



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

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Pronounced on: 26th May, 2023

+ **O.M.P. (COMM.) No. 278/ 2019 and I.A. Nos. 9870/2019, 17853/2019, 7921/2020, 10163/2020 and 150/2021**

NATIONAL HIGHWAYS AUTHORITY OF INDIA

..... Petitioner

Through: Mr. Santosh Kumar, Mr. Daksh Arora and Mr. Mohit Agarwal, Advocates

versus

ORISSA STEEL EXPRESSWAY PVT.LTD Respondent

Through: Mr. Darpan Wadhwa, Sr. Advocate with Mr. Arjun Syal, Ms. Manjira Dasgupta and Ms. Akshita Sachdeva, 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 Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter "Act,1996") has been filed on behalf of the petitioner seeking the following reliefs:

"a. Call for the entire/complete records of the arbitration case between the Respondent and the Petitioner, which was decided by the Learned Arbitral Tribunal by an award dated 31.03.2019;

b. Set aside the Impugned Award dated 31.03.2019.



- c. Allow cost of this petition in favour of the Petitioner.*
d. Pass any other order as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case.”

FACTUAL MATRIX

2. The present petition has been filed by the petitioner against the impugned award of total sum of Rs.322.78 Crores in favour of the respondent/claimant, against the petitioner, along with the future interest at the rate of 10% p.a. from the date of award till the date of its realization. The present petition under section 34 of the Act arises out of the said award dated 31st March, 2019 passed by the learned Arbitral Tribunal.
3. The petitioner is an autonomous body constituted under the National Highways Authority of India Act, 1988 and is working under the supervision of the Ministry of Road Transport and Highways, Government of India. The petitioner is responsible for the development, maintenance, and management of the National Highways.
4. The respondent is a Company incorporated by a consortium comprising MBL Infrastructure Ltd. and SREI Infrastructure Finance Ltd. under the provisions of the Companies Act, 1956. The respondent is a Special Purpose Vehicle.
5. The petitioner invited bids for the 4/2 laning of the Rimuli- Roxy - Rajamunda section of NH-215 from km 163.00 to km 269.00 equivalent to 106 kms.with an indicative project cost of Rs.449 Crores as Built, Operate and Transfer (BOT) (Toll) on Design, Build, Finance, Operate, and Transfer (DBFOT) pattern. The respondent participated in the said bid and it was found lowest. Accordingly, the Letter of Award dated 29th



April, 2010 was issued in favour of the respondent by the petitioner. Consequently, the parties entered into a Concession Agreement on 06th July, 2010. According to, Article 9 of the Concession Agreement, the respondent furnished the Performance Bank Guarantee for Rs.14.65 Crores on 27th June, 2012.

6. The petitioner *vide* letter dated 30th December, 2011 agreed that 21st June, 2011 shall be the Appointed Date. A Meeting was conducted between the parties since period of two months had elapsed since the signing of the Concession Agreement and there were certain disputes regarding the work hence, the petitioner waived off the Conditions Precedent under Clause 24.1.1 and Clause 4.3 of the Concession Agreement.

7. During the period of 2012-2017, there were continuous correspondences between the parties wherein the petitioner had constantly stated that the respondent could not complete the project within the stipulated time frame due to numerous factors.

8. The petitioner in its letter dated 16th February 2016 informed the Independent Engineer that the encumbrance-free land for the length of 100% of project highway was not handed over to the respondent till date. In reply to the said letter, *vide* communication dated 17th February 2016, the Independent Engineer issued a letter to the petitioner for the extension of the concession period. The respondent however, did not agree to terms of extension of the concession period. As a result of which meeting was held on 05th April, 2016 amongst the petitioner's employees wherein a decision was taken that the project would be foreclosed and settled as per the Concession Agreement.



9. The respondent vide letter dated 20th April, 2016 based on its calculations provided the actual cost incurred by it in the project till date of foreclosure. A Pre-Conciliation meeting under the Chairmanship of CGM, NHAI along with the respondent and the Independent Engineer was held on 22nd August, 2016.

10. The Independent Engineer vide its letters dated 16th November, 2016, 25th November, 2016 and 26th November, 2016 stated that the valuation of work executed on the project site had been scrutinized and reviewed based on documents provided by the respondent. The Valuation Report - I and Valuation Report - II were finalized and the Joint Measurement Sheets were duly signed by the Independent Engineer and the respondent.

11. The petitioner issued letter dated 13th January, 2017 to the respondent to foreclose the project without the release of the Provisional Bank Guarantee and informed them to free the project site for the purpose of rebid and other appropriate measures in consultation with the Independent Engineer. The petitioner vide letter dated 3rd March, 2017 acknowledged that the site had been taken over by the petitioner.

12. The petitioner vide letter dated 5th May, 2017 informed the respondent about the constitution of the ISAC to resolve the issue through a three-layer one-time amicable settlement, where cases are taken first by 3 CGM's Committee and then negotiated by ISAC (a higher-level committee) followed by adjudication by Executive Committee/ NHAI Board for speedy settlement of cases. However, the respondent vide letter dated 13th June, 2017 denied the said proposal and insisted on the constitution of ISAC only for the resolution of issues.



13. The respondent vide letter dated 16th October, 2017 invoked the arbitration under Clause 44.3 of the Concession Agreement and appointed their nominee arbitrator pursuant to which the petitioner vide its letter dated 5th February, 2018 appointed its nominee arbitrator.

14. The two nominated arbitrators appointed the Presiding Arbitrator vide letter dated 31st March, 2018. The Presiding Arbitrator vide order dated 31st March, 2018 fixed 18th April, 2018 as the first date in the proceeding.

15. On 18th August, 2018, the Arbitral Tribunal observed that the pleadings are complete in the arbitral proceedings. The Tribunal framed issues for consideration, on 17th September, 2018. The submissions of both the parties were concluded on 15th December, 2018.

16. The learned Arbitral Tribunal published the impugned award dated 31st March 2019. Aggrieved by the impugned award, the petitioner invoked Section 34 of the Act by way of filing the instant petition.

SUBMISSIONS

(On behalf of the petitioner)

17. Learned counsel appearing on behalf of the petitioner submitted that the instant petition under Section 34 of the Act, 1996 is to raise important issues relating to a limb of 'public policy' on the grounds that the impugned award is in contravention with the 'fundamental policy' of Indian law and that the impugned award is vitiated by 'patent illegality' appearing on the face of the award on extraneous considerations *de hors* and contrary to the terms of the contract executed between the parties and in complete disregard of the evidence on record, in deciding the



controversy between the parties. In this regard, learned counsel appearing on behalf of the petitioner has relied upon the following judgments:

- ***Ssangyong Engg. & Construction Co. Ltd. v. NHAI*, (2019) 15 SCC 131**
- ***Patel Engineering Ltd. vs. North Eastern Electric Power Corporation Ltd. (NEEPCO)*, 2020 SCC Online SC 466**
- ***Associate Builders v. DDA*, (2015) 3 SCC 49**

18. Learned counsel appearing for the petitioner further submitted that the learned Tribunal was incorrect in ignoring the letter dated 20th April, 2016 given by the respondent to the petitioner wherein it was specified that the respondent was willing to settle and foreclose the contract on payment of Rs.194.50 crores plus price adjustment of Rs.16.46 crores. It is submitted that the said letter makes it evident that the offer to pay the sum of Rs.194.50 crores and foreclose the contract cannot be attributed to the petitioner since the proposal was submitted by the respondent which was never accepted by the petitioner. Therefore, the observation of the learned Tribunal has wrongly held that it was acceptable to the petitioner to settle and foreclose the contract by paying Rs.194.50 crores which is contrary to the admitted facts and is, therefore, liable to be set aside.

