediation, conciliation or other procedure during the arbitral proceedings to encourage settlement of disputes;*
- g. to provide that every final arbitral award is enforced in the same manner as if it were a decree of the court;*
- h. to provide a settlement agreement reached by the parties as a result of conciliation proceedings will have the same status and effect as an arbitral award*

*on agreed terms on the substance of the dispute rendered by an arbitral tribunal; and*

- i. to provide that, for purposes of enforcement of foreign awards, every arbitral award made in a country to which one of the two international Conventions relating to foreign arbitral awards to which India is a party applies, will be treated as a foreign awards.*

*5. The Bill seeks to achieve the above objects.”*

*63. The Supreme Court has, in Chloro Controls (I) Ltd. v. Severn Trent Water Purification Inc., held that the legislative intent and essence of the 1996 Act “is to bring domestic as well as international commercial arbitration in consonance with the UNCITRAL Model Rules, the New York Convention and Geneva Convention”. The afore-extracted passages, from the Statements of Object and Reasons of the 1996 Act has, necessarily, to guide the Court, while interpreting the provisions thereof. While on the point, it may be noted that, in Bharat Sewa Sansthan v. U.P. Electronics Corporation Ltd., the Supreme Court has clearly held the “main objective of the (1996) Act” as being “to make provision for an arbitral procedure which is fair, efficient and capable of meeting the needs of the specific arbitration and to minimise the supervisory role of courts in the arbitral process and to permit an arbitral Tribunal to use mediation, the conciliation or other procedures during the arbitral proceedings in settlement of disputes, etc.”*

*64. There can be no gainsaying the proposition, therefore, that, while exercising any kind of jurisdiction, over arbitral orders, or arbitral awards, whether interim or final, or with the arbitral process itself, the Court is required to maintain an extremely circumspect approach. It is always required to be borne, in mind, that arbitration is intended to be an avenue for “alternative dispute resolution”, and not a means to multiply, or foster, further disputes. Where, therefore, the arbitrator resolves the dispute, that resolution is entitled to due respect and, save and except for the reasons explicitly set out in the body of the 1996 Act, is, ordinarily, immune from judicial interference.*

65. Interestingly, while examining, in *Snehadeep Structures (P) Ltd. v. Maharashtra Small Scale Industries Development Corporation Ltd.*, the scope of the expression “appeal” as employed in Section 7 of the Interest on Delayed Payments to Small Scale and Ancillary Undertakings Act, 1993, the Supreme Court held that, “if ... the meaning of “appeal” is ambiguous, the interpretation that advances the object and purpose of the legislation, shall be accepted.” Purposive interpretation, as has been noticed in *Shailesh Dhairyawan v. Mohan Balkrishna Lulla and Richa Mishra v. State of Chhattisgarh*, has, over time, replaced the principle of “plain reading” as the golden rule, for interpreting statutory instruments.

66. In my opinion, this principle has to guide, strongly, the approach of this Court, while dealing with a challenge such as the present, which is directed against an order which, at an interlocutory stage, merely directing furnishing of security, by one of the parties to the dispute. The power, of the learned Sole Arbitrator, to direct furnishing of security, is not under question; indeed, in view of sub-clause (b) of Section 17(1)(ii) of the 1996 Act, it cannot. The arbitrator is, under the said sub-clause, entirely within his jurisdiction in securing the amount in dispute in the arbitration. Whether, in exercising such jurisdiction, the arbitrator has acted in accordance with law, or not, can, of course, always be questioned. While examining such a challenge, however, the Court has to be mindful of its limitations, in interfering with the decision of the arbitrator, especially a decision taken at the discretionary level, and at an interlocutory stage.”

61. An appeal can be filed under Section 37 of the Act, 1996 if the Court refuses to set aside the impugned Award under Section 34. An appeal shall also lie from an order passed by the Arbitral Tribunal under Section 37(2). Nevertheless, the scope of Section 37 is very limited. The Hon’ble Supreme Court in *Haryana Tourism Ltd. v. Kandhari Beverages Ltd.*, (2022) 3 SCC 237, held that the High Court cannot enter

into the merits of the claim in an appeal under Section 37 of the Act, 1996. The relevant paragraph is reproduced below:

*“8. 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.”*

62. The law surrounding ‘patent illegality’ and the ‘fundamental policy of Indian Law’ is no more *res integra*. There has been a catena of judicial decisions that explained the scope and nature of patent illegality and fundamental policy of Indian Law.

