



* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
 % **Pronounced on: 26th May, 2023**
 + **O.M.P. (COMM) 263/2019**
BHOPAL SANCHI HIGHWAYS PRIVATE LIMITED

.... Petitioner

Through: Mr.Rajshekhar Rao, Senior
 Advocate with Mr.Dheeraj P. Deo,
 Mr.Yashraj Samant and Mr.Aiby
 Peter, Advocates

Versus

**NATIONAL HIGHWAYS AUTHORITY OF INDIA THROUGH
 ITS CHAIRMAN** Respondent

Through: Dr. Maurya Vijay Chandra,
 Mr.Abhishek Rishabh Shukla,
 Mr.Rudrashish Bhardwaj and
 Mr.Gaurav Kumar, Advocates

CORAM:
HON'BLE MR. JUSTICE CHANDRA DHARI SINGH

J U D G M E N T

CHANDRA DHARI SINGH, J.

1. The instant petition under Sections 34 (1) & (2) of the Arbitration and Conciliation Act, 1996 (hereinafter "The Act, 1996") has been filed on behalf of the Petitioner seeking the following reliefs:

"i) allow the present application and set aside the impugned award dated 30.11.2018 and order dated 27.02.2019 to the extent of the



claims rejected by the Ld. Arbitral Tribunal against the Applicant and/or;

ii) pass such order or further orders as you may deem fit in light of the facts and circumstances of the case.”

FACTUAL MATRIX

2. The facts necessary for the disposal of the present petition are that, on 27th November, 2009, the Respondent invited proposals & vide Request for Qualification (RFQ) for short listing of bidders for the project of construction, operation & maintenance of Bhopal-Sanchi Section of NH-86 Extn. in the State of Madhya Pradesh by two lanes on Design, Built, Finance, Operate & Transfer on Annuity (DBFOT Annuity) basis. The bid submitted by the consortium of Pratibha Industries Ltd (PIL) and Abhyudaya Housing & Construction Pvt. Ltd. (AHCPL) was accepted and the contract was awarded vide LOA dated 21st May 2010. In terms of the bid documents, the Petitioner Company was incorporated as the Special Purpose Vehicle (SPV) to undertake the work.

3. A Concession Agreement (CA) was signed between the parties on 22nd July, 2010 for a period of 15 years, including a construction period of 24 months for the length of 53.775 km and the Petitioner was responsible for constructing project facilities as well as Operation and Maintenance of the Project Highway and other obligations set forth in the Contract. Upon achieving the Provisional Completion of the Project Highway, the Claimant was entitled to receive payment of Annuities @ Rs



12.95 crores at half yearly intervals for a period of 15 years from the Appointed Date excluding the Construction Period.

4. There were issues between the parties in relation to completion of work on time. Upon the said issues being escalated, the Petitioner terminated the contract vide termination notice dated 13th November 2014 averring that the Applicant failed to execute the work because the Respondent miserably failed to meet its various obligations under the Concession Agreement. On the other hand, the Respondent terminated the contract vide notice dated 31st December 2014, on the ground that the Applicant failed to execute its obligations within the contract in the given time. The Independent Engineer in its project closure report certified that the value of the executed work by the Applicant as on the date of termination of contract, i.e. 31st December, 2014 was Rs 24,17,52,984/-.

5. The Petitioner invoked the arbitration clause, i.e., clause 44.3 of the contract, to resolve the dispute between the parties vide a letter dated 24th February, 2016. Thereafter, this Court appointed a Sole Arbitrator to decide the dispute between the parties.

6. The learned Arbitrator had framed the following issues for being determined:

- a. Whether the Respondent had misrepresented that it had good and valid right to the site and the power and authority to grant license in respect thereto to the Claimant in terms of the Concession Agreement?



- b. Whether the delay in execution of the Works, even in the available stretches, was due to breaches and defaults of the Respondent?
- c. Whether the termination of Contract by either party is valid?
- d. Whether the Claimant proves that it is entitled to Claims as set out the Abstract of Claims at paragraph J at page 64 and 65 of the Statement of Claim?
- e. Whether the Respondent proves that it is entitled to the Counter Claims as set out in pages 86 to 94 and reliefs prayed for at pages 95 of the Statement of Defense filed by the Respondent?

7. The Learned Sole Arbitrator passed the impugned order on 30th November 2018 thereby rejecting all but one claim of the Petitioner besides also rejecting all the counter claims of the Respondent.

8. The Applicant also filed an application under Section 33 of the Act whereby the Applicant requested the learned Arbitrator to pass additional award to the extent of work done of Rs 24,17,52,984/-, which was rejected by the Learned Tribunal vide order dated 27th February 2019.

9. The Petitioner, having been aggrieved of the above, is before this Court seeking setting aside of the award dated 30th November 2018 and the order dated 27th February 2019.



SUBMISSIONS

(On behalf of the Petitioner)

10. Learned senior counsel appearing on behalf of the petitioner submitted that the Impugned Award suffers from patently illegality and the learned Arbitrator's findings in the impugned award are perverse and would shock the conscience of this Court. It is further submitted that the learned Arbitrator has not considered the pleadings and evidence placed before him, and has arrived at a conclusion that is entirely implausible. It is submitted that the learned Arbitrator has incorrectly interpreted the contract as well as the law while passing the impugned award.

11. Learned senior counsel further submitted that the entire award is vitiated on account of the learned Tribunal's erroneous finding that the issuance of a notification under Section 3(D)(1) of the National Highways Act (NH Act) was equivalent to possession having been delivered to the NHAI and consequently to the Petitioner. This interpretation is not only contrary to the scheme of the NH Act and in particular section 3E thereof, but also goes to reinforce the Petitioner's case that physical possession of the subject land was admittedly not available with NHAI even as late as 13.11.2014 thereby demonstrating that Appointed Date could not have been 18.10.2011. For the same reason, the finding that NHAI was only required to give constructive possession of the land which was required to be constructed upon is entirely perverse and liable to be set aside.

12. Learned senior counsel further submitted that the learned Tribunal failed to take cognizance of the letter of the Authority dated 01.01.2013



wherein the Project Director of NHAI had clearly stated that as per NH Act only 60 days after payment of compensation by NHAI, the land in question becomes the property of NHAI and any person can be removed therefrom with the help of police. In the entire award, there is no mention of any evidence demonstrating as to when after the relevant Section 3D notification, the Respondent deposited the amount of compensation with the competent authority and when did the Respondent serve notices on the landowners for vacating the possession of the land with a direction that the land should be handed over to the Petitioner.

13. Learned senior counsel appearing on behalf of the petitioner further submitted that the learned Tribunal while deciding the Issue No.1 has held that the constructive possession of the site was to be handed over to the Petitioner. The said finding of the learned Tribunal is *ex facie* wrong in view of the clear and unambiguous provision contained in Articles 10.3.1 and 10.3.2 and other sub-clauses of the said Article where the obligation of the Respondent was to grant "vacant access and right of way" and not only the constructive possession of the Right of Way (RoW) *per se*.

14. It is further submitted by the learned senior counsel on behalf of the Petitioner that the learned Tribunal's finding on Issue No.1 at para 202(3) is based on a completely misconstrued reading of the contractual provisions. The same is not tenable on the face of clear and unambiguous provisions contained in Article 10.3.1 to 10.3.4 read with Article 48. On a bare perusal of Article 10.3.1 and 10.3.2, it becomes clear beyond any iota of doubt that the obligation of the Respondent was to grant 'vacant



access and Right of Way' to the extent of 80% of the total area of the site required and necessary for the two laned project highway on the Appointed Date. The remaining area, which could not be more than 20% of the total site requirement, and could be included in the Appendix jointly signed by the parties in terms of provisions of Article 10.3.1, was required to be handed over by the Respondent not later than 90 days from the Appointed Date.

15. Learned senior counsel appearing on behalf of the petitioner further submitted that the learned Tribunal while deciding the Issue Nos.1 & 2 and also other issues has relied heavily on the joint memorandum dated 07-08.11.2011 wherein it was recorded that more than 80% at site was available to carry out the construction along the alignment of proposed road on the basis. On 08.11.2011 (vide the Memorandum date 07.11.2011), the Respondent declared that they had 60.46 Hq. of the notified land in possession, as per Section 3D of the National Highways Authority of India Act, 1988 and the same was handed over to the Petitioner.

16. It is submitted that however, as per the NH Act, this notified land would be in possession of the landowners till the time the further process as provided under Section 3G, 3H & 3E were completed. Therefore, this land was not in possession of the Respondent on the Appointed Date and the Respondent was not entitled to hand over the notified land to the Petitioner on the Appointed Date. However, the learned Tribunal failed to consider the effect of numerous subsequent events documented in contemporaneous correspondence demonstrating that the recording in the



memorandum dated 07/08.11.2011 regarding 80% of the land being available was not correct. Additionally, the learned senior counsel for the petitioner submitted that the status of land available at site on different dates besides the fact that stretches at 14 locations were not even acquired by the Respondent on such date.

17. Learned senior counsel appearing on behalf of the petitioner laid emphasis on the point that the learned Arbitrator clearly ignored that stretches at 14 locations were admittedly left out in notification under 3A of land Acquisition Act. The said admission was duly recorded in minutes of meeting dated 28.01.2013, forwarded to Petitioner on 02.02.2013. Therefore, Respondent published a new notification under Section 3A of NH Act to acquire the aforesaid land at five different locations on 18.03.2013 & nine different locations on 20.03.2014. Such negligent approach of Respondent speaks volumes about their unlawful conduct; however, the learned Arbitrator ignored such important aspect, which goes to the root of the matter.

18. It is further submitted that during the entire construction period and even on the date of termination of the Agreement, i.e., 13.11.2014, the land available with the Respondent was less than 80% of the minimum required land as on Appointed Date. It is the admitted position of the Respondent that the land available on the termination date was only 38.933 km out of the total length of 53.775 km which is about 72% of the required land. Further, it is pointed out that out of this, 16.491 km was notified land under Section 3D of the Act. Therefore, learned Arbitrator's findings in respect to Issue No. 1 are arbitrary, capricious, perverse, and



the illegality is not trivial but goes to the root of the matter and the finding is liable to be set aside.

19. Learned senior counsel appearing on behalf of the petitioner submitted that the learned Tribunal once again went wrong in deciding Issue No.2 thereby holding that the Petitioner was entirely responsible for removal of utilities. The only liability of the Petitioner was to coordinate with the service provider for removal of utilities and the cost of shifting / removal of utilities were to be incurred by the Respondent Authority. There have been instances where the Respondent Authority took unreasonably long time in approval of the cost estimates which resulted in delay in removal of utilities.

20. It is submitted that the Tribunal noted that necessary approval from Madhya Pradesh Electricity Board (MPEB) could not be obtained for 14 months for which by no strength of argument, Petitioner could be held responsible. Time taken by the service provider cannot be attributed to the Petitioner, whose obligations were confined to make necessary application for obtaining permission therefrom. The learned Tribunal noted the instance of MPEB sending estimate on 23.11.2012 (almost after one year from the Appointed Date) and Respondent Authority issuing cheque on 17.12.2012, however, the learned Arbitrator did not find any responsibility of delay on the part of the Respondent Authority which took 25 days' time in merely issuing cheques.

21. Learned senior counsel appearing on behalf of the petitioner further submitted that the learned Tribunal's reliance on a query put forth



during the pre-bid meeting also demonstrates the Tribunal's failure to appreciate the controversy in question. The percentage of availability of 'Right of Way' has got nothing to do with the existence of utilities inasmuch as such utilities exist not only in the existing RoW which was available with the Respondent, but also in the additional RoW required to be acquired. Therefore, the query as well as the answer thereto had no relevance to the issue of removal of utilities.

22. It is submitted that in so far as forest clearance was concerned, the learned Tribunal has arbitrarily held that the delay in granting approval occurred at Ministry of Environment & Forest and hence, such delay cannot be attributable to the Respondent. It is further submitted that the project had to be completed within 2 years from the appointed date, however, the Respondent took more than 2 years to obtain permissions like forest clearance. Further, the learned Arbitrator's finding at Para 206 (8) that as per Clause 10.2.2 the ROW was granted to the Claimant on an "as is where is basis". However, the learned Arbitrator fails to mention the complete clause which says that ROW is granted on "as is where is basis", "free from any encumbrance" to develop, operate, maintain the said licensed premises. In view of the above, it is submitted that the findings of the learned arbitrator are totally perverse and will shock the conscience of the court and ought to be set aside as such.

23. Learned senior counsel submitted that the decision of the learned Tribunal on Issue No. 3 holding the termination of contract by the Respondent as valid in para 241 of the impugned order is contrary to finding of the Tribunal as recorded in para 219. Furthermore, it is



submitted that the said finding of the learned Tribunal on Issue No.3, holding the termination of the contract by the Respondent as valid is also contrary to its finding in para 299 of the impugned award where the learned Tribunal held that contract came to an end by default committed by both the parties. Such inconsistencies and contradictions vitiate the impugned award.