19. It is further submitted that the learned Tribunal has incorrectly inferred the statement made by the petitioner, by stating that since the compensation was quantified the petitioner could not press for any counter claim. It is further submitted that the petitioner was willing to pay the amount for foreclosure compensation worked out by the Independent Engineer after joint measurements duly signed by the Independent



Engineer, i.e., Rs.35,21,90,670/- as against Rs.247.58 Crores which had been claimed by the respondent without any basis.

20. It is contended that the learned Tribunal erred in awarding the claim of Rs.158.69 crores to the respondent on the incorrect presumption that the petitioner was willing to settle and foreclose the contract by payment of Rs.194.50 crores. It is submitted the same is contrary to the stand of the petitioner which was to settle and foreclose the contract in terms of the amount worked out by the Independent Engineer after joint measurements came out to the tune of Rs.35,21,90,670/-, therefore, the said award claim must be set aside.

21. It is further contended that the learned Tribunal failed to consider that the valuation of the work submitted by the respondent was scrutinized and reviewed by the Independent Engineer. It is submitted that the learned Arbitral Tribunal while allowing the claims of the respondent did not consider the slow pace of construction work being achieved by the respondent despite ample land and Right of Way being available with it during the original contract period.

22. It is submitted that the learned Arbitral Tribunal erred in awarding Claim no. 2 (Cost of Capital and Finance Cost) and Claim no. 3 (Head Office Overhead Expenditure) in the Arbitral Award as they were already covered under Claim No. 1 (Total Cost Expenditure), since Claim No.1 was supposed to be in lump-sum payment in respect of all the claims. It is further submitted that Claim No.2 and Claim No. 3 are mere duplication of the Claim No.1 and hence, not tenable in law.

23. It is further submitted that the Tribunal vide order dated 21st November, 2018 observed that it had made an error by not fixing a



separate fee for the counter claim in terms of proviso of Section 38(1) of the Act, 1996, however, it rejected the counter claim of the petitioner on the ground that the petitioner did not pay any amount in support of the counter claim and therefore, the said award is bad in law and is liable to be set aside. It is further argued by the learned counsel for the petitioner that under Section 31(3) of the Act, 1996 the arbitral award should have given reasoning which is intelligible after considering the pleadings and evidence of both the parties on the record. It is asserted that the Tribunal in the present case has merely restated the contentions of both the parties and the award has been rendered without reason.

24. It is contended by the petitioner that the Tribunal erred in rejecting the counter claim on the ground of non- payment of Arbitral fees and the same is contrary to the provisions of Section 38(2) of the Act, 1996 as the Tribunal has been paid in full by the respondent and on behalf of the petitioner and the same has been recorded in the order dated 2nd February, 2019 passed by the Tribunal.

25. It is contended that the Tribunal failed to consider the law laid down by this Court in the case of ***Delhi State Industrial Infrastructure Development Corporation Ltd. (DSIIDC) vs. Bawana Infra Development (P) Ltd.*** 2018 SCC OnLine Del 9241 wherein the High Court while interpreting the fee schedule in the Fourth Schedule of the amendment in Act in the year of 2015, held that the "sum in dispute" shall include both claim and counter claim amounts. It is submitted that this Court further held that if the legislature intended to have the Arbitral Tribunal exceed the ceiling limit by charging separate fee for claim and counter claim amounts, it would have provided so in the Fourth Schedule.



26. Learned counsel appearing on behalf of petitioner submitted that the impugned award has been passed in complete non-application of mind and violation of principles of natural justice, since the learned Arbitral Tribunal has failed to consider and advert to any of the submissions made on behalf of the petitioner. It is further submitted that the petitioner did not adjudicate upon the counter claims and wrongly held it as counter blast to claims of the respondent.

27. Hence, it is prayed by the learned counsel for the petitioner that the instant petition may be allowed and the impugned award may be set aside.

(On behalf of the respondent)

28. *Per Contra*, learned Counsel appearing on behalf of the respondent submitted that the instant petition is nothing but an abuse of the process of law. It is submitted that it is the settled position of law that a Court shall not sit in appeal over the award of an Arbitral Tribunal by re-assessing or re-appreciating evidence of the arbitral proceeding since an arbitrator is the master of the quality and quantity of evidence. It is also submitted that an award can be challenged only under the grounds mentioned in Section 34 of the Act, 1996. It is therefore submitted, in the absence of any such ground, it is not possible to re-examine the facts or evidence on the record. In support of his arguments, learned counsel appearing on behalf of the respondent has relied upon the following judgments:

- ***Associated Builders v. Delhi Development Authority, (2015) 3 SCC 49***



- ***P.R Shah, Shares and Stock broker (P) Ltd. Vs. B.H.H. Securities (P) Ltd. and Ors., (2012) 1 SCC 594***
- ***Fiza Developers and Inter-Trade P. Ltd. v. AMCI (I) Pvt. Ltd. and Ors., (2009) 3 SCC 49***

29. Learned counsel for the respondent submitted that the learned Arbitral Tribunal had adopted a judicial approach by considering all the evidence placed on record by both parties. It is submitted that Arbitral Tribunal has given a detailed award which runs into seventy pages and the award provides detailed reasoning of the facts and the arguments of both the parties. It is contended that the award has been rendered unanimously based upon admissions of the parties and as stated in the award *“None of the parties adduced oral evidences but made arguments on the basis a/the documents which according to them are common in nature.”*. It is further contended that the Arbitral Tribunal has considered the pleadings of the parties and oral arguments.

30. It is submitted that the learned Arbitral Tribunal has rightly appreciated the conduct of the parties and the correspondences exchanged between them to decide the issues and award the claim. It is further submitted that the interpretation of the contract is within the domain of the Arbitral Tribunal, and as such interpretation ought not be interfered with in a challenge under Section 34 of the Act, 1996 especially since no cogent grounds have been set out by the petitioner that warrant interference.

31. Learned counsel for the respondent submitted the petitioner failed to provide the required land (i.e., 75% of the Project land) at various locations along the stretch which needed to be cleared and requisite



permissions were to be obtained in this regard. It is submitted that only about 50% of the land was available to the respondent and that too was not on continuous stretches.

