

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

% **Date of order: 23rd January 2023**

+ **O.M.P. (COMM) 247/2019 & I.A. 1313/2023**

NATIONAL HIGHWAY AUTHORITY OF INDIA Petitioner

Through: **Mr. Anukul Raj, Ms. Nikil Raj,
Mr. Anubhav Deep Singh and Mr.
Tushar Bhalla, Advocates**

versus

M/S SSANGYONG ENGINEERING & CONSTRUCTION CO.

LTD. Respondent

Through: **Mr. Navin Kumar and Ms. Aarti
Mahto, Advocates**

CORAM:

HON'BLE MR. JUSTICE CHANDRA DHARI SINGH

ORDER

CHANDRA DHARI SINGH, J (Oral)

1. The instant petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter "Arbitration Act") has been filed on behalf of the petitioner seeking setting aside of the Arbitral Award dated 28th July 2018 (hereinafter "the Award") passed by a three-member Arbitral Tribunal (hereinafter "learned Tribunal").

FACTUAL MATRIX

2. A brief background of the dispute between the parties before this Court is delineated hereunder:-

a. The petitioner is the Government of India Undertaking responsible for maintenance, management and development of National Highways or stretch of the National Highways vested in or entrusted to it by the Central Government. The respondent is a Multi-National Company registered as per the laws of Republic of Korea, represented by its Power of Attorney, Mr. S. J. Kim, working largely in the field of infrastructure development, including construction of roads, highways, dockyards and other such projects across the world.

b. The petitioner awarded a contract for construction of a four-lane Highway at the Jhansi-Lakhanadon section between km 351 to km 405.77, National Highway-26 in the state of Madhya Pradesh to the respondent vide Letter of Acceptance dated 30th December 2005.

c. During the course of carrying out the work contracted between the parties, two major disputes arose amongst them, which was narrowed down by the learned Tribunal as under:-

- A. *Refusal and Delay of the Engineer/Respondent for issuance of Defect Liability Certificate (DLC);*
- B. *Refusal of the Engineer/Respondent for determination of new rates for additional / new works instructed the Engineer /Respondent and as per the variation Clause 51.1(c), (d), (e) and (f).*

d. Subsequently, upon completion and conclusion of arbitration proceedings, the Arbitral Award dated 28th July 2018 was passed and the following findings were made therein:-

Regarding Claim A

- i. *The Claimant Contractor, M/s. Ssangyong Engineering & Construction Co. Ltd., Gurgaon is partly entitled for Claim. No. 1 i.e. Refusal and Delay of the Engineer/ Respondent for issuance of Defect Liability Certificate (DLC).*
- ii. *The Respondent/Employer, the National Highway Authority of India New Delhi shall pay Rs.24,69,892/- to the Claimant Contractor, M/ s. Ssangyong Engineering & Construction Co. Ltd. Gurgaon as per the Tribunals findings as detailed out under sub para 9.3.0 to 9.6.7 supra.*
- iii. *The Respondent, the National Highway Authority of India shall pay interest on delayed payments from 01.04.2015 to the date of award amounting to Rs.8,05,926/- to the Claimant as per AT's findings under Sub para 9.8.0 to 9.8.3 supra.*

Regarding Claim B

- i. *The Claimant Contractor, M/s. Ssangyong Engineering & Construction Co.Ltd., Gurgaon is not entitled for*

Claim No.2 (Or Claim B) i.e. Refusal of the Engineer/Respondent for determination of new rates for additional/new works instructed by the Engineer /Respondent and as per variation clause 51.1 (c), (d), (e) & (f)

ii. *The Respondent/Employer, the National Highway Authority of India New Delhi shall pay nil amount to the Claimant Contractor, M/s. Ssangyong Engineering & Construction Co.Ltd. Gurgaon as per the Tribunals findings as detailed out under sub para 9.7.0 to 9.7.7 supra.*

iii. *In view of Arbitral Tribunals decision under sub para 10.2 (i) & (ii) above, AT awards nil amount as interest.*

e. The petitioner being aggrieved by the findings of the learned Tribunal has approached Court challenging the same under Section 34 of the Arbitration Act.