24. Learned senior counsel appearing on behalf of the petitioner submitted that the learned Tribunal has noted in its award dated that, “it has been noticed that the independent engineer has quantified the work done by the claimant as Rs.24,17,52,984/-. However, the claimant has not made any prayer for payment on account of the work done. Therefore, no direction can be issued for Rs.24,17,52,984/- in favour of the claimant.”

25. It is submitted that the said observation is not accurate as Claim No. 1 of the Petitioner/Claimant under the head 'Debt Due' actually related to the total expenditure incurred and this is clear from the assertion of the Claimant/Petitioner at page 60 of the claim petition wherein the claimant has asserted that “The total expenditure incurred by the claimant for and in connection with the works of the project highway has been taken as Debt Due.”

26. It is submitted that the Independent Engineer had clearly certified that the value of the work executed by the Petitioner was Rs. 24,17,52,984/-. In fact, this finding of the independent engineer was never challenged or disputed by the Respondent. It is submitted that the aforesaid claimed amount subsumed within itself the claim amount of



Rs.24,17,52,984/- as noted in paragraph no. 230 at page 84 of the Award wherein it is noted that, 'physical progress of the two laning of the road upto 31.12.2013 was only 20.24%. Financial progress was of a total expenditure of 24.17 crores, as on 31.12.2014.' It is for this reason a separate computation of Rs.24,17,52,984/- by way of a separate prayer is not found in the statement of claim, as the same is subsumed under the claim under the first head of the claim. A separate claim for the said amount in terms of the quantification by the Independent Engineer, as noted in the award, would have been a duplication of the claims under this head.

27. In light of the above submissions, the impugned award dated 30.11.2018 and order dated 27.02.2019 should be set aside entirely on the ground of patent illegality or perversity.

(On behalf of the respondent)

28. Learned counsel on behalf of the respondent submitted that the impugned award is a well-reasoned award passed by the learned Arbitrator. It is submitted that it is a well settled principle of law that an award is to be interfered with on very limited grounds and the award does not give rights to any of the limited grounds of review mentioned in Section 34 of the Act, 1996. It is submitted that the award is neither unreasoned, nor perverse, nor does it suffer from any error apparent on the face of the record nor it is against public policy of law in India.

29. Learned counsel appearing on behalf of the respondent submitted that the Respondent was obliged only to give constructive possession of



the Land required to build the Project Highway as per Article 48 at page 143 of the Concession Agreement (CA). The requirement for private land acquisition was very nominal, i.e., only 50.7 hectares for the entire 53 km stretch.

30. It is submitted that the land acquisition by the NHAI was deemed to have been complete for the purposes of the Concession Agreement with the section 3D notification. This position was accepted by the Concessionaire in its Memorandum of Site, and this is the only reasonable interpretation that can be drawn from the provisions of the National Highways Act, 1956. The Scheme of the National Highways Act, 1956 as amended in 1997 is that Central Government can issue notifications under Section 3A for “intention to acquire”. Immediately upon such notification, the law under Section 3B, declares it to be “lawful for any person, authorized by the Central Government...” to carry out survey, measurement, valuation or enquiry, take levels, dig or bore holes, set out boundaries and intended lines of work, placing marks and cutting trenches, and other acts prescribed by rules. Thus, the submission by the Petitioner that notification under Section 3D is for these preliminary and incidental work is incorrect.

31. It is submitted that the powers to carry out the exploratory work is acquired by the Central Government or its concessionaires immediately after Section 3A notification, which is much before Section 3D notification. Section 3D (b) states that “upon publication of the declaration of intent [under section 3D] ... the land shall vest absolutely in the Central Government free from all encumbrances.” The Notice under



Section 3E can be served only after compensation under Section 3H has been deposited. Thus, the Petitioner has argued that Respondents can only come in possession of the site after completion of Section 3H notification and not 3D notification. It is submitted that this is a fallacious interpretation and will do violence to both the purpose and the scheme of the statute.

32. It is further submitted that the argument raised by the Petitioner that there were encumbrances on the land especially trees and fences, for which the land owners disrupted work legitimately, is misleading. It must be borne in mind that the definition of land in Section 3 of National Highways Act, 1956 “includes benefits to arise out of land and things attached to the earth or permanently fastened to anything attached to earth.” Upon a notification under section 3D of the National Highways Act, 1956 these are vested absolutely in the Central Government free from all encumbrances. Further, the Petitioner have not pointed out specific instances of disruptions due to objections by landlords on this account barring one or two, which have been replied on facts stating that those specific situations were resolved expeditiously.

33. Learned counsel appearing on behalf of the Respondent further submitted that the requirement of land for achieving the milestones were fulfilled from day one and therefore, unavailability of land or ROW could not have been the reason for slow progress of the Work and non-achievement of milestones. In fact, the first milestone could have been reached if the Concessionaire completed the top layer of the road that it had already constructed up to the DBM layer between chainages 33 to 51.



It is submitted that the same was not done due to the paucity of equity that needed to be infused by the JV partners evident from the balance sheets of the JV company.

34. Learned counsel further submitted that the Petitioner is not entitled to debt due or any termination payment as its termination of the Concession Agreement had no basis in law. The Petitioner has alleged breaches on the part of the Respondent. It is submitted that the Respondent committed no breach that was fundamental and therefore does not entitle the Petitioner to terminate the Concession Agreement. Thus, the purported termination of the Concession Agreement by the Concessionaire is *non est* and of no consequence in law and therefore does not entitle the Concessionaire to any termination payments, including the Debt Due.

35. It is further submitted that the Respondents took over the plant and machinery pursuant to Article 17 of the CA. The CA was rightfully terminated by the Respondent. In any event, the cost of the plant and machinery was highly inflated, as has been demonstrated by in the process of auction of the plant and machinery.

36. Learned counsel submitted that in a DBFOT Contract, the NHAI liability is limited to the payment of Annuities. Remaining payments are all risks of the Concessionaire. NHAI is only liable to pay damages as per the CA, if admissible. The Petitioner has failed to bring on record to prove any claim for damages. Annuities were not payable in view of the fact that the Project Highway was not completed.



37. It is stated that as demonstrated hereinbefore and also admitted by the Petitioner at the fag end of the Arguments, the Contract was bid very aggressively and was not at all profitable. The Respondents have demonstrated that at SBI+2% discounting rate, the NPV of the project comes to less than the investment. Similarly, even in the assessment of the project consultants of the Bankers, the project would only make 1.6% profit. This was before the project was initiated.

38. It is submitted that in view of the delay caused by the Petitioner in achieving financial close, achieving the milestones despite work front being available, the project outlay could only increase and make the project unprofitable. As such, any claim for loss of profit cannot be sustained.

39. The claims of EPC contractor and all costs are Concessionaire's responsibility. There is no basis for this claim in the Contract. It is stated that since the Claims were vexatious and outlandish, there is no reason for payment of any cost or interest on any sum granted.

40. In light of the above submissions, learned counsel for the respondent prayed that the impugned award is neither unreasoned, nor perverse, nor suffers from any error apparent on the face of the record nor is against public policy of law in India. Therefore, the instant petition being devoid of merits is liable to be dismissed.



QUESTION FOR ADJUDICATION

41. Heard learned counsels for the parties and perused the record.
42. Upon perusal of the pleadings and hearing the parties at length, this Court opines that the controversy between the parties qua the impugned Award may be narrowed down to adjudicate the following issues:
- i. Whether the Impugned Award dated 30.11.2018 passed by the Sole Arbitrator suffers from patent illegality and hence, deserves to be set aside.
 - ii. Whether the order dated 27.02.2019 is in teeth of law and merits to be dismissed.

ANALYSIS

43. Before adjudicating upon the merits of the case, it is essential to recapitulate the idea, purpose, goal and objective of the Arbitration Act as well as Section 34 of the Act to understand the implications the provisions therein have on the powers and jurisdiction of this Court.

Spirit of the Arbitration Act

44. The Arbitration Act was enacted for providing a mechanism to the public to resolve their disputes in a process less rigorous, technical and formal than that of litigation. It has proven to be easier, more accessible, efficient and even cost effective for the parties involved, whether at an individual level or at the level of a business or corporation. The alternative dispute mechanism is not only advantageous for the people



involved in disputes but has also been aiding the effective disposal and release of burden on the Courts of the Country. The parties have a more hands-on involvement in an Arbitration process and play an active role in the adjudication process.

45. The Hon'ble Supreme Court in ***Union of India vs. Varindera Constructions Ltd., (2018) 7 SCC 794***, while discussing the object of arbitration held as under:-

“12. The primary object of the arbitration is to reach a final disposition in a speedy, effective, inexpensive and expeditious manner. In order to regulate the law regarding arbitration, legislature came up with legislation which is known as Arbitration and Conciliation Act, 1996. In order to make arbitration process more effective, the legislature restricted the role of courts in case where matter is subject to the arbitration. Section 5 of the Act specifically restricted the interference of the courts to some extent. In other words, it is only in exceptional circumstances, as provided by this Act, the court is entitled to intervene in the dispute which is the subject-matter of arbitration. Such intervention may be before, at or after the arbitration proceeding, as the case may be. In short, court shall not intervene with the subject-matter of arbitration unless injustice is caused to either of the parties.”

46. Therefore, expeditious and effective disposal of matters are most certainly considered the primary objectives of the enactment of the Arbitration Act. To fulfil the objective of introducing the Arbitration Act, it has been deemed necessary by the legislature as well as the Hon'ble Supreme Court to limit interference by the Courts in the process of



arbitration, whether before, during or after the conclusion of the proceedings.

47. The petitioner before this Court has invoked Section 34 of the Arbitration Act to challenge the impugned Award. The relevant portion of the said provision is reproduced hereunder for perusal and consideration:-

“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....”

48. The contents of the provision clearly show that the intention of legislature while enacting the Arbitration Act, as well as while carrying out amendments to 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 Arbitral Tribunal. Any claim brought forth a Court of law under Section 34 of the Arbitration Act shall be in accordance with



the principle of the provisions laid down under the Arbitration Act as well as interpreted by the Hon'ble Supreme Court.

49. The Law Commission of India in its 246th Report has also elaborated upon the background of introducing Section 34 of the Arbitration Act and laid down as under:-

"3. The Arbitration and Conciliation Act, 1996 (hereinafter "the Act") is based on the UNCITRAL Model law on International Commercial Arbitration, 1985 and the UNCITRAL Conciliation Rules, 1980. The Act has now been in force for almost two decades, and in this period of time, although arbitration has fast emerged as a frequently chosen alternative to litigation, it has come to be afflicted with various problems including those of high costs and delays, making it no better than either the earlier regime which it was intended to replace; or to litigation, to which it intends to provide an alternative. Delays are inherent in the arbitration process, and costs of arbitration can be tremendous. Even though courts play a pivotal role in giving finality to certain issues which arise before, after and even during an arbitration, there exists a serious threat of arbitration related litigation getting caught up in the huge list of pending cases before the courts. After the award, a challenge under Section 34 makes the award inexecutable and such petitions remain pending for several years. The object of quick alternative disputes resolution frequently stands frustrated.

4. There is, therefore, an urgent need to revise certain provisions of the Act to deal with these problems that frequently arise in the arbitral process. The purpose of this Chapter is to lay down the foundation for the changes suggested in the Report of the Commission. The suggested amendments address a variety of issues that plague the present regime of arbitration in India and, therefore, before



setting out the amendments, it would be useful to identify the problems that the suggested amendments are intended to remedy and the context in which the said problems arise and hence the context in which their solutions must be seen.

25. Similarly, the Commission has found that challenges to arbitration awards under Sections 34 and 48 are similarly kept pending for many years. In this context, the Commission proposes the addition of Sections 34(5) and 48(4) which would require that an application under those sections shall be disposed of expeditiously and in any event within a period of one year from the date of service of notice. In the case of applications under Section 48 of the Act, the Commission has further provided a time-limit under Section 48(3), which mirrors the time-limits set out in Section 34(3), and is aimed at ensuring that parties take their remedies under this section seriously and approach a judicial forum expeditiously, and not by way of an afterthought.”

50. With the repeal of Arbitration Act of 1940 by way of Arbitration Act, 1996, the legislature sought to achieve the objective of reducing the supervisory role of courts in arbitration proceedings. The amendment of Section 34 was also to have the Courts readily and expeditiously adjudicate upon any proceedings arising out of arbitration proceedings. The challenge to an Award also must be disposed of as expeditiously possible by the Courts.

51. It is clear that the speed and efficiency of disposal of disputes between parties are few of the substantial and key purposes of the introduction, development and promotion of resolving disputes by way of alternate mechanisms of dispute resolution.



52. Hence, the objective, goal and purpose of the Act as well as the intention of the legislature have to be given due consideration while adjudicating a petition under Section 34 of the Arbitration Act.

Scope of Powers of Arbitrator & Intervention of Courts

53. The Arbitrator, who in his wisdom, passes an Award, upon conducting the arbitration proceedings with the participation of parties to the dispute, considering the Statement of Claim and Statement of Defence presented by and on behalf of the parties, the relevant documents placed on record by the parties, is considered a Court for the purposes of adjudicating the dispute before him. An unfettered intervention in his functioning would defeat the spirit and purpose of the Arbitration Act, as discussed in the foregoing paragraphs.