63. In ***Ssangyong Engineering & Construction Co. Ltd. v. NHAI***, (2019) 15 SCC 131, the Hon’ble Supreme Court while explaining the scope of the expression ‘public policy of India’ made the following pertinent observations:

*“23. 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 paragraphs 18 and 27 of Associate Builders (supra), i.e., the fundamental policy of Indian law would be relegated to the “Renusagar”*

*understanding of this expression. This would necessarily mean that the Western Geco (supra) expansion has been done away with. In short, Western Geco (supra), as explained in paragraphs 28 and 29 of Associate Builders (supra), 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 paragraph 30 of Associate Builders (supra).*

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*25. 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 paragraphs 18 and 27 of Associate Builders (supra), or secondly, that such award is against basic notions of justice or morality as understood in paragraphs 36 to 39 of Associate Builders (supra). 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 (supra), as understood in Associate Builders (supra), and paragraphs 28 and 29 in particular, is now done away with.*

*26. Insofar as domestic awards made in India are concerned, an additional ground is now available under sub-section (2A), 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.*

27. Secondly, it is also made clear that re-appreciation 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.

28. To elucidate, paragraph 42.1 of *Associate Builders* (supra), namely, a mere contravention of the substantive law of India, by itself, is no longer a ground available to set aside an arbitral award. Paragraph 42.2 of *Associate Builders* (supra), 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.

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30. What is important to note is that a decision which is perverse, as understood in paragraphs 31 and 32 of *Associate Builders* (supra), 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.”

64. In the case of *Associate Builders vs. Delhi Development Authority*, (2015) 3 SCC 49, the Hon’ble Supreme Court clarified the meaning and scope of ‘fundamental policy of Indian Law’ in the context of Section 34 of the Arbitration Act in the following manner:

“28. In a recent judgment, *ONGC Ltd. v. Western Geco International Ltd.*, 2014 (9) SCC 263, this Court added three other distinct and fundamental juristic principles

*which must be understood as a part and parcel of the fundamental policy of Indian law. The Court held-*

*35. What then would constitute the “fundamental policy of Indian law” is the question. The decision in ONGC [ONGC Ltd. v. Saw Pipes Ltd., (2003) 5 SCC 705] does not elaborate that aspect. Even so, the expression must, in our opinion, include all such fundamental principles as providing a basis for administration of justice and enforcement of law in this country. Without meaning to exhaustively enumerate the purport of the expression “fundamental policy of Indian law”, we may refer to three distinct and fundamental juristic principles that must necessarily be understood as a part and parcel of the fundamental policy of Indian law. The first and foremost is the principle that in every determination whether by a court or other authority that affects the rights of a citizen or leads to any civil consequences, the court or authority concerned is bound to adopt what is in legal parlance called a “judicial approach” in the matter. The duty to adopt a judicial approach arises from the very nature of the power exercised by the court or the authority does not have to be separately or additionally enjoined upon the for a concerned. What must be remembered is that the importance of a judicial approach in judicial and quasi-judicial determination lies in the fact that so long as the court, tribunal or the authority exercising powers that affect the rights or obligations of the parties before them shows fidelity to judicial approach, they cannot act in an arbitrary, capricious or whimsical manner. Judicial approach ensures that the authority acts bona fide and deals with the subject in a fair, reasonable and objective manner and that its decision is not actuated by any extraneous consideration. Judicial approach in that sense acts as a check against flaws and faults that can render the*