SUBMISSIONS

3. Learned counsel appearing on behalf of the petitioner submitted that the learned Tribunal, while passing the Award, did not appreciate that the respondent miserably failed to complete the project without defects within the stipulated time. Since the project was not completed within time, a supplementary agreement had to be executed between the parties on 11th February 2009.

4. It is submitted that the entire claim of the respondent before the learned Tribunal was based on the ground that the petitioner failed to issue a Defect Liability Certificate (hereinafter “DLC”) because of which the respondent had to keep its Bank Guarantees alive. It is submitted that the issuance of the DLC was subject to successful completion of the project, which the petitioner failed to carry out. There were large number of defects in the work carried out by the respondent which required rectification and execution of balance work and any purported use despite such defects is not a usage contemplated under the contract. The DLP was extended since the work was incomplete. The entire stretch of road had defects and it was not possible to allow traffic on such roads. The petitioner took all measures to ensure that the work is completed without defects, however, the respondent could not deliver its part of the contract.

5. Learned counsel submitted that time was not the essence of the contract between the parties. It is submitted that time cannot be the essence of contract in agreement/contracts where there is scope for extension or variations in the time line. The submissions of the respondent, that under no circumstances the time as given in the contract could have been changed or varied, is not sustainable. It is averred that since time was not the essence of the contract, the parties were at liberty to extend the time of completion of contract. Learned counsel appearing for the petitioner relied upon Clauses 43.1, 48.1, 49 of the contract to give force to his arguments.

6. It is submitted that the DLC could have been issued only upon successful completion of the project without any defects. The very

meaning of DLC, as defined under Clause 62.1, is that it is a certificate issued on completion of project, free from all defects. It is submitted that the respondent could not have claimed the DLC without curing the defects.

7. It is submitted that there has been no delay in release of the Bank Guarantees, since the same was beyond the control of the petitioner. It is submitted that the respondent had challenged assessment of the project under the Income Tax Act, 1961 which accounted for Tax Deducted at Source from its bills. The respondent succeeded in its claim, however, the Income Tax Department filed an appeal before the Income Tax Appellate Tribunal, Jabalpur. The respondent succeeded in this appeal as well, against which and the Department, preferred an appeal before the High Court of Madhya Pradesh and hence, the petitioner was duty bound to keep these Bank Guarantees alive till the pendency of the said appeals.

8. It is further submitted that, subsequently, the respondent filed an OMP before this Court. A Coordinate Bench of this Court directed the Bank Guarantees to be kept alive. Thereafter, upon an undertaking of the respondent, which was noted in the order of the Coordinate Bench of this Court, the Bank Guarantees were released immediately. Hence, the petitioner cannot be held responsible for any delay in release of the said Bank Guarantees.

9. It is submitted that the learned Tribunal failed to appreciate and correctly interpret the law and provisions of the contract. It is further submitted that the Award is against the public policy and is patently

illegal. Therefore, the same is liable to be set aside.

10. *Per Contra*, learned counsel appearing on behalf of the respondent vehemently opposed the instant petition and submitted that the same is not maintainable for the reason that there is no ground for challenge to the Award under the limited scope of Section 34 of the Arbitration Act. It is submitted that the petitioner is seeking the interference of this Court in a matter of interpretation of the terms of the contract between the parties and appreciation of documentary evidence filed before the learned Tribunal.

11. It is submitted that this Court may not enter into merits of the case while adjudicating upon the instant petition under Section 34 of the Arbitration Act in as much as the very objective of arbitration or alternate dispute resolution is to minimise judicial intervention. It is submitted that the Court may not act as a court of appeal and re-interpret the terms of the contract or re-appreciate the facts and evidence before the learned Tribunal, to come to a different finding.

12. It is submitted that the learned Tribunal while passing the Award had considered the claim of the respondent and had awarded a sum of Rs. 24,69,892/- in favour of the respondent. It is further submitted that the learned Tribunal interpreted the contract between the parties while considering all facts and pleadings filed by the parties before it, and had found that the Claim A of the respondent was justified and payable. There is no error to this effect in the observation and finding of the learned Tribunal.