54. An Arbitrator has wide powers while adjudicating arbitration proceedings. There is, undoubtedly, a scrutiny on the Arbitrator and the Awards passed by him, which has been stipulated under the Arbitration Act. However, there is a deemed privilege of limited intervention from the Courts which the Arbitrators have. The same has been reiterated by the Hon'ble Supreme Court time and again.

55. There is an extent to accountability put upon an Arbitrator while passing an Award. This is evident from the fact that with the enforcement of the Arbitration and Conciliation Act, 1996, an Arbitrator needs only to adhere to and fulfil the requirements under Section 31 of the Act. The limited requirements under Section 31 are reproduced hereunder:-



“Form and contents of arbitral award. –

(1) An arbitral award shall be made in writing and shall be signed by the members of the arbitral tribunal.

(2) For the purposes of sub-section (1), in arbitral proceedings with more than one arbitrator, the signatures of the majority of all the members of the arbitral tribunal shall be sufficient so long as the reason for any omitted signature is stated.

(3) The arbitral award shall state the reasons upon which it is based, unless—

(a) the parties have agreed that no reasons are to be given, or

(b) the award is an arbitral award on agreed terms under section 30

(4) The arbitral award shall state its date and the place of arbitration as determined in accordance with section 20 and the award shall be deemed to have been made at that place.

(5) After the arbitral award is made, a signed copy shall be delivered to each party.

(6) The arbitral tribunal may, at any time during the arbitral proceedings, make an interim arbitral award on any matter with respect to which it may make a final arbitral award. ...”

56. In addition to the requirements laid down under the provision, an Arbitrator, although acting in accordance with the requirements of the Arbitration Act, need not act as a formal Court while adjudicating a dispute and pass an Award which is lengthy, detailed or speaking. The Hon’ble Supreme Court has reiterated that an Award which is not speaking shall be set aside by the Court only in exceptional cases.

57. In **Anand Brothers (P) Ltd. vs. Union of India & Ors., (2014) 9 SCC 212**, the Hon’ble Supreme Court on the question of a reasoned or speaking Award observed and held as under:-



“7. Before we examine whether the expression "finding" appearing in Clause 70 would include reasons in support of the conclusion drawn by the arbitrator, we consider it appropriate to refer to the Constitution Bench decision of this Court in Raipur Development Authority v. Chokhamal Contractors wherein this Court was examining whether an award without giving reasons can be remitted or set aside by the Court in the absence of any stipulation in the arbitral agreement obliging the arbitrator to record his reasons. Answering the question in the negative, this Court held that a nonspeaking award cannot be set aside except in cases where the parties stipulate that the arbitrator shall furnish reasons for his award. This Court held: (SCC pp. 750-51, para 33)

“33 When the parties to the dispute insist upon reasons being given, the arbitrator is, as already observed earlier, under an obligation to give reasons. But there may be many arbitrations in which parties to the dispute may not relish the disclosure of the reasons for the awards. In the circumstances and particularly having regard to the various reasons given by the Indian Law Commission for not recommending to the Government to introduce an amendment in the Act requiring the arbitrators to give reasons for their awards we feel that it may not be appropriate to take the view that all awards which do not contain reasons should either be remitted or set aside.”

Having said that, this Court declared that the Government and their instrumentalities should-as a matter of policy and public interest-if not as a compulsion of law, ensure that whenever they enter into an agreement for resolution of disputes by way of private arbitrations, the requirement of speaking awards is expressly stipulated and ensured. Any laxity in that behalf might lend itself to and, perhaps justify the legitimate criticism, that the Government failed to provide against possible prejudice to public interest.



8. The following passage is in this regard apposite: (Raipur Development Authority case, SCC pp. 752-53, para 37)

“37. There is, however, one aspect of non-speaking awards in non-statutory arbitrations to which Government and governmental authorities are parties that compel attention. The trappings of a body which discharges judicial functions and is required to act in accordance with law with their concomitant obligations for reasoned decisions, are not attracted to a private adjudication of the nature of arbitration as the latter, as we have noticed earlier, is not supposed to exert the State's sovereign judicial power. But arbitral awards in disputes to which the State and its instrumentalities are parties affect public interest and the matter of the manner in which Government and its instrumentalities allow their interest to be affected by such arbitral adjudications involve larger questions of policy and public interest. Government and its instrumentalities cannot simply allow large financial interests of the State to be prejudicially affected by non-reviewable---except in the limited way allowed by the statute-non-speaking arbitral awards. Indeed, this branch of the system of dispute resolution has, of late, acquired a certain degree of notoriety by the manner in which in many cases the financial interests of Government have come to suffer by awards which have raised eyebrows by doubts as to their rectitude and propriety. It will not be justifiable for Governments or their instrumentalities to enter into arbitration agreements which do not expressly stipulate the rendering of reasoned and speaking awards. Governments and their instrumentalities should, as a matter of policy and public interest-if not as a compulsion of law-ensure that wherever they enter into agreements for resolution of disputes by resort to private arbitrations, the requirement of speaking awards is expressly stipulated and ensured. It





is for Governments and their instrumentalities to ensure in future this requirement as a matter of policy in the larger public interest. Any lapse in that behalf might lend itself to and perhaps justify, the legitimate criticism that Government failed to provide against possible prejudice to public interest.”

9. Reference may also be made to the Arbitration and Conciliation Act, 1996 which has repealed the Arbitration Act, 1940 and which seeks to achieve the twin objectives of obliging the Arbitral Tribunal to give reasons for its arbitral award and reducing the supervisory role of courts in arbitration proceedings. Section 31(3) of the said Act obliges the Arbitral Tribunal to state the reasons upon which it is based unless the parties have agreed that no reasons be given or the arbitral award is based on consent of the parties. There is, therefore, a paradigm shift in the legal position under the new Act which prescribes a uniform requirement for the arbitrators to give reasons except in the two situations mentioned above. The change in the legal approach towards arbitration as an alternative dispute resolution mechanism is perceptible both in regard to the requirement of giving reasons and the scope of interference by the court with arbitral awards. While in regard to requirement of giving reasons the law has brought in dimensions not found under the old Act, the scope of interference appears to be shrinking in its amplitude, no matter judicial pronouncements at time appear to be heading towards a more expansive approach that may appear to some to be opening up areas for judicial review on newer grounds falling under the caption “public policy” appearing in Section 34 of the Act. We are referring to these developments for it is one of the well-known canons of interpretation of statutes that when an earlier enactment is truly ambiguous in that it is equally open to diverse meanings, the later enactment may in certain circumstances serve as the parliamentary exposition of the former.



14. It is trite that a finding can be both: a finding of fact or a finding of law. It may even be a finding on a mixed question of law and fact. In the case of a finding on a legal issue the arbitrator may on facts that are proved or admitted explore his options and lay bare the process by which he arrives at any such finding. It is only when the conclusion is supported by reasons on which it is based that one can logically describe the process as tantamount to recording a finding. It is immaterial whether the reasons given in support of the conclusion are sound or erroneous. That is because a conclusion supported by reasons would constitute a "finding" no matter the conclusion or the reasons in support of the same may themselves be erroneous on facts or in law. It may then be an erroneous finding but it would nonetheless be a finding. What is important is that a finding presupposes application of mind. Application of mind is best demonstrated by disclosure of the mind; mind in turn is best disclosed by recording reasons. That is the soul of every adjudicatory process which affects the rights of the parties...."

58. Therefore, while considering a challenge to an Arbitral Award where private parties are involved, the Court need not examine the validity of the findings or the reasoning behind the findings given by an Arbitrator. The extent to which a Court may exercise supervisory powers in this respect is limited to examining whether the Award and the conclusion drawn therein are supported by findings and not whether the findings themselves are erroneous or sound.

59. It has also been reiterated that, while adjudicating a challenge under Section 34 of the Arbitration Act, the Courts must limit themselves to examining the Award itself and not the facts of the case. A Court shall



not conduct a roving enquiry into the facts and evidence of the matter and neither shall the Court sit in appeal against the Award of the Arbitrator.

60. The power of Court under Section 34 to set aside award, held, does not include power to modify such an award. Given the limited scope of judicial interference with award under Section 34 on extremely limited grounds not dealing with merits of an award, “limited remedy” under Section 34, is coterminous with “limited right”, namely, either to set aside an award or remand matter under circumstances mentioned in Section 34. Section 34 jurisdiction cannot be assimilated with revisional jurisdiction under Section 115 of the CPC. This position has been laid down in the case of *NHAI v. M. Hakeem*, (2021) 9 SCC 1 in the following terms:

“16. What is important to note is that, far from Section 34 being in the nature of an appellate provision, it provides only for setting aside awards on very limited grounds, such grounds being contained in sub-sections (2) and (3) of Section 34. Secondly, as the marginal note of Section 34 indicates, “recourse” to a court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-sections (2) and (3). “Recourse” is defined by P. Ramanatha Aiyar's Advanced Law Lexicon (3rd Edn.) as the enforcement or method of enforcing a right. Where the right is itself truncated, enforcement of such truncated right can also be only limited in nature. What is clear from a reading of the said provisions is that, given the limited grounds of challenge under sub-sections (2) and (3), an application can only be made to set aside an award. This becomes even clearer when we see sub-section (4) under which, on receipt of an application under sub-section (1) of Section 34, the court may adjourn the Section 34 proceedings and give the Arbitral Tribunal an opportunity to resume the arbitral proceedings or take such action as will eliminate the grounds for setting aside



the arbitral award. Here again, it is important to note that it is the opinion of the Arbitral Tribunal which counts in order to eliminate the grounds for setting aside the award, which may be indicated by the court hearing the Section 34 application.

17. It is important to remember that Section 34 is modelled on the UNCITRAL Model Law on International Commercial Arbitration, 1985, under which no power to modify an award is given to a court hearing a challenge to an award. The relevant portion of the Model Law reads as follows:

“34. Application for setting aside as exclusive recourse against arbitral award.—(1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paras (2) and (3) of this article.

(4) The court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the Arbitral Tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the Arbitral Tribunal's opinion will eliminate the grounds for setting aside.”

18. Redfern and Hunter on International Arbitration (6th Edn.), states that the Model Law does not permit modification of an award by the reviewing court (at p. 570) as follows:

“10.06. The purpose of challenging an award before a national court at the seat of arbitration is to have that court declare all, or part, of the award null and void. If an award is set aside or annulled by the relevant court,



it will usually be treated as invalid, and accordingly unenforceable, not only by the courts of the seat of arbitration, but also by national courts elsewhere. This is because, under both the New York Convention and the Model Law, a competent court may refuse to grant recognition and enforcement of an award that has been set aside by a court of the seat of arbitration. It is important to note that, following complete annulment, the claimant can recommence proceedings because the award simply does not exist—that is, the status quo ante is restored. The reviewing court cannot alter the terms of an award nor can it decide the dispute based on its own vision of the merits. Unless the reviewing court has a power to remit the fault to the original tribunal, any new submission of the dispute to arbitration after annulment has to be undertaken by commencement of a new arbitration with a new Arbitral Tribunal.”

19. *The statutory scheme under Section 34 of the Arbitration Act, 1996 is in keeping with the Uncitral Model Law and the legislative policy of minimal judicial interference in arbitral awards.*

23. *It is settled law that a Section 34 proceeding does not contain any challenge on the merits of the award. This has been decided in MMTC Ltd. v. Vedanta Ltd. [MMTC Ltd. v. Vedanta Ltd., (2019) 4 SCC 163 : (2019) 2 SCC (Civ) 293] , as follows : (SCC p. 167, para 14)*

“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.”

24. Likewise, in Ssangyong Engg. & Construction Co. Ltd. v. NHAI [Ssangyong Engg. & Construction Co. Ltd. v. NHAI, (2019) 15 SCC 131 : (2020) 2 SCC (Civ) 213] , this Court under the caption “Section 34(2)(a) does not entail a challenge to an arbitral award on merits” referred to this Court's judgment in Renusagar Power Co. Ltd. v. General Electric Co. [Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCC 644] , the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (“the New York Convention”) and various other authorities to conclude that there could be no challenge on merits under the grounds mentioned in Section 34 — (see paras 34 to 48). This Court also held, in Maharashtra State Electricity Distribution Co. Ltd. v. Datar Switchgear Ltd. [Maharashtra State Electricity Distribution Co. Ltd. v. Datar Switchgear Ltd., (2018) 3 SCC 133 : (2018) 2 SCC (Civ) 65] (at p. 170), that the court hearing a Section 34 petition does not sit in appeal (see para 51).”