32. It is submitted that the Concession Agreement was signed on 6th July, 2010 but even after six years in 2016, the petitioner was neither able to obtain requisite approvals nor was it able to handover the right of way for a substantial part of the land. It is contended that at this stage the petitioner decided unilaterally to foreclose the contract.

33. It is submitted that the respondent was entitled to foreclosure compensation. It is submitted that the petitioner's proposed foreclosure was based on a meagre of compensation, however, the respondent did not agree to the said proposal and instead gave a counter offer, agreeing to foreclose the project, leaving the question of foreclosure compensation to be adjudicated by the ISAC and failing which the arbitration can be invoked. It is further submitted that the said proposal of the respondent was accepted by the petitioner that the contract would be foreclosed and it was agreed that the amount of compensation shall be determined either by ISAC or by way of arbitration. It is contended that ISAC was not even established even after a time period of seven months and the matter was finally referred to arbitration upon notice being issued, thus, revealing the insincerity of the petitioner in resolving the disputes.

34. It is contended that the Tribunal has awarded the actual amount of cost towards the physical cost, overheads, financing and equity cost incurred by the respondent and disallowed the loss of profits claimed by the respondent.



35. It is submitted that the Tribunal held that the counter claims were never referred to the Tribunal. It is further contended that the petitioner themselves had stated that they would not press counter claim if the respondent confined its claim to foreclosure compensation only.

36. It is submitted that after the compensation was quantified, the petitioner wrongly claimed the counter claims. It is further contended that as per the second proviso section 38(2) of the Act, 1996, in case a party did not pay his share of the Arbitral fees the Tribunal has the power to terminate or suspend such claims or counter claims. The Arbitral Award has recorded has follows:—

“The Respondent did not pay a single sum on account of each Arbitrator's fees and other expenses towards proportionate establishment cost/administrative charges to the researcher-cum-assistants/associates even expenses relating to arbitration”

Therefore, in the present case under second proviso section 38(2) of the Act, 1996 the petitioner is not entitled for adjudication of the Counter Claims.

37. It is submitted that the counter claims were rejected as per second proviso of Section 38(2) of the Act, 1996 wherein the Arbitral Tribunal has the power that it may suspend or terminate the arbitral proceedings if a party has not paid its own share of the Arbitral fees. Therefore, the Arbitral Tribunal has acted within its jurisdiction to terminate its mandate regarding the Counter Claim.



38. Accordingly, there are no grounds available to the petitioner herein for challenging the instant award on the grounds under Section 34 of the Act, 1996.

39. In view of the facts and circumstances, the instant petition is *de hors* of any merit and deserves to be rejected outrightly.

FINDINGS AND ANALYSIS

40. I have heard learned counsel for the parties at length, who have taken me through the award passed by the learned Arbitral Tribunal, provisions of the contract executed between the parties and the correspondences exchanged between them as well as the relevant documents.

41. The respondent/claimant claimed an amount of Rs.247.58 crores for the total cost incurred by the claimant. It has also claimed Rs.157.61 crores for the “costs of capital and finance costs”, Rs.49.24 crores under the head “office expenditures” and Rs.491.06 crores on account of the loss of profit. The petitioner/respondent had filed a statement of defense and counter claims before the learned Arbitral Tribunal claiming Rs.67,96,809/- for the amount deposited by the petitioner towards CA/NPV along with interest. The petitioner further claimed Maintenance Cost of Rs. 31,48,60,586/- and for reimbursement of remuneration paid to the Independent Engineer it claimed an amount of Rs 8,42,66,026/-. Moreover, the petitioner claimed an amount of Rs.10.15 crores and for the cost of fresh contract entrusted to the new contractor, an amount of Rs.1383.43 crores respectively for the funds deposited with RWS & S, PHED, NESCO, WESCO.



42. The learned Arbitral Tribunal framed the issues with mutual consent of the parties which are as follows:

“(i) Whether or not the present arbitration proceeding is premature in view of the failure of the claimant to adhere to the settlement procedure provided in the letter dated 13.01.2017?”

“(ii) Whether, upon mutual foreclosure, the parties are barred to rely upon the terms of the Concession Agreement for determining compensation?”

“(iii) Whether the Concession Agreement was foreclosed mutually" as is where is basis"?”

“(iv) If the contract is foreclosed, is the claimant required to be reimbursed for all the costs incurred.”

“(v) In the alternative, is the claimant entitled to be compensated under quantum merit?”

“(vi) Whether the claims of the claimant are beyond the jurisdiction of the present arbitration proceedings since the Concession Agreement contained no provision for foreclosure?”

“(vii) Whether or not the claim petition is maintainable?”

“(viii) If the present contract was foreclosed, whether the counterclaim filed by the respondent is maintainable?”

“(ix) Whether or not the counter claim set up by the respondent is fit to be upheld?”

“(x) Whether the party or parties are entitled to any relief or reliefs?””

43. The Arbitral Tribunal segregated the issues into three parts. First part is procedural, i.e., issues no. (i), (vi) and (vii). The second part is based on merit i.e., issues no. (ii), (iv) and (v) and the third part is reliefs i.e., issues no. (ix) and (x) which do not require any analysis as per the learned Tribunal.

44. The instant arbitral award was challenged by the petitioner mainly on four grounds. Firstly, the conclusion on which the learned Tribunal



reached is based only on assumptions and in absence of any pleading and evidence lead by the petitioner. Secondly, the award made by the learned Tribunal is contrary to the terms and conditions as per which foreclosure of the Concession Agreement was agreed between the parties. Thirdly, the impugned award has been passed in complete non-application of mind and in violation of principles of natural justice. Fourthly, that the learned Arbitral Tribunal has acted in a wrongful manner by not deciding the counter claims of the petitioner.

45. Section 34 of the Act, 1996 has been reproduced herein below for convenience:

“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.]



(2A) An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the court, if the court finds that the award is vitiated by patent illegality appearing on the face of the award:

Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by reappreciation of evidence.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under Section 33, from the date on which that request had been disposed of by the arbitral tribunal:

Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.

(4) On receipt of an application under sub-section (1), the Court may, where it is appropriate and it is so requested by a party, adjourn the 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 opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award.

(5) An application under this section shall be filed by a party only after issuing a prior notice to the other party and such application shall be accompanied by an affidavit by the applicant endorsing compliance with the said requirement.

(6) An application under this section shall be disposed of expeditiously, and in any event, within a period of one year from the date on which the notice referred to in sub-



section (5) is served upon the other party.”

46. Under Section 34(2) of the Act, 1996 provides several grounds on account of which the Court can set aside the arbitral award. While under Section 34 (3) of the Act, 1996 describes the various limitations under which an arbitral award cannot be set aside by the Court.