13. It is, hence, submitted that the instant petition is liable to be dismissed, since the same is devoid of merit and beyond the scope of Section 34 of the Arbitration Act.

14. Heard learned counsel for the parties and perused the record.

ANALYSIS AND FINDINGS

15. The petitioner has raised a challenge to certain findings and the Award thereto passed by the learned Arbitral Tribunal and has not assailed the validity of the entire Award. The petitioner has invoked Section 34 of the Arbitration Act, the relevant portion of which is reproduced hereunder:-

“34. Application for setting aside arbitral award.—

(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).

(2) An arbitral award may be set aside by the Court only if—

(a) the party making the application [establishes on the basis of the record of the arbitral tribunal that]—

(i) a party was under some incapacity, or

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

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

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

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

(b) the Court finds that—

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

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

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

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

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

(iii) it is in conflict with the most basic notions

of morality or justice.

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

16. The contents of the provision abundantly show that the intention of legislature while enacting the Arbitration and Conciliation Act, as well as while amending the same, was that there should be limited intervention of the Courts in arbitral proceedings, especially after the proceedings have been concluded and an Award thereto has been made by the concerned Arbitrator(s).

17. The words used in the provision are “*An arbitral award may be set aside by the Court only if*”, which signifies the intent of limiting the scope of interference by Courts in an Arbitral Award, passed after thorough procedure, involvement of parties, and appreciation of facts, evidence and law, ‘only’ in the event of the circumstances delineated in the provision being met. The limited grounds which may invite the intervention and action thereupon by the Courts are explicitly laid down under the provision.

18. In the instant case, the petitioner has invoked Section 34 of the Arbitration Act contending that the Award in question is against the public policy, is in violation of the principles of law and is patently illegal. Upon a perusal of the pleadings and hearing the arguments on behalf of the parties, it is clear that the petitioner is aggrieved by the findings of the learned Arbitral Tribunal made in the Claim A.

19. The petitioner has raised the ground of contravention of public policy of India to assail the impugned Award. The scope of the expression has been explained by the Hon'ble Supreme Court in ***Ssangyong Engineering & Construction Co. Ltd. vs. NHAI, (2019) 15 SCC 131***, as under:-

“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 subsection (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.”

20. The petitioner has also raised the ground of patent illegality while challenging the Award. The Hon’ble Supreme Court in ***Associate Builders vs. DDA, (2015) 3 SCC 49***, while interpreting the same has observed as under:-

“42. In the 1996 Act, this principle is substituted by the “patent illegality” principle which, in turn, contains three subheads

42.1 (a) A contravention of the substantive law of India would result in the death knell of an arbitral award. This must be understood in the sense that such illegality must go to the root of the matter and cannot be of a trivial nature. This again is a really a contravention of Section 28(1)(a) of the Act, which reads as under:

“28. Rules applicable to substance of dispute.—

(1) Where the place of arbitration is situated in India,—

(a) in an arbitration other than an international commercial arbitration, the arbitral tribunal shall decide the dispute submitted to arbitration in accordance with the substantive law for the time being in force in India;”

42.2 (b) a contravention of the Arbitration Act itself would be regarded as a patent illegality- for example if an arbitrator gives no reasons for an award in contravention of section 31(3) of the Act, such award will be liable to be set aside.

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

“28. Rules applicable to substance of dispute.— (3) In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.”

This last contravention must be understood with a caveat. An arbitral tribunal must decide in accordance with the terms of the contract, but if an arbitrator construes a term of the contract in a reasonable manner, it will not mean that the award can be set aside on this ground. Construction of the terms of a contract is primarily for an arbitrator to decide unless the arbitrator construes the contract in such a way that it could be said to be something that no fair minded or reasonable person could do.”

21. Therefore, it is evident that the phrases are not to be construed in their plain meaning and have to be given due caution and consideration while being invoked to assail any Arbitral Award. Therefore, to successfully challenge an Arbitral Award, the petitioner ought to satisfy this Court on the said grounds.