61. In ***UHL Power Co. Ltd. vs. State of Himachal Pradesh, (2022) 4 SCC 116***, the Hon’ble Supreme Court reiterated the narrow scope under Section 34 of the Arbitration Act and held as under:

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



award, is all the more circumscribed. In MMTC Ltd. v. Vedanta Ltd. 5, the reasons for vesting such a limited jurisdiction on the High Court in exercise of powers under Section 34 of the Arbitration Act have been explained in the following words: (SCC pp. 166-67, para 11)

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

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

“2. The contours of the power of the Court under Section 34 of the Act are too well established to require any reiteration. Even a bare reading of Section 34 of the Act indicates the highly constricted power of the civil court to interfere with an arbitral award. The reason for this is obvious. When parties have chosen to avail an alternate mechanism for dispute resolution,



they must be left to reconcile themselves to the wisdom of the decision of the arbitrator and the role of the court should be restricted to the bare minimum. Interference will be justified only in cases of commission of misconduct by the arbitrator which can find manifestation in different forms including exercise of legal perversity by the arbitrator.”

62. In ***Delhi Airport Metro Express Pvt Ltd vs. Delhi Metro Rail Corporation, (2022) 1 SCC 131***, the Hon’ble Supreme Court to this aspect held as under:

“28. 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 of 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.”

63. Further, in ***State of Jharkhand vs. HSS Integrated DSN, (2019) 9 SCC 798***, the Hon’ble Supreme Court held that even when there are more than one plausible views and the Arbitrator, in his wisdom, adopts one of them, having given reasons for his findings, the Courts shall not interfere with such an Award. It was observed as under:-

“6.1. In Progressive-MVR3, after considering the catena of decisions of this Court on the scope and ambit of the proceedings under Section 34 of the Arbitration Act, this



Court has observed and held that even when the view taken by the arbitrator is a plausible view, and/or when two views are possible, a particular view taken by the Arbitral Tribunal which is also reasonable should not be interfered with in a proceeding under Section 34 of the Arbitration Act.

6.2. In Datar Switchgear Ltd., this Court has observed and held that the Arbitral Tribunal is the master of evidence and the findings of fact which are arrived at by the arbitrators on the basis of the evidence on record are not to be scrutinised as if the Court was sitting in appeal. In para 51 of the judgment, it is observed and held as under: (SCC pp. 169-70)

“51. The proposition of law that the Arbitral Tribunal is the master of evidence and the findings of fact which are arrived at by the arbitrators on the basis of evidence on record are not to be scrutinised as if the Court was sitting in appeal now stands settled by a catena of judgments pronounced by this Court without any exception thereto.”

64. Hence, the law which has been settled by the Hon'ble Supreme Court is that the scope of interference with an Arbitral Award under Section 34 of the Arbitration Act is fairly limited and narrow. The Courts cannot sit in an appeal while adjudicating a challenge to an Award which is passed by an Arbitrator, who is the master of evidence, after due consideration after facts, circumstances, evidence and material before him. Therefore, it is clear that this Court shall also limit itself to the Award in question and not re-appreciate evidence and all material before the Arbitrator.

ISSUE-WISE ANALYSIS

Issue no. 1



65. The question before this Court is to adjudicate whether the Impugned Award dated 30.11.2018 passed by the Sole Arbitrator suffers from patent illegality and hence, deserves to be set aside.

66. The ground taken by the petitioner while assailing the Arbitral Award is that the impugned award suffers from patent illegality and the findings therein are perverse and would shock the conscience of this Court, and that the arbitrator has not considered the pleadings and evidence placed before him and has arrived at a conclusion that is implausible, or the said award has been passed by adopting an incorrect interpretation of the contract as well as the law.

67. The law regarding patent illegality and public policy of India is no more *res integra* and has been authoritatively clarified by the Hon'ble Supreme Court in a number of judicial pronouncements. Since, it has been settled that the scope of interference under Section 34 of the Arbitration Act is limited, it is now pertinent to see the factors that are to be considered while adjudicating upon a challenge and in what circumstances may an Award may be set aside.

68. On a bare reading of the invoked provision Section 34 of the Arbitration Act as quoted above, it has become evident the words used therein are that "*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. What is to be seen by a Court exercising jurisdiction under Section 34 of the Arbitration Act is that an Award passed by an Arbitral Tribunal may only be set aside if it is patently illegal, against the public policy of India, based on no evidence and delineates no reason for passing the Award.

69. The Hon'ble Supreme Court in **BCCI vs. Cricket Association & Ors. (2015) 3 SCC 251**, on the question of public policy, held as under:-

“90. The validity of Rule 6.2.4 as amended can be examined also from the standpoint of its being opposed to "public policy". But for doing so we need to first examine what is meant by "public policy" as it is understood in legal parlance. The expression has been used in Section 23 of the Contract Act, 1872 and in Section 34 of the Arbitration and Conciliation Act, 1996 and host of other statutes but has not been given any precise definition primarily because the expression represents a dynamic concept and is, therefore, incapable of any straitjacket definition, meaning or explanation. That has not, however, deterred jurists and courts from explaining the expression from very early times.

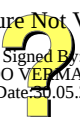
91. Mathew, J. speaking for the Court in Murlidhar Aggarwal v. State of U.P. 27 referred to Winfield's definition in Public Policy in English Common Law 42 Harvard Law Review 76 to declare that: (SCC p. 482, para 31)

“31. Public policy does not remain static in any given community. It may vary from generation to generation and even in the same generation. Public policy would be almost useless if it were to remain in fixed moulds for all time.”



92. *The Court then grappled with the problem of ascertaining public policy if the same is variable and depends on the welfare of the community and observed: (Murlidhar Aggarwal case, SCC pp. 482-83, para 32)*

“32. If it is variable, if it depends on the welfare of the community at any given time, how are the courts to ascertain it? The Judges are more to be trusted as interpreters of the law than as expounders of public policy. However, there is no alternative under our system but to vest this power with Judges. The difficulty of discovering what public policy is at any given moment certainly does not absolve the Judges from the duty of doing so. In conducting an enquiry, as already stated, Judges are not hidebound by precedent. The Judges must look beyond the narrow field of past precedents, though this still leaves open the question, in which direction they must cast their gaze. The Judges are to base their decisions on the opinions of men of the world, as distinguished from opinions based on legal learning. In other words, the Judges will have to look beyond the jurisprudence and that in so doing, they must consult not their own personal standards or predilections but those of the dominant opinion at a given moment, or what has been termed customary morality. The Judges must consider the social consequences of the rule propounded, especially in the light of the factual evidence available as to its probable results. Of course, it is not to be expected that men of the world are to be subpoenaed as expert witnesses in the trial of every action raising a question of public policy. It is not open to the Judges to make a sort of referendum or hear evidence or conduct an inquiry as to the prevailing moral concept. Such an extended extra-judicial enquiry is wholly outside the tradition of courts where the tendency is to 'trust the Judge to be a typical representative of his day and generation'. Our law relies, on the implied



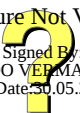


insight of the Judge on such matters. It is the Judges themselves, assisted by the Bar, who here represent the highest common factor of public sentiment and intelligence. No doubt, there is no assurance that Judges will interpret the mores of their day more wisely and truly than other men. But this is beside the point. The point is rather that this power must be lodged somewhere and under our Constitution and laws, it has been lodged in the Judges and if they have to fulfil their function as Judges, it could hardly be lodged elsewhere.”*

93. *In Central Inland Water Transport Corpn. this Court was also considering the import of the expression "public policy" in the context of the service conditions of an employee empowering the employer to terminate his service at his sweet will upon service of three months' notice or payment of salary in lieu thereof. Explaining the dynamic nature of the concept of public policy this Court observed: (SCC pp. 217-18, para 92)*

“92. . . . Public policy, however, is not the policy of a particular Government. It connotes some matter which concerns the public good and the public interest. The concept of what is for the public good or in the public interest or what would be injurious or harmful to the public good or the public interest has varied from time to time. As new concepts take the place of old, transactions which were once considered against public policy are now being upheld by the courts and similarly where there has been a well recognised head of public policy, the courts have not shirked from extending it to new transactions and changed circumstances and have at times not even flinched from inventing a new head of public policy

It is thus clear that the principles governing public policy must be and are capable, on proper occasion, of

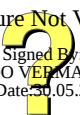




expansion or modification. Practices which were considered perfectly normal at one time have today become obnoxious and oppressive to public conscience. If there is no head of public policy which covers a case, then the court must in consonance with public conscience and in keeping with public good and public interest declare such practice to be opposed to public policy. Above all, in deciding any case which may not be covered by authority our courts have before them the beacon light of the Preamble to the Constitution. Lacking precedent, the court can always be guided by that light and the principles underlying the fundamental rights and the directive principles enshrined in our Constitution.”

94. *We may also refer to the decision of this Court in ONGC Ltd. v. Saw Pipes Ltd., wherein this Court was considering the meaning and import of the expression "public policy of India" as a ground for setting aside an arbitral award. Speaking for the Court M.B. Shah, J. held that the expression "public policy of India" appearing in the Act aforementioned must be given a liberal meaning for otherwise resolution of disputes by resort to arbitration proceedings will get frustrated because patently illegal awards would remain immune to court's interference. This Court declared that what was against public good and public interest cannot be held to be consistent with public policy. The following passage aptly summed up the approach to be adopted in the matter: (Saw Pipes Ltd. case, SCC pp. 727-28, para 31)*

“31. Therefore, in our view, the phrase 'public policy of India' used in Section 34 in context is required to be given a wider meaning. It can be stated that the concept of public policy connotes some matter which concerns public good and the public interest. What is for public good or in public interest or what would be injurious or harmful to the public good or public interest has varied from time to time. However, the





award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice. Hence, in our view in addition to narrower meaning given to the term 'public policy' in Renusagar case it is required to be held that the award could be set aside if it is patently illegal. The result would be-award could be set aside if it is contrary to:

- (a) fundamental policy of Indian law; or*
- (b) the interest of India; or*
- (c) justice or morality, or*
- (d) in addition, if it is patently illegal.*

Illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court. Such award is opposed to public policy and is required to be adjudged void.”

95. *In ONGC Ltd. v. Western GECO International Ltd., this Court was examining the meaning of "fundamental policy of Indian law", an expression used by this Court in Saw Pipes case. Extending the frontiers of what will constitute "public policy of India" this Court observed: (Western GECO International Ltd. case , SCC pp. 278-80, paras 35 & 38-39)*

“35. What then would constitute the 'fundamental policy of Indian law' is the question. The decision in ONGC 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 fora 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.

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.”

96. *To sum up: public policy is not a static concept. It varies with times and from generation to generation. But what is in public good and public interest cannot be opposed to public policy and vice versa. Fundamental Policy of Law would also constitute a facet of public policy. This would imply that all those principles of law that ensure justice, fair play and bring transparency and objectivity and promote probity in the discharge of public functions would also constitute public policy. Conversely, any deviation, abrogation, frustration or negation of the salutary principles of justice, fairness, good conscience, equity and objectivity will be opposed to public policy. It follows that any rule, contract or arrangement that*



actually defeats or tends to defeat the high ideals of fairness and objectivity in the discharge of public functions no matter by a private non-governmental body will be opposed to public policy.”

70. While discussing the fundamentals of patent illegality, the Hon’ble Supreme Court in ***State of Chhattisgarh v. Sal Udyog (P) Ltd., (2022) 2 SCC 275*** held as under:

“14. The law on interference in matters of awards under the 1996 Act has been circumscribed with the object of minimising interference by courts in arbitration matters. One of the grounds on which an award may be set aside is "patent illegality". What would constitute "patent illegality" has been elaborated in Associate Builders v. DDA, where "patent illegality" that broadly falls under the head of "Public Policy", has been divided into three sub-heads in the following words: (SCC p. 81, para 42)

“42. In the 1996 Act, this principle is substituted by the "patent illegality" principle which, in turn, contains three sub-heads:

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 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.-(1)-(2) * * *

(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.'

15. In Ssangyong Engg. & Construction Co. Ltd. v. NHAI, speaking for the Bench, R.F. Nariman, J. has spelt out the contours of the limited scope of judicial interference in reviewing the arbitral awards under the 1996 Act and observed thus: (SCC pp. 169-71, paras 34-41)

"34. What is clear, therefore, is that the expression "public policy of India", whether contained in Section 34 or in Section 48, would now mean the "fundamental policy of Indian law" as explained in



paras 18 and 27 of Associate Builders⁸ i.e. the fundamental policy of Indian law would be relegated to "Renusagar" understanding of this expression. This would necessarily mean that Western Geco expansion has been done away with. In short, Western Geco, as explained in paras 28 and 29 of Associate Builders, 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.

35. It is important to notice that the ground for interference insofar as it concerns "interest of India" has since been deleted, and therefore, no longer obtains. Equally, the ground for interference on the basis that the award is in conflict with justice or morality is now to be understood as a conflict with the "most basic notions of morality or justice". This again would be in line with paras 36 to 39 of Associate Builders , as it is only such arbitral awards that shock the conscience of the court that can be set aside on this ground.

36. Thus, it is clear that public policy of India is now constricted to mean firstly, that a domestic award is contrary to the fundamental policy of Indian law, as understood in paras 18 and 27 of Associate Builders, or secondly, that such award is against basic notions of justice or morality as understood in paras 36 to 39 of Associate Builders⁸. 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, as understood in Associate Builders⁸, and paras 28 and 29 in particular, is now done away with.