47. The Hon'ble Supreme Court regarding the scope of Section 34 of the Act, 1996 has held in the judgment of ***Reliance Infrastructure Ltd. v. State of Goa*** 2023 SCC OnLine SC 604 as under:

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

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

“11. As far as Section 34 is concerned, the position is well-settled by now that the Court does not sit in appeal over the arbitral award and may interfere on merits on the limited ground provided under Section 34(2)(b)(ii) i.e. if the award is against the public policy of India. As per the legal position clarified through decisions of this Court prior to the amendments to the 1996 Act in 2015, a violation of Indian public policy, in turn, includes a violation of the fundamental policy of Indian law, a violation of the interest of India,



conflict with justice or morality, and the existence of patent illegality in the arbitral award. Additionally, the concept of the “fundamental policy of Indian law” would cover compliance with statutes and judicial precedents, adopting a judicial approach, compliance with the principles of natural justice, and Wednesbury [Associated Provincial Picture Houses v. Wednesbury Corpn., [1948] 1 K.B. 223 (CA)] reasonableness. Furthermore, “patent illegality” itself has been held to mean contravention of the substantive law of India, contravention of the 1996 Act, and contravention of the terms of the contract.

12. It is only if one of these conditions is met that the Court may interfere with an arbitral award in terms of Section 34(2)(b)(ii), but such interference does not entail a review of the merits of the dispute, and is limited to situations where the findings of the arbitrator are arbitrary, capricious or perverse, or when the conscience of the Court is shocked, or when the illegality is not trivial but goes to the root of the matter. An arbitral award may not be interfered with if the view taken by the arbitrator is a possible view based on facts. (See Associate Builders v. DDA [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204]. Also see ONGC Ltd. v. Saw Pipes Ltd. [ONGC Ltd. v. Saw Pipes Ltd., (2003) 5 SCC 705]; Hindustan Zinc Ltd. v. Friends Coal Carbonisation [Hindustan Zinc Ltd. v. Friends Coal Carbonisation, (2006) 4 SCC 445]; and McDermott International Inc. v. Burn Standard Co. Ltd. [McDermott International Inc. v. Burn Standard Co. Ltd., (2006) 11 SCC 181])

13. It is relevant to note that after the 2015 Amendment to Section 34, the above position stands somewhat modified. Pursuant to the insertion of Explanation 1 to Section 34(2), the scope of contravention of Indian



public policy has been modified to the extent that it now means fraud or corruption in the making of the award, violation of Section 75 or Section 81 of the Act, contravention of the fundamental policy of Indian law, and conflict with the most basic notions of justice or morality. Additionally, sub-section (2-A) has been inserted in Section 34, which provides that in case of domestic arbitrations, violation of Indian public policy also includes patent illegality appearing on the face of the award. The proviso to the same states that an award shall not be set aside merely on the ground of an erroneous application of the law or by reappreciation of evidence.

14. As far as interference with an order made under Section 34, as per Section 37, is concerned, it cannot be disputed that such interference under Section 37 cannot travel beyond the restrictions laid down under Section 34. In other words, the court cannot undertake an independent assessment of the merits of the award, and must only ascertain that the exercise of power by the court under Section 34 has not exceeded the scope of the provision. Thus, it is evident that in case an arbitral award has been confirmed by the court under Section 34 and by the court in an appeal under Section 37, this Court must be extremely cautious and slow to disturb such concurrent findings.”

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

“37. Insofar as domestic awards made in India are concerned, an additional ground is now available under sub-section (2-A), added by the Amendment Act, 2015, to Section 34. Here, there must be patent illegality appearing on the face of the award, which refers to such illegality as goes to the root of the



matter but which does not amount to mere erroneous application of the law. In short, what is not subsumed within “the fundamental policy of Indian law”, namely, the contravention of a statute not linked to public policy or public interest, cannot be brought in by the backdoor when it comes to setting aside an award on the ground of patent illegality.

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

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

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



under Section 34(2-A).

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

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

“43. It will thus appear to be a more than settled legal position, that in an application under Section 34, the court is not expected to act as an appellate court and reappreciate the evidence. The scope of interference would be limited to grounds provided under Section 34 of the Arbitration Act. The interference would be so warranted when the award is in violation of “public policy of India”, which has been held to mean “the fundamental policy of Indian law”. A judicial intervention on account of interfering on the merits of the award would not be permissible. However, the principles of natural justice as contained in Section 18 and 34(2)(a)(iii) of the Arbitration Act would continue to be the grounds of challenge of an award. The



ground for interference on the basis that the award is in conflict with justice or morality is now to be understood as a conflict with the “most basic notions of morality or justice”. It is only such arbitral awards that shock the conscience of the court, that can be set aside on the said ground. An award would be set aside on the ground of patent illegality appearing on the face of the award and as such, which goes to the roots of the matter. However, an illegality with regard to a mere erroneous application of law would not be a ground for interference. Equally, reappreciation of evidence would not be permissible on the ground of patent illegality appearing on the face of the award.

44. A decision which is perverse, though would not be a ground for challenge under “public policy of India”, would certainly amount to a patent illegality appearing on the face of the award. However, a finding based on no evidence at all or an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside on the ground of patent illegality.

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

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

(i) a finding is based on no evidence, or(ii) an Arbitral Tribunal takes into account something irrelevant to the decision which it arrives at; or(iii) ignores vital evidence in arriving at its



decision, such decision would necessarily be perverse.

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

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

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

“26. A cumulative reading of the UNCITRAL Model Law and Rules, the legislative intent with which the 1996 Act is made, Section 5 and Section 34 of the 1996 Act would make it clear that judicial interference with the arbitral awards is limited to the grounds in Section 34. While deciding applications filed under Section 34 of the Act, Courts are mandated to strictly act in accordance with and within the confines of Section 34, refraining from appreciation or reappreciation of



matters of fact as well as law. (See Uttarakhand Purv Sainik Kalyan Nigam Ltd. v. Northern Coal Field Ltd. [Uttarakhand Purv Sainik Kalyan Nigam Ltd. v. Northern Coal Field Ltd., (2020) 2 SCC 455 : (2020) 1 SCC (Civ) 570], Bhaven Construction v. Sardar Sarovar Narmada Nigam Ltd. [Bhaven Construction v. Sardar Sarovar Narmada Nigam Ltd., (2022) 1 SCC 75] and Rashtriya Ispat Nigam Ltd. v. Dewan Chand Ram Saran [Rashtriya Ispat Nigam Ltd. v. Dewan Chand Ram Saran, (2012) 5 SCC 306].)

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

29. *Patent illegality should be illegality which goes to the root of the matter. In other words, every error of*



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

30. Section 34(2)(b) refers to the other grounds on which a court can set aside an arbitral award. If a dispute which is not capable of settlement by arbitration is the subject-matter of the award or if the award is in conflict with public policy of India, the award is liable to be set aside. Explanation (1), amended by the 2015 Amendment Act, clarified the expression “public policy of India” and its connotations for the purposes of reviewing arbitral awards. It has been made clear that an award would



be in conflict with public policy of India only when it is induced or affected by fraud or corruption or is in violation of Section 75 or Section 81 of the 1996 Act, if it is in contravention with the fundamental policy of Indian law or if it is in conflict with the most basic notions of morality or justice.