22. In the facts and circumstances of the present case, regarding Claim A, it has been submitted on behalf of the petitioner that the learned Tribunal failed to consider that the DLP was only extended since the respondent failed to deliver the encumbrance free project as per the terms of the contract. On the other hand, it has been alleged on behalf of the respondent that due to the non-issuance of the DLC and extension of the DLP, the respondent had to incur costs.

23. The observation of the learned Tribunal on this aspect, while referring to the relevant clauses of the General Conditions of Contract (hereinafter “GCC”) and Conditions of Particular Application (hereinafter “COPA”), was as follows:-

“9.3.2 Thus the AT finds that the conjoint and harmonious construction and analysis of all the clauses as stated above would lead to the following conclusions:-

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(iii) The Contract shall be considered as completed only after DLC is issued by the Engineer and delivered to the Respondent with a copy to the Claimant. The DLC shall be issued by the Engineer within 28 days after the expiration of DLP, or, if different DLPs shall become applicable, the expiration of the latest such period or as soon thereafter as any works instructed, pursuant to clauses 49 & 50 have been completed to the satisfaction of the Engineer.

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(vii) “Defect liability Period” (DLP) shall mean the DLP named in the appendix to tender which is 365 days calculated from the date of completion of the works certified by the Engineer in accordance with clause 48 or in the event of more than one TOC having been issued by the Engineer under clause 48, the respective dates so certified.

(viii) As per the Contract, Claimant is required to execute & complete all such outstanding works and work of amendment, reconstruction and remedying defects, shrinkages or other faults as the Engineer as a result of an inspection during the DLP or within 14 days after the expiration of DLP may instruct the Claimant to execute.

(ix) All outstanding work and/ or remedying of defects as pointed/instructed by the Engineer shall be executed by the Claimant at his own cost if as per opinion of the Engineer it is due to use of materials, plant or workmanship, not as per provision of the Contract or/ and due to any fault in design where the Contractor is responsible for the design of the Permanent Works.

(x) If the Claimant defaults in carrying out such outstanding works, remedying of defects within a reasonable time, the Respondent/ Employer is empowered as per the Contract to employ and pay other persons to carryout the same. If as per opinion of the Engineer, the Claimant was liable to do at his own cost as per the Contract. In such a situation all costs after due consultation with the Respondent and the Claimant, be determined by the Engineer and shall be recoverable from the Claimant by the Respondent and may be deducted from any amount due or become due to the Claimant.

(xi) Contract provides for extension of DLP with some riders. The DLP can be extended by a period equal to the period during which the Works cannot be used by reasons of defect or damage. If any part of the Works is affected, the DLP shall be extended only for that part. Further in neither case DLP can be extended beyond 365 days after issuing of TOC for that part."

24. A perusal of the clauses, as interpreted and narrowed down by the learned Tribunal, shows that the issuance of DLC was not unconditional and neither was the DLP fixed. Both were subject to certain conditions and riders, which were to be adhered to by both the parties. One of such conditions was that the works could not be used if there were defects or damages in the same.

25. The learned Tribunal *qua* this question, noted as under:-

“AT observes that as per TOC, the time limit to remove defects & complete outstanding works was fixed as three months of issuance of TOC & failure on part of same by the Claimant, the Respondent/ Engineer should have started further action as prescribed under sub-clause 49.4 of the GCC of the Contract to get the work executed from third party at the risk & cost of the Claimant. The plea of the Respondent that to apply clause 49.4 to get the balance works and defects, if any, completed through other agency at the risk & cost of the Claimant was not resorted as it is tedious and time consuming to arrange an agency for execution of balance work & defects. The Respondent's this plea is not acceptable as the Respondent being drafter of the Contract cannot now deny that he is not capable to perform as per the Contract.

Further the clause 49.5 of COPA provides that if only part of the Works cannot be used, DLP shall be extended for that part only. AT have carefully gone through the contemporary records/ letters issued for the defects and punch list of outstanding works; which mainly concerned turfing, painting of road side furniture etc or work of some junction where land issue was not settled by the Respondent. There is no non-use of any part of the Permanent Work due to defect or damage, pointed out by the Engineer.