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

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

39. To elucidate, para 42.1 of Associate Builders, 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 Builders⁸, 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, 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 Builders⁸, 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."

16. *In Delhi Airport Metro Express (P) Ltd. referring to the facets of patent illegality, this Court has held as under: (SCC p. 150, para 29)*

"29. Patent illegality should be illegality which goes to the root of the matter. In other words, every error of law committed by the Arbitral Tribunal would not fall within the expression "patent illegality". Likewise, erroneous application of law cannot be categorised as patent illegality. In addition, contravention of law not linked to public policy or



public interest is beyond the scope of the expression "patent illegality". What is prohibited is for Courts to reappreciate evidence to conclude that the award suffers from patent illegality appearing on the face of the award, as Courts do not sit in appeal against the arbitral award. The permissible grounds for interference with a domestic award under Section 34(2-A) on the ground of patent illegality is when the arbitrator takes a view which is not even a possible one, or interprets a clause in the contract in such a manner which no fair-minded or reasonable person would, or if the arbitrator commits an error of jurisdiction by wandering outside the contract and dealing with matters not allotted to them. An arbitral award stating no reasons for its findings would make itself susceptible to challenge on this account. The conclusions of the arbitrator which are based on no evidence or have been arrived at by ignoring vital evidence are perverse and can be set aside on the ground of patent illegality. Also, consideration of documents which are not supplied to the other party is a facet of perversity falling within the expression "patent illegality".

71. The abovementioned precedents have settled the position of a challenge to an Arbitral Award. The facets under Section 34 of the Arbitration Act, specifically under Sub-section 2, provide the limited purview of such a challenge. In order to set aside an Award under Section 34 the petitioner must show that illegality which has been alleged goes to the root of the matter and is not an illegality of trivial nature. In failure of the same the impugned Award cannot be held to be against the public policy. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court. Such award is opposed to public policy and is required to be adjudged void.



72. Having dealt with the legal position at length and having traversed the contours of the statutory provisions and precedents applicable, it is now appropriate to apply the law to the facts of the case and adjudicate the challenge to the impugned award.

73. Before dealing with the findings on claims by the learned Arbitrator, it is pertinent to peruse the substantial findings on Issues No. 1 to 3 framed by the learned Arbitrator during the proceedings before him.

74. As regards Issue No.1 i.e. “Whether the Respondent had misrepresented that it had good and valid right to the Site and the power and authority to grant license in respect thereto to the Claimant in terms of the Concession Agreement?” – it was held as under:

“198. The Tribunal is of the opinion that the Concessionaire is not correct in its submission that there were deliberate misrepresentations by the Respondent. A perusal of the Request for Proposal - Bid (hereinafter referred as Bid Documents) and the various Articles of the Concession Agreement, as well as the other documents, on record would show that there was no legal or factual misrepresentation made by the Respondent to the Concessionaire.

199. This is evident from the reply to the pre-bid queries made by the Claimant at serial no. 31 at page no. 220 of the Concession Agreement Volume. The query and the answer are as follows:

Query: "Please clarify what % of the right of way is under the possession of NHAI."

Answer "About 50%."



200. With regard to forest clearance also it has to be noted that in the reply to the pre-bid queries made by the Claimant at serial no. 32 on page no. 220 of the Concession Agreement Volume. It is recorded as under:

Query: "Please clarify if the project road passes through any forest/reserved forest."

Answer: "About 4.93% of the project length passes through a Reserved Forest."

201. Thus it cannot be said that there was any deliberate misrepresentation by the Respondent, at this stage.

202. Various Articles of the Concession Agreement relevant at this stage are as follows:

Article 4.1.1 of the CA provides the respective rights and obligations of the parties. These are Conditions Precedent to be fulfilled or waived, on or before the Appointed Date. The Claimant has founded its claim on the alleged nonfulfilment by the Respondent of the Conditions Precedent under Clause 4.1.2 (a) and (c).

1. Under Article 4.1.2 (a), the Respondent was required to procure for the Claimant the RoW to the site in accordance with the provisions of Article 1 0.3.1.

2. Under Article 1 0.3.1, the parties shall inspect the site and prepare a memorandum containing an inventory of the site. This memorandum is to contain the details of unencumbered buildings, structures, roadworks, trees and any other immovable structures on or attached to the Site. The



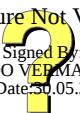
memorandum is to specify those parts of the Site to which vacant access and RoW have not been granted to the Claimant. The signing of memorandum by the two parties shall be deemed to constitute a valid license and RoW to the Concessionaire for free and unrestricted use and development of the vehicle and unencumbered Site for completion of the project. It is agreed between the parties that valid license and RoW with respect to the parts of the Site as set forth in the Appendix shall be deemed to have been granted to the Concessionaire upon vacant access thereto being provided by the authority to the Concessionaire. Under 10.3.2 the authority is required to grant vacant access and RoW to the Concessionaire to the extent of 80% of the land required and necessary for the Two-Lane Project Highway. In the event, Financial Close is delayed solely on account of delay in the grant of such vacant access and RoW. The Authority is liable to pay damages in accordance with the provisions contained in Article 4.2.

3. Under Article 10.3.4, the Authority is required to make best efforts to procure and grant, no later than 90 days from the Appointed Date, RoW to the Concessionaire. It must be emphasised at this stage that the Respondent was required to "make best efforts to procure the RoW". I am of the opinion that this Article has been erroneously interpreted by the Concessionaire to mean that 80% of the RoW was to be provided, positively by the goth day from the Appointed Date.



4. Factually also, I am of the opinion that the submissions made by the Concessionaire are erroneous.

5. It is a matter of record that the parties had signed a Joint Memorandum which clearly states "The project Site from Km 0. 00 to 53.774 of NH-86 (Ext) along with existing alignment (existing chainage from Km 13/6 (Misrod bypass junction) to Km 46 (Raisen town) and Km 1 to 17 (Raisen - Salamatpur junction) and Km 39 to Km 45 (Salamatpur-Sanchi)) is jointly inspected today on dated 07/11/2011. More than 80% land at Site is available to carry out the construction along alignment of proposed project road." The Appendix-I to the Memorandum prepared on 07.11.2011, under Article 10, Clause 1 0.3.1 also shows (column (a)) that the total area required for proposed 60 mtr ROW in By-pass and 35 mtr in remaining stretch is 212.138 hectares. However, total land required for construction is 188.20 hectares. Column (b) shows that total area of existing ROW including the Road was 136.71 hectares. It is also noted that notification under Section 3 (D) (1) (i) have been published on 16.05.2011 (56.784 ha in Raisen) and 18.05.2011 (3.674 ha in Bhopal) for the acquisition of a total of 60.46 hectares. Therefore, the total land/ROW made available was 197.17 hectares. Thus, 92% of the land required for construction was made available to the Claimant. The Appendix-I further shows that under Article 11.2 it was the responsibility of the Claimant to shift the utilities. However, the costs of shifting such utilities shall be borne by the Authority or by the entity owning such





utilities. Similarly, felling of the trees was the responsibility of the Claimant. However, the Respondent shall assist the Claimant in obtaining the applicable permits. The cost of such felling of the trees is/was to be borne by the Respondent.

6. Prior to the signing of the Joint Memorandum on 07.11.2011 the Respondent had claimed to have procured the Environmental Clearance and to be in possession of the required and necessary Site. Consequently, 18.10.2011 was declared as the Appointed Date. The contents of this Memorandum is sought to be denied by the Claimant on the ground that physical verification subsequently carried out showed that the Site actually available was only 48.14% as on 19.07.2012 and 58.92% on 31.07.2013. Thereafter, it appears that another joint inspection was done with respect to the availability of land. The representatives of the Claimant Mr. Arif Zafar, the then Project Director - NHAI, BSHPL and Mr. Anil Kumar, the then Construction Manager, BSHPL and Joint Inspection sheet duly signed was forwarded by Regional Office vide letter no. NHAI/RO/MP/BPL/MoM/20127783 dated 31.07.2012 from which it is evident that the land available was about 80% of total length (53.775) i.e. 42.911 Km and hindered length due to Land Acquisition was 10.9 Km.

7. A Joint Site visit was again conducted on 09.11.2013 and subsequently a meeting was held between the parties on 11.11.2013 at the



office of the Respondent. At the meeting the representatives of the Claimant had agreed with regard to the availability of working fronts for construction of the two-lane main carriageway in 46.590 kms and for service road in 4.99 kms of total 7.25 kms.

8. From the above, it is evident that the Concessionaire was offered the constructive possession of the RoW in terms of Article 48 read with Article 10.3.4. Further, the Respondent clearly had the legal authority to grant a license to the Claimant to enjoy free access in terms of the Concession Agreement. This is evident from the fact that notification under Section 3 (D) (i) had been issued to acquire part of the area of land required for providing the necessary RoW. Upon issuance of notification under Section 3 (D) (i), the title of the land covered by the aforesaid notification would vest in the Central Government. Thereafter, constructive possession of the same was handed over to the Concessionaire. Therefore, factually also the submission of the Concessionaire seems to be erroneous.

9. In fact, it appears the Concessionaire singularly failed to perform its obligations under Article 10.3.5. The defaults committed by the Concessionaire ultimately led to the termination of the CA by the Respondent.

Finding: *This issue is accordingly decided against the Claimant.”*



75. As regards Issue No.2 i.e. “Whether the delay in execution of the Works, even in the available stretches, was due to breaches and defaults of the Respondent?” – it was held as under:

“203. On this issue, the Claimant had made submissions, on the basis that on the 90th day from the Appointed Date, the status of the land available was almost the same as on the Appointed Date i.e. 27.958 kms which is about 52% of the land required. This plea has to be rejected in view of the admissions made by the parties in the Memorandum dated 07.11.2011 (signed on 08.11.2011).

204. However, it is the case of the Claimant that even on the Site made available it was not possible to make any progress on the Project, due to the defaults committed by the Respondent. It is submitted that the Respondent failed to assist the Claimant in relocation of the utilities which were hindering the progress of the Project. The Claimant accepts that responsibility of relocating the utilities lies with the Claimant under the CA. Article 11.2 clearly states that the Concessionaire shall undertake shifting of any utility to an appropriate location or alignment, within or outside the Site. Even this is only required to be done if such utility shall cause a material adverse effect on the progress of the Project. The cost of such shifting shall be borne by the Authority or the entity owning such utility. The Concessionaire would not be required to perform its obligations if the failure to remove the utility is a direct consequence of delay on part of the entity owning such utility. The above provision makes it clear that primarily it was the duty of the Concessionaire. The Respondent was only required to render necessary assistance. It is the pleaded case of the Respondent that all possible assistance was rendered to the Claimant for the purpose of removal of utilities. In any event, the definition of encumbrance in Article 48, excludes the existence of utilities referred to in Clause 11.1.



206. Shifting of Utilities:

1. *Electrical Utilities: The Claimant has relied on Clause 11.2 and submitted that it was the primary responsibility of the authority to obtain necessary Permission/NOC for shifting of the utility and make necessary payments to the agencies for shifting the utilities. According to the Claimant, 13.185 kms of Right of Way was hindered due to existing electrical utilities on the Site. Necessary approval was not obtained from Madhya Pradesh Electricity Board (MPEB) for 14 months i.e. till 17.12.2012. In view of the provision contained in Clause 5.1.4, I find no merit in the aforesaid submission.*

2. *From the above it becomes clear that the Concessionaire alone is required to make all necessary applications to the relevant Government Instrumentalities for obtaining Applicable Permits. It is for the Concessionaire to procure the appropriate proprietary rights, licences and permits for use to complete the Project Highway. It is further required to perform and fulfil its obligations under the Financial Agreements. It is also the duty of the Concessionaire to maintain harmony and good industrial relations among its employees and the employees of the Contractors.*

3. *Therefore, the Claimant cannot lay the entire blame on the Respondent for any delay that may have been caused in issuance of the NOC by the Madhya Pradesh Electricity Board. The Claimant has placed on record a letter dated 17.12.2012 (Ex. CD-19) showing that MPEB had sent the revised estimate for shifting the height raising of 11 KV and LT line at different*



locations on 23.11.2012. The Respondent had sent the cheque on 17.12.2012 as payment for the revised demand. The Tribunal does not find from this material that the Respondent was in any manner responsible for the delay.

4. The shifting of other utilities could also be achieved with timely action being taken by the Entity/Authority in issuing a necessary NOC. I see no reason to hold the Respondent liable for any delay in the absence of any material being produced by the Claimant. It must be pointed out that the Claimant was well aware of all the hindrances from the time of making the bid to undertake the Project. This is evident from the reply to the pre-bid queries made by the Claimant at serial no. 31, which is to be found on page no. 220 of the Volume containing the Concession Agreement ...

5. From this, it is apparent that the Claimant accepted the Project with eyes wide open. It is therefore clear that the Claimant is simply attempting to cover up its own failure in performing its own obligations as required under Article 4. Furthermore, the delay if any would not be critical, so as to justify the non-performance by the Claimant, of its own obligations. In fact, the consequence of the delay would only have led to grant of extra time to the Concessionaire in view of the provision contained in Article 11.2 of the CA. The Tribunal finds that the Respondent having made reasonable efforts, as required under Article 11 of the CA, the Claimant cannot be permitted to claim that its non-performance was due to the delay caused by the Respondent.