X X X

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

(emphasis supplied)

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



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

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

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

“15. This Court also accepts as correct, the view expressed by the appellate court that the learned



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

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

Therefore, it held by the said judgment that the Court may set aside an arbitral award on very limited grounds under Section 34 of the Act, 1996. Even if a contrary view is possible on the facts established before the Arbitral Tribunal, the Court cannot, in the absence of any compelling reason, interfere with the view taken by the arbitrators. The Court does not sit in appeal over the award made by the Tribunal. Hence, the scope of interference is very limited under Section 34 of the Act, 1996. Keeping these principles in mind, I will now examine the present case.

48. The learned Arbitral Tribunal has dealt with issue No. (i), regarding whether the arbitration proceedings are premature in view of the failure of the respondent in following the settlement procedure dated 13th January 2017. The relevant portion of the reasons given by the learned Arbitral Tribunal is reproduced herein below:

“According to us fast growing mechanism of expeditious justice delivery i.e. Mediation, Conciliation and Arbitration collectively called



Alternative Dispute Resolution (ADR) is order of the day. It is well accepted mechanism all over the world for resolving disputes in just and convenient manner ignoring procedural hazards. No hindrance can be preferred. An Arbitration agreement though appears to be part of the original agreement but independent in nature. We have to adopt a pragmatic approach and not a pedantic or technical approach while interpreting or construing an arbitration agreement or arbitration clause. A common sense approach has to be adapted to give effect to the intention of the parties to arbitrate. We have to adopt attitude of a reasonable business person, having business common sense as well as being equipped with the knowledge that may be peculiar to the business venture. The arbitration clause cannot be constructed with a purely legalistic mindset, as if one is construing a provision in a statute, as per the ratio of 2014 (5) SCC 1 (Enercon (India) Ltd. & Ors. Vs. Enercon GMBH & Anr.).

In many cases parties try to settle the matter by way of mediation and/or conciliation before going to Court or Arbitrator/s. Even sometimes Arbitrator/s refers back the matter for settlement between the parties for mediation/conciliation or other procedures under Section 30 of the Arbitration & Conciliation Act, 1996. But that can be done by agreement of the parties. In this case, we find IE was the Mediator. Remedy before the Mediator seems to be exhausted. Conciliation for amicable settlement before Chairman of the Authority and Chairman of the Board of Directors of the concessionaire was available under Clause 44.2 of the CA. As per letter dated January 13, 2017 final foreclosure notice was issued by the Respondent permitting the Claimant to settle claims through settlement-cum-ISAC procedure for amicable settlement failing which Concessionaire i.e., Claimant may go for Arbitration. Correspondences were



exchanged between the parties. Claimant requested the Respondent to constitute ISAC. Ultimately the Respondent by its letter dated May 5, 2017 informed the Claimant that a three layers one time amicable settlement system has been introduced in NHAI i.e. Respondent herein where such cases are taken out first by 3 CGMs Committees and further vetted/negotiated by ISAC (a higher level Committee) followed by approval by Executive Committee/NHAI Board, for settlement of cases. This proposal was not accepted by the Claimant. It is well known that conciliation stands on mutuality. The Claimant cannot be compelled to proceed before the forum not of his choice nor the Arbitrator can direct to do so contrary to Section 30 of the Act. Conciliation per se depends upon acceptance of proposal of one party by the other. Section 62(2) of the Arbitration and Conciliation Act, 1996 prescribes that Conciliation proceedings shall commence when the other party accepts in writing the invitation to conciliate. As per Sub-Section (3) therein if the other party rejects the invitation, there will be no conciliation proceedings. Sub-Section (4) prescribes for time frame and rejection.

It appears that the proposal of the Respondent under letter is an introduction of new scheme of conciliation in the place and instead of the agreement. Moreover the period as prescribed under the clause was over. Having so, the Claimant went for Arbitration. Moreover scheme appears to be not for conciliation but for consideration of the demand of the Claimant by the Respondent de hors the agreement. In further such process cannot be construed as a scheme of expeditious disposal. From January, 2017 the Claimant waited for amicable settlement by conciliation when respondent came out with a counter proposal of scheme of consideration de hors the original agreement in May, 2017. Ultimately Claimant



invoked the Arbitration clause 44.3 of the CA in October, 2017. The entire process of conciliation was frustrating. In the garb of nomenclature "conciliation", the Respondent invited the Claimant to enter upon a long-drawn procedure of their adjudication.

Secondly, after the nomination of the Arbitrator by the Claimant vide letter, dated October 16, 2017 after about four months that date i.e. on February 5, 2018, the Respondent itself nominated their nominee Arbitrator to participate in the arbitration proceedings when both of them nominated the third Arbitrator which ultimately formed the present Tribunal. Therefore, issue of prematurity was evaporated by their own participation in the arbitration proceedings. Thirdly, the Respondent not only submitted to the jurisdiction of the Arbitrators but also made their counter claim for adjudication by the Arbitrators. In 2015 (13) SCC 477 (Govind Rubber Ltd. vs. Louis Dreyfus Commodities Asia Pvt. Ltd.) it was held that by making a counter claim, the party indeed submitted to the Jurisdiction of the Arbitrator.

Finally, it is well settled principle that a party to the breach cannot adjudicate the breach. Therefore, adjudication by the respondent in the name of Conciliation cannot be sustained. In 1987 (2) SCC 160 (State of Karnataka vs. Shree Rameshwaira Rice Mill etc) it was held that even assuming that the stipulation in the contract affords scope for being construed as empowering the officer of the state to decide upon the question of breach as well as assess the quantum of damages, adjudication by the officer regarding the breach of the contract cannot be sustained under law because a party to the agreement cannot be an arbiter in his own cause. Interest of justice and equity require that where a party to a contract disputes the committing of any breach of conditions, the



adjudication should be made by an independent person or body and not by the other party to the contract. This principle was followed in AIR 2011 SC 2477 = 2011 (5) SCC 758 (M/s. J.G. Engineering Pvt. Ltd. vs. Union of India and Anrs.) where under it was held that in Therefore plea of prematurity on the part of the Respondent is patent lie. act the question the other party committed breach cannot be decided by the party alleging breach. A contract cannot provide that one party will be the arbiter to decide whether he committed breach or other party committed breach. That question can only be decided by an adjudicatory forum, i.e. a Court or an Arbitral Tribunal. Therefore, plea of prematurity on the part of the Respondent is patent lie.”