*decision of a court, tribunal or authority vulnerable to challenge.*

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*38. Equally important and indeed fundamental to the policy of Indian law is the principle that a court and so also a quasi judicial authority must, while determining the rights and obligations of parties before it, do so in accordance with the principles of natural justice. Besides the celebrated audi alteram partem rule one of the facets of the principles of natural justice is that the court/authority deciding the matter must apply its mind to the attendant facts and circumstances while taking a view one way or the other. Non-application of mind is a defect that is fatal to any adjudication. Application of mind is best demonstrated by disclosure of the mind and disclosure of mind is best done by recording reasons in support of the decision which the court or authority is taking. The requirement that an adjudicatory authority must apply its mind is, in that view, so deeply embedded in our jurisprudence that it can be described as a fundamental policy of Indian law.*

*39. No less important is the principle now recognised as a salutary juristic fundamental in administrative law that a decision which is perverse or so irrational that no reasonable person would have arrived at the same will not be sustained in a court of law. Perversity or irrationality of decisions is tested on the touchstone of Wednesbury principle of reasonableness. Decisions that fall short of the standards of reasonableness are open to challenge in a court of law often in writ jurisdiction of the superior courts but no less in statutory processes wherever the same are available. 40. It is neither necessary nor proper for us to attempt an exhaustive enumeration of what would constitute the fundamental policy of Indian law nor is it possible to place the expression in the straitjacket of a definition. What is important in*

*the context of the case at hand is that if on facts proved before them the arbitrators fail to draw an inference which ought to have been drawn or if they have drawn an inference which is on the face of it, untenable resulting in miscarriage of justice, the adjudication even when made by an Arbitral Tribunal that enjoys considerable latitude and play at the joints in making awards will be open to challenge and may be cast away or modified depending upon whether the offending part is or is not severable from the rest.”*

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*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:*

- 1. a finding is based on no evidence, or*
- 2. an arbitral tribunal takes into account something irrelevant to the decision which it arrives at; or*
- 3. ignores vital evidence in arriving at its decision, such decision would necessarily be perverse.*

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*33. It must clearly be understood that when a court is applying the “public policy” test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. Thus an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score . Once it is found that the arbitrators approach is not arbitrary or capricious, then he is the last word on facts.....”*

65. It is therefore clear that the decisive test is that *first*, the learned arbitrator had to adopt a judicial approach; *second*, the principles of

natural justice had to be upheld; *third*, the decision must not have been egregious, or rather, perverse.

66. A relevant portion of the impugned order is reproduced herein to examine whether the order is perverse in nature:

*“39. My reasons therefor are as under.*

*A. The challenge to blacklisting, on 23 May 2022 pegged by the counsel for the claimant on non-issuance of notice to show cause and non-grant of opportunity of being heard, has no merits. **Patel Engineering Limited** supra cited by the counsel for the respondent applies on all fours to the matter in hand. In the present case also, as in the matter before the Supreme Court, the power of blacklisting was exercised in accordance with the terms of the agreement and not in exercise of any sovereign or statutory powers. Supreme Court, in the said judgment, distinguished between the two and held that the failure in that case also to mention blacklisting to be one of the probable actions that could be taken against the delinquent bidder, did not by itself disable the employer from blacklisting the delinquent bidder if it was otherwise justified. It thus follows that non-mentioning by the respondent in the notices dated 22 October 2019 of 15 November 2019 admittedly served on the respondent, of blacklisting be one of the probable actions that could be against the claimant herein, cannot be a ground to interfere with the action taken by the respondent of blacklisting the claimant. Rather, I am of the view that once the respondent in the notices aforesaid, after expressly referring to clause 3 (a) and (b), also gave opportunity to the claimant to show cause why action under any other clause of the agreement should not be taken against the claimant, the requirement of giving notice to show cause and opportunity of being heard stood satisfied*

*and no such ground for interference with the order of blacklisting is made out.*