6. With regard to forest clearance also it has to be noted that in the reply to the pre-bid queries made by the Claimant at serial no. 32, which is to be found on



page no. 220 of the Volume containing the Concession Agreement....

7. Here also the Claimant having accepted the information given in the pre-bid document cannot now claim that the delay has been caused due to existence of Forest Land in the Project. In fact, the delay if any occurred in the MoEF. This is evident from the letter dated 22.02.2014 which mentions that prior permission was sought for diversion of the Forest Land on 01.02.2012 and 27.08.2012. It must be understood that prior approval for diversion of Forest Land is a serious issue. This necessarily consumes considerable amount of time to ensure that the statutory procedure is completed. Therefore, the Respondent cannot be held responsible for any delay.

8. Similarly, the Respondent cannot be held responsible for not obtaining necessary permission to remove encroachments. It was the responsibility of the Concessionaire to take necessary steps for removing the encroachments such as Temples, Mosques etc. It is evident from Clause 10.2.2 that the ROW was granted to the Claimant on an "as is where is basis". The Claimant has been granted leave and licence rights in respect of all the land (along with any buildings, constructions or immovable assets, if any, thereon). Therefore, it is evident that the Claimant had to take necessary action for the removal of such structures. The Respondent has specifically pleaded that it has always assisted the Concessionaire in removing the encumbrances.

9. Specifically, it is stated that the responsibility of removing the structures mentioned in paragraph 10 F (2) at page no.35 of the Statement of Claim was the responsibility of the Claimant. This apart the Claimant



has not placed any material of the record to show that any effort was made by the Claimant for removal of such structures. It must be remembered that the Claimant had accepted the RoW on "as is where is" basis. The responsibility of the Respondent is only to render necessary assistance, if requested by the Claimant. I find merit in the submissions of the Respondent that it was for the Claimant to negotiate with the persons/entities in control of the religious structures for re-location of the same.

10. The Respondent had clearly pleaded that the existence of the structures did not cause any hindrance. The first five religious structures mentioned in paragraph 10 F (2) at page no.35 of the Statement of Claim were at chainages where the Claimant could not even start work due to disputes with its own EPC Contractor. Item number 13 in the list is blank, it is also pointed out that the obstructions are mostly only on one side of the carriageway. The Claimant has not placed on record any material to rebut the aforesaid statement. Even otherwise in the Rejoinder, the Claimant has relied on Article 10.4. However, the Claimant has ignored the last sentence of Article 10.4 which provides "It is further agreed that the Concessionaire accepts and undertakes to bear any and all risks arising out of the inadequacy or physical condition of the Site". This clearly shows that it was the responsibility of the Concessionaire to remove the encroachment of the Site. The Respondent had no role to play in the process. This claim is therefore also rejected.

11. The Claimant has made a grievance of delay in permissions/approvals for cutting Trees. It is not disputed that the Supplementary Agreement signed on 12.12.2011 states that the Claimant will obtain



permission for tree cutting within three months. It is also admitted position that under Article 11.4 of CA it is the obligation of the Claimant to obtain the necessary permits for felling trees. However, under this Article, the Respondent is required to render necessary assistance to the Claimant. The Claimant has set out the various requests made to the authority seeking permission to cut the trees. In its reply the Respondent has submitted that necessary assistance was rendered to the Claimant in its endeavours to obtain the necessary permissions. Having considered the entire material the Tribunal is of the opinion that cutting of the trees would not have been critical hindrance to the Claimant for the timely completion of the project. The Tribunal finds no merit in this submission of the Claimant.

Delay in finalization and approval of Design Speed:

207. According to the Claimant, the issue with respect to change in the design speed remained un-decided from September 2011 till June 2012. On the basis of the facts narrated in the Statement of Claim, it is submitted that the Respondent was responsible for the delay in the time taken for taking a decision about the design speed. The Respondent has submitted that it took four months to revert to the letter dated 22.12.2011 as the Claimant had not complied with the Condition Precedent in Article 4 of the CA till writing of the letter dated. 12.12.2011. The issue with regard to this delay is covered by the Supplementary Agreement between the parties dated 12.12.2011. I find merit in the submission of the Respondent that the Claimant itself did not submit the necessary plan and profile for chainage for 0.00 kms to chainage 13.00 kms and chainages 22.70 kms to chainages 53.775 kms till 13.03.2013. Within 2 days thereafter the Respondent approved the plan and profile of the aforesaid stretches.



208. A far more serious reason for rejecting the claim made by the Concessionaire is that the issue relating to design speed of chainages 13.00 kms to chainages 23.70 kms were resolved even before the Concessionaire could reach the stage where construction of the aforesaid patch was scheduled. The reason for the same was that even till the date of termination of the Agreement the Concessionaire was unable to finalise its EPC Contractor for the affected stretch from chainages 0.00 kms to 25.00 kms. Therefore, the delays in resolving the issue of design between 13.00 kms and 23.7 kms would be of no consequence. These averments have not been denied by the Claimant. Therefore, the Claimant cannot be permitted to take any benefit from the aforesaid delay.

In view of the above, it is held that the Claimant has failed to prove that the delay in execution of the Works, even in the available stretches, was due to breaches and defaults of the Respondent. This issue is accordingly decided against the Claimant.

Land Acquisition:

209. This brings us to the grievance made by the Claimant that since the land acquisition proceedings under Section 3 of the National Highways Act, 1956 had not been completed, the Claimant was not able to do any constructive work on the said land. It was submitted that the Claimant had met stiff opposition from the landowners, which would have led to violence. There was also the danger of the land owners initiating proceedings against the Claimant for trespass. Therefore, it was impossible for the Claimant to do any work on the aforesaid land. The Tribunal finds this grievance to be without any merit.

210. The submission of the Claimant is that the Respondent has misrepresented, is based on the assumption that the Respondent was not in a position to give vacant possession of the land required for the Project on or before the Appointed Date. Here



also, the Tribunal finds that the said submission of the Claimant is without any merit, legally as well as factually.

211. The fulcrum of the submission made by the Claimant is that the Respondent would only be able to hand over possession on completion of the procedure as laid down in Section 3A to 3H of the National Highways Act, 1956. This submission would be contrary to the scheme of the NH Act, 1956 (as amended in 1997).

212. The scheme of acquisition under Section 3 of the NH Act, 1956 is such as to ensure that the land required for the construction of a National Highway is made available without undue delay. Under Section 3A the Government can issue notifications declaring its "intention to acquire land". Once the procedure under Section 3A has been followed the Government or any other person authorised by the Central Government would have the power under Section 38 to enter the land for the purposes specified in Section 38. Under Section 3C any person interested in the land may file objections within 21 days from the date of publication of the notification under Sub-Section 1 of Section 3A. Every objection under Sub-Section 1 is required to be made to the Competent Authority in writing setting out the grounds thereof. Thereafter, the Competent Authority shall give the objector an opportunity of being heard, either in person or by a legal practitioner. After hearing all the objections and after making such further inquiry, if any, as the Competent Authority thinks necessary may by order either allow or disallow the objections. From the above, it becomes clear that the Competent Authority is required to decide the objections after observing rules of natural justice.

213. The bone of contention between the parties is the scope and ambit of the provisions contained in Section 30. A perusal of the aforesaid provision would show that upon completion of the procedure under Section 3C the Central Government has the power to declare, by notification in the Official Gazette, that



the land should be acquired for the purpose or purposes mentioned in sub-section (1) of Section 3A. Sub-section (2) of Section 30 declares that on the publication of the declaration under sub-section (1), the land shall "vest absolutely" (emphasis supplied) in the Central Government "free from all encumbrances". The provision cannot be said to be vague or susceptible to two interpretations.

214. It is clear that upon publication of the declaration under Section 30 the acquired land is in the ownership of the Central Government. The previous owners of the land or persons having interest in the land are only entitled to claim compensation in accordance with law. The dictionary meaning of the word "vest" as given in the Oxford English dictionary is "to put in possession". It is clear that once the land vests in a person he is deemed to be in full possession of the land, with all rights of ownership. The terminology used in Section 30 is that "the land shall vest absolutely in the Central Government".

215. To remove any doubt this Section provides that the land shall vest in the Central Government free from all encumbrances. The intention of the provision is made further clear by reading the provision contained in Section 30 together with the provisions in Section 3E and 3F. Under Section 3F it is provided that "Where the land has vested in the Central Government under Section 30, it shall be lawful for any person authorised by the Central Government in this behalf, to enter and do other act necessary upon the land for carrying out the building, maintenance, management or operation of a national highway or a part thereof, or any other work connected therewith". This provision makes it absolutely clear that the Claimant was entitled to carry out all the required operations for completion of the Project, immediately upon the issuance of the Section 30 notification read with Section 3F. Therefore the Tribunal finds that the Claimant has failed to show that the Respondent has made any misrepresentations as alleged, in law.



216. The Claimants cannot be permitted to take advantage of the provisions contained in Sections 3E, 3G and 3H. These provisions deal with the determination and payment of compensation independent of the provision contained in Sections 3D and 3F. The provisions contained in Section 3 have to be construed harmoniously to advance the object sought to be achieved by the aforesaid provisions. Therefore, the submission of the Claimant that the land would only vest in the Central Government upon completion of the process under Sections 3G, 3H and 3E cannot be accepted. In such circumstances, the Projects of national importance may be indefinitely delayed. It would mean that the possession could only be taken of the acquired land after the completion of the proceedings before the Arbitrator under Section 3G. This would defeat the very purpose of enacting the National Highways Act, 1956. An interpretation that defeats the intention or the purpose of the enactment has to be rejected. (See *Union of India versus Kushala Shetty and Others*; (2011) 12 SCC 69; paras 20, 21 and 28).

217. It appears that the subsequent measurements relied upon by the Concessionaire have excluded the areas covered under Section 3 (D) (i) notifications dated on 16.05.2011 (56. 784 ha in Raisen) and 18.05.2011 (3.674 ha in Bhopal) for a total acquisition of 60.46 hectares of land. On the ground that the procedure provided under Section 3 (E), Section 3 (G) and Section 3 H) have not been completed. Therefore finally it has to be accepted that 80% of the land required for RoW was available to the Concessionaire on the Appointed Date.

Finding: Issue no.2 is accordingly decided against the Claimant.”

76. As regards Issue No.3 i.e. “Whether the termination of Contract by either party is valid?” – it was held as under:



“220. The Tribunal is of the opinion that in the face of the admissions made in the Joint Memorandum dated 07.11.2011 (signed on 08.11.2011) and the Supplementary Agreement dated 12.12.2011, the plea of the Claimant that 80% of the land was not available on the Appointed Date is of no consequence. It is admitted that 64.15% of the land was made available on 18.10.2011 and finally 80% of the land was made available on 08.11.2011. However, in view of the waiver of its rights to claim damages, the Claimant would be estopped from claiming that the Respondent was in breach of the Condition Precedent to make available 80% of the required land on the Appointed Date. The Memorandum further records that 80% of the land was made available to the Concessionaire on 08.11.2011. It is further recorded that the Concessionaire did not have any obstructions in execution of work since 04.07.2011, in the available land.

221. It appears that the Concessionaire continued with its efforts to complete the project, after the execution of the Supplementary Agreement this is evident from numerous letters which are placed on the record by the Claimant. It appears that the Concessionaire was not prepared to take up any work on the Right of Way which had vested in the Central Government on the issuance of Notification under Section 3 (D). The Concessionaire insisted that it could only work on the area in which the compensation had been paid to the landowners. This is quite evident from the letter written by the Concessionaire to the Respondent on 06.08.2012. It is on this basis that the Concessionaire continued to claim that 80% of the land was not made available.

222. For the reasons stated in support of the determination on Issue No. 1 and Issue No. 2 it would not be possible to hold that the Claimant was prevented from performing its obligations under the CA. In fact, it would appear that the Concessionaire singularly failed to perform its obligations under Article 10.3.5.



The defaults committed by the Concessionaire ultimately led to the termination of the CA by the Respondent.

223. It is also not possible to accept the oral submission made by the Claimant, that it is entitled to compensation under Section 56 of the Indian Contract Act, 1872. Section 56 provides that a Contract may be held voidable when performance of the Contract is made impossible by reason of some event after the commencement of the work of the Contract. Impracticability in performance of the obligations cannot be equated with impossibility. The Joint Memorandum makes it clear that the reciprocal obligations of each other have been mutually waived. This is a clear admission that both parties have failed to strictly comply with the Conditions Precedent under Article 4. It is true that both parties have made efforts thereafter, to fulfill their respective obligations. But the situation remained unchanged till the letters of termination were issued by the parties. The Tribunal is of the opinion that the Claimant was unable to demonstrate that it was impossible to perform its obligations under the CA. Merely because it had become more onerous to perform the obligations would not be a justification for the Claimant to terminate the Agreement. It is well settled that a party cannot be absolved of its liability to perform its obligations under the contract, merely because due to some extraneous circumstances, the performance of the contract has become onerous. See (i) Alopri Prasad and Sons vs. Union of India (1960) 2 SCR 793; (Paras 20 to 24) (ii) Travancore Devaswom Board vs. Thanath International (2004) 13 SCC 44; (Paras 12 and 13).