49. Under Section 62(2) of the Act, 1996, prescribes that Conciliation proceedings shall commence when the other party accepts in writing the invitation to conciliate. Further, under Section 62(3) of the Act, 1996 enunciates that if the other party rejects the invitation, there will be no Conciliation proceedings. In the instant petition, the Arbitral Tribunal held that since the respondent did not agree to the Conciliation proceedings and the Tribunal could not compel the respondent to participate in the said proceedings as per the provisions of Section 62 of the Act, 1996. It is further held that the petitioner submitted to the jurisdiction of the Arbitral Tribunal without any objection. After looking into the reasons given above by the learned Arbitral Tribunal, it is crystal clear that the learned Tribunal has considered the submissions made by the parties as well as the documents which were referred by them, and after considering them, has reached to the conclusion that the arbitral proceedings are not pre-mature. In view of the above facts and



circumstances, I do not find any reason to interfere in the findings given by the learned Arbitral Tribunal *qua* the issue No. (i)

50. The learned Arbitral Tribunal has dealt with issue No. (vi) and (vii), whether the claim of the respondent are beyond jurisdiction since the Concession Agreement did not contain any provision for foreclosure and if the respondent's petition for claiming various damages maintainable. The relevant portion of the same is reproduced hereinbelow:

“Issue Nos (VI) and (VII) seem to be elementary in nature. However let us give answers to the issues. It is well settled that the Arbitrators proceed on the basis of reference made to them. By a letter dated June 13, 2017 the Claimant intended about quick resolution of the amount to be paid to them as foreclosure compensation. Even subject matter of the letter indicates 'basis: Foreclosure of the agreement'. In response thereto the Respondent by its letter dated February 5, 2018 nominated their Arbitrator for subject project, 'to adjudicate the disputes, under reference raised by the concessionaire (Copy of the Contractor's letter dated 13.06.2017 is enclosed)'. This is the cause of action. Hence no question can be raised doubting jurisdiction of the Arbitrators. Alternatively such submission can be construed as mere statement from the Bar. The word, 'reference' contemplates act of parties to the arbitration agreement, referring their disputes to an agreed Arbitrator/s to settle the disputes. Further, the word 'reference' contemplates an act of the appointing authority referring the disputes to the Arbitrator/s appointed by him. The dispute relates to determination of foreclosure compensation which may or may not be reimbursement of the expenditure incurred by the Claimant in limini. Meaning of 'compensation' is much wider which includes



reimbursement, if any. Dictionarically compensation has two parts, i.e. 'reimbursement' & 'damages'. Compensation includes compensatory damages & expectation damages amongst others. See pages 301, 416-417 of Black's Law Dictionary 8th Edition. However let us confine ourselves to the meaning of 'foreclosure'.

The word 'foreclosure' was earlier unknown to the law of contract. This principle borrowed from the laws regarding, debt, mortgage etc. The word is not available under the Indian Contract Act, 1872. Principle of novation has been applied by the Respondent. The term is loosely applied to various methods statutory or otherwise, known in different jurisdictions, of enforcing payment of the debt secured by a mortgagee, by taking and selling the mortgaged estate as per Page 1881 of Advanced Law Lexicon, 3rd Edition, 2005. The Contract Act under section 62 only prescribes provision of novation, rescission and alteration of contract. If the parties, to a contract agreed to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed. However, conceptually meaning of 'novation' is substitution of new contract for it. Foreclosure meant closure of original contract upon payment of dues to the satisfaction of the parties.

As per the ratio of AIR 2000 SC 380 (Lata Construction & Ors. Vs. Dr. Rameshchandra Ramniklal Shah. 8b Anr.) one of the essential requirements of 'Novation', as contemplated by Section 62, is that there should be complete substitution of a new contract in place of the old. It is in that situation the original contract need not be performed. Substitution of a new contract in place of an old contract which would have the effect of rescinding or completely altering the terms of the original contract



has to be by agreement between the parties. A substituted contract should rescind or alter or extinguish the previous contract. But if the terms of the two contracts are inconsistent and they cannot stand together, the subsequent contract cannot be said to be in substitution of the earlier contract.

Similar view has been taken by the Court in another judgment reported in 2004 (1) SCC 12 (City Bank N.A. Vs. Standard chartered Bank & Ors.) which speaks novation, rescission or alteration of a contract under Section 62 can only be done with the agreement of both the parties of a contract. Both the parties have to agree to substitute the original contract with a new contract or rescind or alter. It cannot be done unilaterally. Section 62 would not be applicable as there was no novation of the contract.

Non-fulfillment of the terms of the contract under the letter of foreclosure itself disentitles the Respondent from raising any point of novation. In further contract does not cease to effect in such circumstances because no accord or satisfaction can be available particularly in view of the ratio of Lata Construction {supra}.

However the term 'foreclosure' cannot have any independent leg to stand. It is an incident of the original contract. If the Respondent try to say that foreclosure is not part of the CA, counter claim is also not part of it. Arbitral Tribunal is formed at post foreclosure period to ascertain respective demands of the parties. Arbitration agreement though part of the original agreement but independent of it to adjudicate disputes and differences between the parties.

It is significant to note that in one hand the Respondent raised issue of jurisdiction of the Arbitrators in proceeding with foreclosure but on the



other hand Ld. Counsel for the Respondent concluded his submissions on November 21, 2018 emphatically stating that in case the Claimant confine themselves within the claim under foreclosure compensation, they will not press for any counter claim. Both the stands of the Respondent cannot simultaneously run. Moreover, challenge of jurisdiction of the Arbitrators cannot be optional. One must be very sure about his submission with regard to jurisdiction.

Arbitration clause indicates 'Any dispute which is not resolved amicably by consideration Therefore there is no confinement of the Arbitrators' jurisdiction to any particular dispute. Where the reference is to decide specific dispute, the Arbitrators' jurisdiction might be circumscribed by the specific reference and the Arbitrator/s can decide only those specific disputes. These principles are well settled re: 2012 (12) SCC 581 (State of Goa Vs. Praveen Enterprises).

In any event interpretation of the contract is also matter of the Arbitrator/s domain who is/are a Judge or Judges chosen by the parties to determine and decide the disputes. The finding of facts recorded by the Arbitrator/s cannot be interfered with on the ground that the terms of the contract were not correctly interpreted as per the ratio propounded in 2015 (5) SCC 739 (Swan Gold Mining Ltd. Vs. Hindustan Copper Ltd.). Therefore, once again in totality, we reject the plea of the Respondent."