AT finds that DLP can be extended for a period during which the Work cannot be used by reasons of any defect or damage. AT finds that the Claimant submitted that this was not the case for the present Contract as the entire stretch of highway was being used even before the DLP expired i.e. 31.03.2014. The Claimant further submitted that the Respondent had handed over the entire stretch of 'Works' to the OMT Contractor and toll collection started from 01.04.2014. The Respondent had not denied the above submissions of the Claimant but states that if toll is being levied and collected by the Respondent that does not mean that there are no

balance works or defects. AT observes that the issue under consideration is not defects or balance works but to identify and prove that the stretches of road were not in use due to defects or damage. Further clause 49.5 of COPA provides to identify part of Works' not in use and DLP shall be extended for that part only.

The defects & punch list are required to be tackled through sub-clause 49.2 to 49.4 of GCC. As such, AT finds and decides that extension of DLP was not as per the Contract and this action of the Engineer/Respondent is not agreed by AT."

26. The learned Tribunal considered the aforementioned clauses and then made the observations thereto. Upon considering the clauses in the contract as well as the claims raised on behalf of the parties, the learned Tribunal partly allowed the claim of the respondent and also awarded an amount of Rs.24,69,892/- to it. An observation regarding the issue in favour of the respondent and against the petitioner was also followed by an award in favour of the respondent and against the petitioner. It is not the case that the learned Tribunal had passed an award and made a finding completely contrary to the observations given.

27. The learned counsel for the respondent argued that due to the actions taken by the respondent in contravention of the agreement, the respondent had to retain the Bank Guarantees beyond the stipulated time. To settle this dispute, the learned Tribunal noted as under:-

"The Claimant has claimed Rs. 55,86,709.38 under this sub claim as detailed out on page 44 of SOC added as Appendix-I. AT has deliberated and decided under sub-para 9.6.6 supra that Performance Bank Guarantees charges paid by the claimant from 12.05.2014 to 31.03.2015 are required to

be reimbursed to the Claimant. Similarly Retention Money Bank Guarantees Extension Charges paid by the claimant from 01.04.2014 to 31.03.2015 are required to be reimbursed to the claimant. AT, on the basis of Debit advice/ invoices produced by the Claimant, in his SOC and various letters brought on record of Arbitral Tribunal, decide that the Claimant is entitled for an amount of Rs.24,69,892/- as detailed out under Annexure-I attached as refund for PBG's & RMBG's extension charges."

28. A perusal of the finding shows that the learned Tribunal directed the petitioner to reimburse the respondent, which shows that the issue was only partly decided in favour of the respondent. The said observation was based on the fact that the liabilities incurred by the respondent upon extending the Bank Guarantees were subject only to the extension of the DLP. Hence, the liability arose due to the action/inaction on part of the petitioner and the award was made accordingly.

CONCLUSION

29. As discussed in the foregoing paragraphs, the scope of interference and intervention by a Court in an Arbitral Award is limited in view of the legislative intent behind the enactment of the Arbitration Act, and even if raised, a challenge to an Arbitral Award must satisfy the test laid down in the Arbitration Act as well as that interpreted by the Hon'ble Supreme Court.

30. The petitioner, in the instant case, has failed to show that there was any patent illegality or error apparent on the face of record and also failed to show that the findings were in contravention to the public policy of India. Merely because a part of the final Award was not in the interest of

the petitioner does not make the Award itself liable to be rendered illegal, erroneous or against public policy.

31. The learned Tribunal has appreciated the entire material produced as well as the oral proceedings conducted before it, and thereafter, passed the Award, wherein the findings have been made in the favour of the respondent, directing the petitioner to make necessary payment and reimbursement to the respondent.

32. Therefore, upon consideration of facts and circumstances, submissions made on behalf of the parties and observations and findings in the Award, this Court finds that there is no merit in the instant petition and the challenge therein to the impugned Award dated 28th July 2018.

33. Accordingly, the instant petition is dismissed for being devoid of merit.

34. Pending applications, if any, also stand dismissed.

35. The order be uploaded on the website forthwith.

CHANDRA DHARI SINGH, J

JANUARY 23, 2023

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[Click here to check corrigendum, if any](#)