224. The Tribunal finds that the Claimant has not been able to establish circumstances of impossibility which would lead to frustration of the CA. In fact the Claimant has failed to establish any such circumstances, which would enable the Claimant to invoke the provisions contain in Sections 53, 54, 55 and 56 of the Indian Contract Act, 1872. The alleged failure of the Respondent to provide 80% of the land required for the



completion of the project has been condoned/waived by signing of the memorandum dated 07.11.2011 (signed on 08.11.2011). As noticed earlier 'waiver' is specifically permitted in the definition of 'Appointed Date' in Article 48 of the CA. Similarly, the Claimant has accepted the amendment by which RoW has been reduced from 60 to 35. After accepting this amendment, the Concessionaire has made a claim for compensation for completion of the work in the stretch where the RoW is less than 28 meters. This clearly shows that it was not impossible for the Concessionaire to complete the Works. Mere difficulty in performance of the CA cannot be equated with a legal requirement of impossibility under Section 56. As noticed earlier that the conduct of both the parties prior to and after signing of the Joint Memorandum dated 08.11.2011 clearly shows that both the parties had continued their efforts to perform their reciprocal obligations under the CA.

225. It is a matter of record that the Concessionaire would have made a meagre profit of 1.6%, had the project completed. The Respondent has demonstrated that in fact, the Concessionaire was evidently to make a loss. It is demonstrated by the following formula...

226. It appears from the facts and circumstances narrated above that the Claimant has entered into a bad bargain. In its anxiety to cut its losses the Claimant decided to terminate the CA. The Tribunal does not find any justification to hold that it had become impossible for the Claimant to perform its obligations due to the defaults committed by the Respondent in the performance of its reciprocal obligations, as provided under Article 4.

227. This is evident from the fact, that on 27.01.2014 the Respondent issued a Notice under Clause 37.1.1 (Ex. CD-12) to cure the Concessionaire's default for slow progress, non-compliance of Concessionaire's obligation on milestones, maintenance work of existing road and others.



228. *The issues raised by the Independent Engineer on various shortfalls of the Concessionaire were brought to the notice of the Claimant.*

229. *It was emphasised that inspite of repeated correspondence to expedite the progress, no tangible progress was seen since the beginning of the Project. The letter indicates that the completion date for the Project was 17.10.2013 has already passed. The progress of the work upto 31.12.2013 was as follows ...*

230. *The above table shows that Physical Progress of the two-laning of the road upto 31.12.2013 was only 20.24%. Financial Progress was of a total expenditure of 24.17 Crores, as on 31.12.2014. The Independent Engineer has commented that the expenditure done through Escrow account on civil works is not commensurate with respect to actual work done at Site. It was further pointed out by the IE that the Concessionaire has failed to achieve project milestone 1, 2 and 3, as per Schedule G of the concession agreement, even after allowing the Concessionaire to re-coup the progress within a grace period of 90 days as per Clause 12.4.2. The report of the IE indicates that the Respondent would be entitled to liquidated damages in the sum of Rs. 9,09,15,000/- for the delay of 817 days at the rate of Rs. 1,04,500/- per day. The letter further points out that the Site almost remained idle without any work progress since 05.06.2013 to 20.12.2013. It appears that, there was change of EPC contractor but without any tangible progress. This led to the service of the Notice of Default being served on the Concessionaire under Clause 37.1.1.*

231. *The Claimant in the reply dated 10.03.2014, to the notice under Clause 37.1.1 stated that the Notice is based on various letters from the IE during the last one year. It is emphasised that the actual area of Site available and the land in possession of the Respondent on the Appointed Date was far less than 80% of the total land required. It is further emphasised that the*



Claimant was unable to make any progress due to non-handing over of the Site, inter alia due to stiff and violent resistance from existing land owners. The discharge of the obligations with regard to the milestones was dependent on the fulfilment of certain obligations by the Respondent. Implicit in the statement is the admission by the Claimant that the milestones have not been achieved as required under Schedule-G of the CA.

232. The Tribunal does not find any merit in the submission that 80% of the required land was not available on the Appointed Date. The Claimant having signed the joint memorandum dated 07.11.2011 (signed on 08.11.2011) cannot now be permitted to deny the contents of the same. As noticed above the memorandum clearly shows that out of the total area of existing RoW 60.46 hectares was subject to land acquisition by virtue of notification under Section 3D (1) of the NH Act having been published. The total area of RoW has been calculated at 92% as on 19.05.2011.

233. However, on 12.12.2011 the parties executed a Supplementary Agreement. This Agreement records that the Claimant was granted the concession on 21.05.2010. The CA was signed on 22.07.2010 and Financial Closure was to be achieved on 04.07.2011. The factual statements made in the Joint Memorandum dated 07.11.2010 were accepted to the effect that 64.15% of land was made available on 18.01.2011 and finally 80% of land was made available to the Concessionaire by 08.11.2011. The Agreement significantly records that "The concessionaire did not have any obstruction in execution of work since 04.07.2011 in the available land although, it was not 80% as required in term of Concession Agreement."

234. The Supplementary Agreement further states that the Condition Precedent, the status of the Condition Precedent to be fulfilled by both the parties for declaring the Appointed Date was reviewed.



235. The Tribunal finds that the Supplementary Agreement records categorical admissions by both the parties...

236. This Agreement has been signed by both the parties and is undoubtedly binding. Therefore, in the face of this document, it would not be possible to accept the submission of the Claimant, that the Condition Precedent with regard to the 80% of the required land being made available have not been complied with.

237. It appears that both the parties were aware that defaults have been committed by both the parties. Therefore, the delay in compliance of Conditions Precedent by the parties has been mutually waived. In law, the waiver would mutually wipe out the defaults of either party. Therefore, the Tribunal is of the view that neither party would be entitled to any damages for the defaults of each other in performing any of the Conditions Precedent upto 12.12.2011.

238. In fact, the waiver is specifically permitted in the definition of "Appointed Date" in Clause 48. ...

From the above, it becomes apparent that the delay in handing over of the Site would not give cause to the Claimant to either Claim damages or to terminate the Agreement. The Claimant cannot be permitted to take advantage of its own wrong.

239. Even otherwise the Tribunal finds that the Claimant was required to build 1.5 meters of road, on either side of the existing highway from Km 0.00 to Km 53.775 and build service roads at some places which constituted 7.21 kms. It was also required to construct a by-pass for a stretch of 7.7 kms. It is also a matter of record that by amendment the Right of Way had been reduced from 60 to 35 meters. It is also a matter of record that most of the progress in the works that the Concessionaire has claimed is in the stretch where the ROW is less than 28





meters (see Memorandum of Site at page 134; Vol 13, Part A). This makes it evident that non-availability of ROW of 60 meters is not the foundational cause of non-completion of the milestones by the Concessionaire.

240. Further, it would appear that the Respondent was only obliged to give constructive possession of the land required to build the Project highway, as envisaged under Article 48 of the CA. This is evident from the definition of ROW,...

241. It appears that the Concessionaire has failed to achieve the construction targets as provided in milestones 1, 2 and 3. Therefore, the Tribunal finds that the Respondent was justified in issuing the Letter of Termination dated 31.12.2014, for the reasons therein.

Finding: *Issue No. 3 is accordingly decided against the Claimant and in favour of the Respondent."*





77. From a perusal of the aforementioned portions of the Award, it is evident that the learned Arbitrator has given his reasons and findings, on the questions as under:

- (i) *firstly*, as to the question whether the Respondent had misrepresented that it had good and valid right to the Site and the power and authority to grant license in respect thereto to the Claimant in terms of the Concession Agreement – the same was answered in the negative, against the Claimant. The Arbitrator held that it was evident on the basis of the analysis of the material on record and facts of the case that the Claimant was offered the constructive possession of the RoW in terms of Article 48 read with Article 10.3.4. It was also held therein that the Respondent had the legal authority to grant a license to the Claimant to enjoy free access in terms of the Concession Agreement since the notification under Section 3 (D) (i) had already been issued to acquire part of the area of land required for providing the necessary RoW. Thereafter, constructive possession of the same was handed over to the Concessionaire. The arbitrator also gave a prima facie opinion therein that the Claimant had singularly failed to perform its obligations under Article 10.3.5.
- (ii) *secondly*, as to the question whether the delay in execution of the Works, even in the available stretches, was due to breaches and defaults of the Respondent – the same was



answered in the negative and against the Claimant. It was held that under Article 11.2 the Concessionaire is liable to undertake shifting of any utility to an appropriate location or alignment, within or outside the Site. The Claimant cannot lay the entire blame on the Respondent for any delay that may have been caused in issuance of the NOC by the Madhya Pradesh Electricity Board. In view of the fact that the Claimant had accepted the RoW on "as is where is" basis, it was the responsibility of the Concessionaire to remove the encroachment of the Site. In any event, the definition of encumbrance in Article 48, excludes the existence of utilities referred to in Clause 11.1. It was held that 80% of the land required for RoW was available to the Concessionaire on the Appointed Date. On the basis of harmonious interpretations of the clauses, it was held that the Claimants cannot be permitted to take advantage of the provisions contained in Sections 3E, 3G and 3H, which would otherwise defeat the intention of the NH Act. It was also held that upon publication of declaration under Section 30 the acquired land is vested in the Central Government free from all encumbrances. It was observed that even till the date of termination of the Agreement the Concessionaire was unable to finalise its EPC Contractor for the affected stretch. Therefore, the delays in resolving the issue of design between 13.00 kms and 23.7 kms would be of no consequence. Accordingly, it was held that the Claimant has



failed to prove that the delay in execution of the Works, even in the available stretches, was due to breaches and defaults of the Respondent.

- (iii) *thirdly*, as to the question that whether the termination of Contract by either party was valid – the same was decided against the Claimant. On the basis of the evidence and perusal of the agreements between the parties, it was held that both the parties were aware that defaults have been committed by both the parties. Therefore, the delay in compliance of Conditions Precedent by the parties stood mutually waived. Hence, the Tribunal gave the ruling that neither party would be entitled to any damages for the defaults of each other in performing any of the Conditions Precedent upto 12.12.2011. The learned Arbitrator also held that the Claimant had failed to achieve the construction targets as provided in milestones 1, 2 and 3. Further, as per the material on record, it was held that it was evident that non-availability of ROW of 60 meters was not the foundational cause of non-completion of the milestones. Therefore, the Respondent was justified in issuing the Letter of Termination dated 31.12.2014, for the reasons stated therein.



78. Having dealt with the substantial findings of the learned Arbitrator regarding the issues in question before him, it is pertinent to peruse the relevant portions of the arbitral award pertaining to the Claims raised by the Petitioner. The same is extracted in the table hereunder:

<u>Claim.</u>	<u>Ruling by the Arbitrator</u>
Claim No.1: (Debt Due)	“The Tribunal finds that the Authority made no representation regarding the accuracy, adequacy, correctness, reliability and/or completeness of any assessment, assumptions, statement or information provided by it. Further, under Article 8.1.1 the Concessionaire has clearly confirmed that it shall have no claim, whatsoever, against the Respondent in respect of the matters noted above. *** Finding: The Tribunal finds that the Claimant has failed to establish the aforesaid Claim. Detailed reasons have been recorded by the Tribunal in support of the findings recorded on Issues No.1, 2, and 3. For the aforesaid reasons, this Claim is rejected.”





Claim No. 2: (Loss on account of illegal seizure of Plant & Machinery and Stores Material by the Respondent)	“The Tribunal finds that the ownership of the plant and machinery is not disputed. Under Article 37.4 the Respondent was entitled to put the plant and machinery to auction. The Tribunal has not been informed by the parties as to whether the Claimant has purchased the Plant & Machinery. The has also not been informed about the final amount received for the sale of the Plant & Machinery and Stores Material. Finding: The Tribunal holds that the Claimant is the rightful owner of the Plant & Machinery and Stores Material The Respondent is therefore directed to pay the Claimant the entire consideration amount received from sale of the Plant & Machinery and Stores Material on the basis of the e-Auction as noticed in the order dated 20.04.2018. The aforesaid amount shall be paid together with interest at the rate of 9% p.a. from the date of the receipt of the consideration amount till payment.”
Claim No. 3: (Outstanding Liabilities)	“ The facts pleaded in support of this claim are that the Claimant had incurred some extra costs on various liabilities in the form of outstanding



	payments to be made to sub-contractors, vendors, statutory liabilities viz. TDS, VAT, Labour Cess etc. and also claims for compensation made due to nonpayment of dues/delay in due payments to Creditors. On the other hand, the Respondent has submitted that these are liabilities of the Claimant and therefore cannot be foisted on the Respondent. Finding: Having considered the entire matter the Tribunal finds that this claim is without any basis. The same is accordingly rejected.”
Claim No. 4: (Loss of Profit)	“The Tribunal finds merit in the submissions made by the Respondent. For the reasons stated in support of the findings recorded on Issues No.1, 2 and 3, the Claim is rejected being without any basis. The Claimant has abandoned the project voluntarily. Therefore, the Tribunal finds that the Claim for loss of profit is without any basis and hence rejected.”