51. The Learned Arbitral Tribunal held that non-fulfilment of the terms of the contract under the letter of foreclosure itself disentitles the petitioner from raising any point of Novation of Contract. The contract does not cease to exist in such circumstances because no accord or satisfaction is available. It is further held that challenge of jurisdiction of



the Arbitral Tribunal cannot be optional since in one hand, the respondent raised issue of jurisdiction of the Arbitral Tribunal but on the other hand, counsel for the petitioner concluded his submissions emphatically stating that in case the respondent confine themselves within the claim under foreclosure compensation, they will not press for any counter claim. It is correctly held by the Arbitral Tribunal that there is no novation of contract in case there is a foreclosure of the Agreement. It is further rightly held that since the petitioner has already submitted to the jurisdiction of the petitioner it cannot contend at the same time that the Tribunal does not have the jurisdiction to decide the claims. After looking into the reasons given above by the learned Arbitral Tribunal, it is evident that the learned Arbitral Tribunal has considered the submissions made by the parties as well as the documents which were referred by them, and after considering them, has reached to the conclusion that there was claim of the respondent are not beyond jurisdiction and the various claims claimed by them in the arbitral proceedings are maintainable. In view of the above facts and circumstances, I do not find any reason to interfere in the findings given by the learned Arbitral Tribunal *qua* the issue No. (vi) and (vii).

52. The issue No.s (ii), (iii), (iv) and (v), deal with all the claims of the the respondent during the Arbitral proceedings regarding the interpretation of the terms of the Contract. These issues have been combined and dealt claim-wise by the Tribunal.

53. This Court has placed reliance on the judgment of Hon'ble Supreme Court held in the case of ***SAIL vs. Gupta Brother Steel Tubes Ltd., (2009) 10 SCC 63*** regarding to the scope of interference under



Section 34 of the Act, 1996 with respect to interpretation of contract as follows:

"16. In ONGC Ltd. [(2003) 5 SCC 705], while dealing with the aspects of liquidated damages, this Court considered the aforesaid Constitution Bench decisions in Chunilal V. Mehta & Sons [AIR 1962 SC 1314] and Fateh Chand [AIR 1963 SC 1405] and after reference to relevant parts of Sections 73 and 74 of the Contract Act held thus: (ONGC Ltd. case [(2003) 5 SCC 705] , SCC p. 733, para 46)

"46. From the aforesaid sections, it can be held that when a contract has been broken, the party who suffers by such breach is entitled to receive compensation for any loss which naturally arises in the usual course of things from such breach. These sections further contemplate that if parties knew when they made the contract that a particular loss is likely to result from such breach, they can agree for payment of such compensation. In such a case, there may not be any necessity of leading evidence for proving damages, unless the court arrives at the conclusion that no loss is likely to occur because of such breach. Further, in case where the court arrives at the conclusion that the term contemplating damages is by way of penalty, the court may grant reasonable compensation not exceeding the amount so named in the contract on proof of damages. However, when the terms of the contract are clear and unambiguous then its meaning is to be gathered only from the words used therein. In a case where agreement is executed by experts in the field, it would be difficult to hold that the intention of the parties was different from the language used therein. In such a case, it is for the party who contends that stipulated amount is not reasonable compensation, to prove the same."



17. In *Tarapore & Co.* [(1994) 3 SCC 521] , a two-Judge Bench of this Court considered few decisions of this Court including the decisions in *Sudarsan Trading Co. v. Govt. of Kerala* [(1989) 2 SCC 38 : AIR 1989 SC 890] , *Associated Engg. Co. v. Govt. of A.P.* [(1991) 4 SCC 93 : AIR 1992 SC 232] and *J&K Handicrafts v. Good Luck Carpets* [(1990) 4 SCC 740] and held that where an arbitrator travels beyond a contract, the award would be without jurisdiction and the same would amount to misconduct and such award would become amenable for being set aside by a court. In *Sudarsan Trading Co.* [(1989) 2 SCC 38 : AIR 1989 SC 890] this Court held that an error by the arbitrator relatable to interpretation of the contract is not amenable to correction by courts.

18. It is not necessary to multiply the references. Suffice it to say that the legal position that emerges from the decisions of this Court can be summarised thus:

- (i) In a case where an arbitrator travels beyond the contract, the award would be without jurisdiction and would amount to legal misconduct and because of which the award would become amenable for being set aside by a court.
- (ii) An error relatable to interpretation of the contract by an arbitrator is an error within his jurisdiction and such error is not amenable to correction by courts as such error is not an error on the face of the award.
- (iii) If a specific question of law is submitted to the arbitrator and he answers it, the fact that the answer involves an erroneous decision in point of law does not make the award bad on its face.
- (iv) An award contrary to substantive



provision of law or against the terms of contract would be patently illegal.

- (v) *Where the parties have deliberately specified the amount of compensation in express terms, the party who has suffered by such breach can only claim the sum specified in the contract and not in excess thereof. In other words, no award of compensation in case of breach of contract, if named or specified in the contract, could be awarded in excess thereof.*
- (vi) *If the conclusion of the arbitrator is based on a possible view of the matter, the court should not interfere with the award.*
- (vii) *It is not permissible to a court to examine the correctness of the findings of the arbitrator, as if it were sitting in appeal over his findings."*

54. It is a well-settled law that there is a limitation on the powers of this Court while examining its jurisdiction under Section 34 of the Act, 1996, however, at the same time, if the interpretation put forward by the Arbitral Tribunal, is a plausible view, such interpretation cannot be set aside by the Court. The Court should intervene in only those exceptional cases where it finds that Award on the face of it is patently illegal, passed without considering the material on record, etc. Keeping these principles in mind, I will now examine the present case.

55. This Court shall now delve into the claims decided by the learned Arbitral Tribunal and which are challenged by the petitioner in the Application under Section of 34 of Act, 1996 before this Court dealing with the interpretation of the Contract.



56. The claim No.1 pertains to Total Costs incurred by the respondent. The relevant portion of the reasons given by the learned Arbitral Tribunal is also reproduced hereinbelow:

Claim No. 1 – Total Costs incurred by the Claimant

“The Claimant arrived at a claim of Rs. 247.58 Crs minus Rs. 85 Crs as above i.e. Rs. 162.58 Crs in the particulars. From the letter dated April 20, 2016 Claimant arrived at Rs. 194.50 plus price adjustment of Rs. 16.46 totaling to Rs. 210.96 Crs and if IE's fees of Rs. 3.89 Crs is reimbursed it will arrive at a figure of Rs. 207.07 Crs. The calculation was made up to March 16, 2016. Out of three methods of calculation of foreclosure compensation i.e. Rs. 235 Crs in terms of clause 37.3 of CA and in the alternative Rs. 277 Crs and Rs. 275 Crs given by the Claimant, as per the Respondent, first method found to be the best method of compensation as on March 31, 2016.

The Respondent contended that major chunk of the work was executed during 2012-13 and the total amount worked out by the IE after joint measurement comes to the tune of Rs. 35,21,90,670/- against the claim of Rs. 247.58 Crs. According to the Respondent, total claim as on April 20, 2016 will be happily acceptable to the tune of Rs. 190 Crs. However, the Respondent specifically contended before us that the total claim was ranging between Rs. 140 and Rs. 250 Crs.