*B. I also find merit in the argument of the counsel for the respondent that the claimant is not entitled to interim relief of stay of the order of blacklisting, for the reason of delay in seeking the said relief and for which no explanation has been furnished. Prima facie it appears, that the claimant has been dragging its feet. Not only did the claimant, after learning in the beginning of November 2020 of the order of its blacklisting, delayed challenge to the same till September 2021 when the writ petition was filed, but in these proceedings also, though pending since February 2022, filed the application seeking stay of blacklisting only on 12 May 2022. It appears, that the claimant was not prejudiced from the blacklisting/debarment, till applied for enlisting to the CPWD and where the blacklisting/debarment by the respondent came in the way of the claimant. An interim measure, by its very nature is urgent and if the persons seeking the same has not shown any urgency in seeking it, the delay in seeking the same can itself be a ground for denying the same. In the facts of the present case, the claimant has failed to explain the delay on its part twice over as aforesaid and the same alone dis-entitles the claimant from any interim relief.*

*C. I also do not find any prima facie case in favour of the claimant. The counsel for the claimant himself during the hearing contended that the dispute and difference between the parties was that while the claimant was seeking extension of time without levy of liquidated damages for delay in execution of works, the respondent though had granted extension of time but had kept open the option of levying liquidated damages. As observed by me during the hearing and to which no response was given by the counsel for the claimant, at least at this stage it appears that the said difference was not reason enough for the claimant to*

*stop the work without availing of the extension of time for completion of work admittedly given by the respondent. If the respondent, in future, had levy any liquidated damages, the claimant should have contested the same. The conduct of the claimant of suspension of work and of removal of its machinery and equipment and labour of the site without availing of the extension of time granted by the respondent, prima facie appears to be a case of abandonment of work by the claimant and which justifies the action of blacklisting of the claimant.”*

67. It can be inferred from the impugned order that the learned Arbitrator gave careful consideration to the provisions of the Contract and the facts and circumstances of the instant case to decree such an order.

68. It can be inferred from the impugned order that the extension was granted to the appellants well within the ambit of the Contractual provisions and that the extension was fair and reasonable in nature, since the order was well-reasoned. A relevant portion of the order is reproduced below:

*“G. The time for completion of work though under the agreement till 21 August 2019, was admittedly extended till May 2020. The claimant however even prior to May 2020, on 6 September 2019 i.e., when 8 months were still remaining, found to have removed its machinery equipment and labour from the site. The same indeed prima facie shows that the claimant did not even want to attempt to complete the work in the remaining 8 months. Considering that the total time for completion of the works was 18 months, the remaining 8 months, in my prima facie view were sufficient time for the claimant to attempt to complete the work. The action of the claimant of removing its machinery equipment and labour from the site indeed makes out a prima facie case of abandonment of the work by the claimant.*

*H. It is not the case of the counsel for the claimant that any of the hindrances faced by the claimant in execution of the work were not entered in the hindrance register maintained for that purpose or that the benefit of the hindrances entered in the said register has not been correctly computed. In the face thereof, the only inference at this stage can be that the delays other than for the hindrances entered in the register, were/are attributable to the claimant. The claimant has thus failed to prima facie satisfy that the respondent was not justified in keeping open its right to levy liquidated damages for delay while granting extension of time for completion of the works.”*

69. The learned Arbitrator has taken the Contractual provisions into account and considered the circumstances, status of work, and the capacity of the appellant while concluding that hindrances were not a reason to abandon the work entirely. Therefore, the learned Arbitrator has observed that the appellant failed to *prima facie* make out a case in his favour, thus justifying the levy of liquidated damages by the respondent.

70. In the light of the circumspect approach mandated by the aforesaid judgments, this Court does not find any reason to interfere with the decision of the Tribunal in the facts and circumstances of the present case. The Tribunal’s findings cannot be said to be arbitrary or perverse.

### **CONCLUSION**

71. For the aforesaid reasons, the Court is of the view that the impugned order is not liable to interference by this Court in the exercise of jurisdiction under Section 37(2) of the Act. The instant appeal, along with pending applications are, therefore, dismissed.

72. It is made clear that the observations in this judgment are only for the purposes of disposal of this interlocutory appeal and will not

prejudice the parties in the final adjudication of their respective contentions before the Tribunal.

73. The order be uploaded on the website forthwith.

**CHANDRA DHARI SINGH, J**

**APRIL 11, 2023**

**gs/as**

*Click here to check corrigendum, if any*