Claim No. 5: (Claims from Sub-Contractor - M/s. Abhyudaya Housing and Construction (P) Ltd.	“For the reasons stated in support of the conclusions of the Tribunal on Issues No.1, 2 and 3, this claim is found to be wholly misconceived. It is accordingly rejected.”
Claim No. 6: Claim for Interest	“Since the Claimant has been awarded damages, only for Claim No.2, the question of any interest being awarded for any other Claim does not arise. Except for the amount of interest awarded in Claim No.2 as noted above, all other Claims for Interest are rejected. It has been noticed that the Independent Engineer has quantified the work done by the Claimant as Rs.24,17,52,984/- (Page No.4, RD-Volume 11). However, the Claimant has not made any prayer for payment on account of the work done. Therefore, no direction can be issued for Rs.24, 17,52,984/- in favour of the Claimant.”



79. To establish that the impugned Award before this Court is liable to be set aside, it has been argued that the findings of the learned Arbitrator are patently illegal. As stipulated by the aforementioned precedents, the words are not to be construed in their plain meaning, but the essence to be appreciated while adjudicating a challenge under Section 34 of the Arbitration Act is that the illegalities or deficiencies are such that they are apparent on the face of record and/or shock the conscience of the Court and can in no manner be sustained.

80. Upon a bare perusal of the Statement of Claim of the respondent and impugned Arbitral Award, this Court is of the view that the learned Arbitrator has correctly analysed the Claims of the respondent and passed the impugned Arbitral Award after due application of mind, and is well-reasoned and the learned Arbitrator has acted well within its jurisdiction.

81. In the case at hand, the petitioner has not been able to show that the impugned Award suffers from such illegality that is apparent on the face of record and upholding the same would be against the law. A clear reading of the precedents cited proves that under the limited scope of Section 34, the present case does not warrant the interference of this Court, as the grounds stated by the petitioner in the instant petition do not meet the scope of this section. Accordingly, with reference to the aforesaid judgments and the impugned Arbitral Award, the Petitioner cannot have the benefit of the “ground of patent illegality” to assail the impugned Arbitral Award under Section 34 of the Act, 1996.



82. Reiterating as previously observed, “patent illegality” is an illegality that goes to the root of the matter but excludes the erroneous application of the law by an arbitral tribunal or re-appreciation of evidence by an appellate court. In this instant case, the Arbitral Award was a well-reasoned award, with the findings being clearly arrived at based on all the documents/evidence on record.

83. Therefore, as regards Issue No. 1, this Court is of the considered view that the petitioner has not been able to show that the grounds laid under Section 34 of the Arbitration Act for setting aside the impugned Award are made out on behalf of the petitioner. The impugned Award is in no way in contravention of the Arbitration and Conciliation Act, 1996, to reason that the Award is patently illegal. None of the impugned findings of the learned Arbitrator depict that the impugned Award is patently illegal to an extent that it would shock the conscience of this Court, is against public policy or fundamental policy of India or falls under the grounds laid down in Section 34 of the Arbitration Act. In view of the above, the challenge to the award fails.

Issue No. 2

84. The next question before this Court is whether the order dated 27.02.2019 is in teeth of law and merits to be dismissed.

85. The impugned order was passed in an Application dated 24.12.2018 filed by the petitioner under Sections 33(1) and 33(4) of the Act, praying therein as under:



“(a) make appropriate correction of the award or in the alternate pass an additional award with respect to the claim preferred by the claimant but inadvertently omitted from the arbitral award by awarding the amount of Rs 24,17,52,984/- in favour of the claimant:”

86. The said Application was decided by the Arbitrator on 27.2.2019. In order to adjudicate the legality of the instant order, it is pertinent to peruse the provisions of Section 33 of the Act, which read as under:

“33. Correction and interpretation of award; additional award.

(1) Within thirty days from the receipt of the arbitral award, unless another period of time has been agreed upon by the parties—

(a) a party, with notice to the other party, may request the arbitral tribunal to correct any computation errors, any clerical or typographical errors or any other errors of a similar nature occurring in the award;

(b) if so agreed by the parties, a party, with notice to the other party, may request the arbitral tribunal to give an interpretation of a specific point or part of the award.

(2) If the arbitral tribunal considers the request made under sub-section (1) to be justified, it shall make the correction or give the interpretation within thirty days from the receipt of the request and the interpretation shall form part of the arbitral award.

(3) The arbitral tribunal may correct any error of the type referred to in clause (a) of sub-section (1), on its own initiative, within thirty days from the date of the arbitral award.



(4) Unless otherwise agreed by the parties, a party with notice to the other party, may request, within thirty days from the receipt of the arbitral award, the arbitral tribunal to make an additional arbitral award as to claims presented in the arbitral proceedings but omitted from the arbitral award.

(5) If the arbitral tribunal considers the request made under sub-section (4) to be justified, it shall make the additional arbitral award within sixty days from the receipt of such request.

(6) The arbitral tribunal may extend, if necessary, the period of time within which it shall make a correction, give an interpretation or make an additional arbitral award under sub-section (2) or sub-section (5).

(7) Section 31 shall apply to a correction or interpretation of the arbitral award or to an additional arbitral award made under this section.”

87. In the case of **Gyan Prakash Arya v. Titan Industries Ltd., (2023) 1 SCC 153**, the Hon’ble Supreme Court held as under:

“13. The original award was passed considering the claim made by the claimant as per its original claim and as per the statement of the claim made and therefore subsequently allowing the application under Section 33 of the 1996 Act to modify the original award in exercise of powers under Section 33 of the 1996 Act is not sustainable. Only in a case of arithmetical and/or clerical error, the award can be modified and such errors only can be corrected. In the present case, it cannot be said that there was any arithmetical and/or clerical error in the original award passed by the learned arbitrator. What was claimed by the original claimant in the statement of claim was awarded. Therefore, the order passed by the learned arbitrator on an application filed under Section 33 of the 1996



Act and thereafter modifying the original award cannot be sustained. The order passed by the learned arbitrator in the application under Section 33 of the 1996 Act is beyond the scope and ambit of Section 33 of the 1996 Act. Therefore, both, the City Civil Court as well as the High Court have committed a grave error in dismissing the arbitration suit/appeal under Sections 34 and 37 of the 1996 Act respectively. The modified award passed by the learned arbitrator allowing the application under Section 33 of the 1996 Act cannot be sustained and the same deserves to be quashed and set aside.”

88. The Hon’ble Supreme Court in the aforementioned case dealt with the scope of the power of modification of Award by an Arbitral Tribunal. As is evident from above, the Award can be modified only to the extent of correcting arithmetical and/or clerical error without any material changes to the award. The statutory provision invoked therein by the Petitioner does not permit that under the garb of modification of Award, a re-trial or fresh adjudication of disputes between the parties can be carried out.

89. Having set out the scope of Section 33 of the Act and the principles that flow from the said provision, it is now pertinent to peruse the impugned Order dated 27.2.2019 passed by the learned Arbitrator. The relevant portion of the Order reads as under:

“I have heard the learned counsel for the parties. Mr. S. S. Ray, counsel for the Claimant has submitted that this is a of an incorrect observation made by the Tribunal. Having noticed that amount claimed have been physically verified by the Independent Engineer, there is no justification for the Tribunal not to make an Award for Rs.24,17,52,984/-. On the other Hand Dr. M. V. Chandra, counsel for the Respondent has submitted



that the Tribunal having given a categoric finding, no changes can be made in the same. A wrong finding cannot be corrected by the Tribunal in exercise of its power of under Section 33(1) or (4) of the Act.

I have perused the application, reply, the SOC and Award dated 30.11.2018. I have also considered the submissions made by the learned counsel for the parties.

Jurisdiction of the Tribunal under Section 33 of the Act is limited to the power of the Tribunal to correct any computation error, clerical or typographical error or any other errors of a similar nature occurring in the Award. In the present case the Tribunal has recorded a finding in paragraph 256 as follows:

"256. It has been noticed that the Independent Engineer has quantified the work done by the Claimant as Rs.24,17,52,984/- (Page No.4, RD-Volume 11). However, the Claimant has not made any prayer for payment on account of the work done. Therefore, no direction can be issued for Rs.24,17,52,984/- in favour of the Claimant."

The table relied upon by the Claimant details the loans obtained from various banks and other entities, together with the interest payable on the loans till 31.12.2016. Taking into consideration all the facts and circumstances, the Tribunal has recorded a finding, which cannot be reviewed in exercise of the jurisdiction of the Tribunal under Section 33 of the Act.

Section 33(4) of the Act permits the Tribunal to make an additional award 'as to claims presented in the arbitral proceeding but omitted from the arbitral award.' In the present case the claim has been rejected after consideration. Therefore, it cannot be said to be a claim presented and omitted.



I therefore find no merit in the application. The same is hereby rejected.”

90. On a bare perusal of the said Order, it is evident that the learned Arbitrator has considered the Application on two counts, i.e. under Section 33(1) and under Section 33(4).

91. *Firstly*, the jurisdiction of the Tribunal under Section 33(1) of the Act is limited to the power of the Tribunal to correct any computation errors, clerical or typographical error or any other errors of a similar nature occurring in the Award. As mentioned in the said order as well as in the award, the Tribunal had recorded a finding that while the Independent Engineer had quantified the work done by the Claimant as Rs.24,17,52,984/-, the Claimant/Petitioner has not made any prayer for payment on account of the work done. It has been held therein that therefore, no direction could be issued *qua* the said amount in favour of the Claimant/Petitioner. This finding of the learned Arbitrator in the award, as rightly held in the Impugned order, could not be reviewed in exercise of the jurisdiction of the Tribunal under Section 33 (1) of the Act since there was no error in the Award of the kind mentioned in the said provision made out. Therefore, as regards the application of Section 33(1) of the Act is concerned, there is no defect in the adjudication by the Arbitrator.

92. *Secondly*, Section 33(4) of the Act grants the Tribunal the authority to issue an additional award concerning claims that were brought up during the arbitration process but were not included in the final arbitral award. The prayer in the said application was to pass an additional award



with respect to the claim preferred by the claimant but inadvertently omitted from the arbitral award by awarding the amount of Rs 24,17,52,984/- in favour of the claimant. However, in the case at hand, the claims as raised by the petitioner in the Statement of Claims before the arbitrator have been evaluated and ultimately rejected by the arbitrator. Consequently, it cannot be classified as a claim that was raised but omitted in the award. A fresh claim or a re-adjudication of claim already adjudicated cannot be allowed under the said provision. Therefore, any case of adjudication under Section 33(4) is not made out. Hence, the arbitrator rightly dismissed the said application filed by the petitioner.

CONCLUSION

93. In the light of facts, submissions and contentions in the pleadings, this Court finds that the petitioner has failed to substantiate its grounds for setting aside the impugned Arbitral Award that the impugned award suffers from patent illegality and the findings therein are perverse and would shock the conscience of this Court, or the arbitrator has not considered the pleadings and evidence placed before him and has arrived at a conclusion that is implausible, or the said award has been passed by adopting an incorrect interpretation of the contract as well as the law.

94. It is settled law that the ground of Patent illegality gives way to setting aside an Arbitral Award with a very minimal scope of intervention. A party cannot simply raise an objection on the ground of patent illegality if the Award is against them. Patent illegality requires a



distinct transgression of law, the clear lack of which thereof makes the petition simply a pointless effort of objection towards an Award made by a competent Arbitral Tribunal. In the instant case, the petitioner has not been able to prove that the impugned Arbitral Award is patently illegal, and thus failed to make out a case for the award to be set aside.

95. Therefore, after consideration of the material on record, including the impugned Arbitral Award, submissions on behalf of the parties, this Court is of the view that there is no finding or conclusion reached by the learned Arbitrator which warrants interference of this Court. The petitioner has not been able to substantiate the case for setting aside of the impugned Award.

96. The same is the case with the impugned order dated 27.2.2019 which is perfectly in line with the provisions and with the scheme of the Act. This finding of the learned Arbitrator in the award, as rightly held in the Impugned order, could not be reviewed in exercise of the jurisdiction of the Tribunal under Section 33 (1) of the Act since there was no error in the Award of the kind mentioned in the said provision made out. Even otherwise, a fresh claim or a re-adjudication of claim already adjudicated cannot be allowed under the said provision. Therefore, any case of adjudication under Section 33(4) was also not made out. Hence, no error is established even in the said impugned order.

97. Accordingly, the instant petition is dismissed as being devoid of merits since there is no cogent reason to set aside the impugned Award.



98. Pending applications, if any, also stand disposed of.
99. The judgment be uploaded on the website forthwith.

(CHANDRA DHARI SINGH)
JUDGE

MAY 26, 2023
SV/@dityak.

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