According to us, if that was acceptable position up to March 16, 2016 or immediately thereafter, why such sum was not paid by the Respondent to the Claimant is best known to them. Even a part payment of the Respondent to the Claimant could have been a test of bona fide. Respondent did not do so, therefore did not succeed the test. On the other hand, by the letter dated October 13, 2016 the Claimant revoked all their offers



due to coercive approach by the Respondent. The Claimant specifically contended that mutual foreclosure can only be executed as per what is agreed by the parties not as per dictated terms so to say or suffer termination and invocation of the Bank Guarantees. The 'stand of Respondent is entirely unreasonable, arbitrary and untenable in law. By the further letter dated January 18, 2017 of the Claimant that the 'Parties have thus agreed to foreclose the contract by mutual consent subject to the claims of OSEPL including claim of foreclosure compensation. Therefore the Claimant did not confine his claim only to the foreclosure compensation but other claims.

Therefore no bilateral act of quantification of foreclosure compensation was finalised. In other words, had there been an agreement, there would have been no dispute before us. Moreover why the process of foreclosure was delayed up to 2017 and the claim was not settled between the parties, is a big question before us. Neither the Respondent paid any amount nor arrived at a conclusion but tried to introduce a long drawn procedure of conciliation to settle the payable sum. In totality, agreement being bilateral act stands vitiated. There was no agreement with regard to quantification at all. There was no accord or satisfaction which is/are basic element/s of novation or foreclosure, if any.

Balance of convenience speaks that there should a lump sum Award. When Respondent itself contended that the claim is ranging between Rs. 140 to Rs. 250 Crs and Claimant claims Rs. 247.58 Crs minus Rs. 85 Crs i.e. Rs. 162.58 Crs again deducted Rs. 3.89 Crs being half of IE's fees/remuneration comes to Rs. 158.69 Crs and we think such amount is reasonable and an Award can be passed on such sum.

We Award accordingly.”



57. The Arbitral Tribunal has held that the respondent is entitled to the foreclosure compensation since the petitioner unilaterally foreclosed the Concessionaire Agreement and unilaterally fixed the terms and conditions of such foreclosure including the foreclosure compensation. It further held that the foreclosure compensation which was unilaterally decided by the petitioner was not paid by the petitioner to the respondent even after certain amount of delay. After looking into the reasons, given above by the learned Arbitral Tribunal, the learned Arbitral Tribunal has considered the submissions made by the parties and which were referred by them, and after considering them, has reached the conclusion that the respondent is entitled to the total cost incurred by the respondent. In view of the above facts and circumstances, I do not find any reason to interfere in the findings given by the learned Arbitral Tribunal *qua* the claim No. 1.

58. The claim No. 2 pertains to the cost of the capital and the finance cost which has been incurred by the respondent. The relevant portion of the learned Arbitral Tribunal is reproduced hereinbelow:

Claim No. 2: Costs of Capital and Finance Costs

“So far the Cost of Capital and Finance Cost are concerned the major sources are (a) borrowed funds and (b) capital infusion from its own sources. According to the Claimant financing cost is Rs. 73.65 Crs and cost of capital is Rs. 83.96 Crs. It is correct to say that neither the Respondent allowed grant of Rs. 229.95 Crs equivalent to bid money nor allowed the Claimant to collect the toll for the constructed road area to meet the expenses. There was no equity support of the Respondent. The Claimant borrowed money from different sources to meet the expenses. The only



defence of the Respondent is that the Claimant managed this capital from various sources and made payments to the Engineering Procurement Construction (EPC) which is already covered under Claim No.1. On the contrary Respondent's own case is that foreclosure compensation was limited to actual cost but does not include any claim for loss of profit, overhead expenses, cost of idling, capital/finance cost etc. Therefore, according to us, this denial is evasive, contradictory in nature and without any foundation. Hence the eligibility of claim of the Claimant under this heading cannot be denied or disputed. Now we have to ascertain the quantum.

So far borrowed funds are concerned, particulars of financing charges are available under Annexure 'E' of the application for amendment Statement of Claim which was allowed. There we find total charges as per summary of finance costs as on March 31, 2018 is Rs. 75,55,69,189/- less profit from Union KBC Liquid Fund of different forms, interest on FDR, interest earn on ICD for a sum of Rs. 1,90,51,946/- ultimately arrived at a figure of Rs. 73,65,17,243/- as claim of the Claimant from the Respondent. Any claim in connection with Bank Guarantee charges cannot come under this heading and covered under Claim 1. Therefore, a sum of Rs. 20,71,594/- which claimed as Bank Guarantee ex. Charges and processing fee will be deducted from such amount. Hence, the total comes to a figure of Rs. 73,44,45,649/-. Similarly we cannot comprehend payment of Management and/or Processing Fees for arranging loans of Rs. 12,83,75,156/- This figure is not tallying with the figure of note of computation prepared by the Ld. Counsel on their behalf. However, we have to go by the record i.e. Annexure 'E' not by the figure given by the Ld. Counsel. Hence upon deducting the said sum we arrive at a figure of Rs. 60,60,70,493/- as on March



31, 2018 with proportionate enhancement from April 1, 2018 to March 31, 2019 @ 2% above the lending rate of SBI on outstanding loan amount.

We Award accordingly.

Second part of the claim is Cost of Capital infused from its own sources. Total investment of the Claimant is Rs. 78.36 Crs. approximately as per Annexure 'B' to SOC with a reasonable expectation of return. in the form of dividends etc. but became impossible due to closure of project. Therefore this idle sum yielded with no return. Thus the Claimant claimed return each year on the capital invested. Since capital is not secured investment and has a down side also; a risk premium 20% is added to the expected rate of return. The claim is compounded from the date of investment till March 31, 2018 for a sum of Rs. 83.96 Crs approximately.

A question arose before us as to whether expected rate of returns on the higher side or not particularly when equity capital was invested by the parent company fully or partially. We have to give answer to the same legally at first then factually.

As per the ratio of 2012 (6) SCC 613 (Vodafone International Holding BV vs. Union of India and An.) despite control of parent/holding company the subsidiary retains its own legal existence and ownership of its own assets because director of subsidiary owe responsibility to their own company rather than its parent/holding company. A company is a separate legal persona. In law, the management of the business of the subsidiary also vests in the board of directors of the subsidiary alone. Therefore, a parent company can claim interest like an independent financier including Bank and subsidiary can protect its interest against any financier including parent



company.

So far as the factual position is concerned, we find from the CA itself that post-tax return on equity of 16% pa. has been indicated. Such situation will arise after actual earning at the time of payment of tax. However, pre-tax rate might go up to @ 22.85% p.a. by reverse calculation. It is also available in the CA that in case of termination payment on account of Authority's default, the Authority shall pay to the Concessionaire a) debt due and b) 150% of the adjusted equity. Therefore, logically claim of Rs. 83.95 Crs approximately @ 13.20% p.a. cannot be said to be unreasonable.

According to the claimant the aforesaid claim is supported by Auditor's report. We find such certificate is annexed as Annexure D to the application for amendment of soC. Upon perusing such certificate dated August 7, 2018 we find that the same was issued at the request of the Claimant to support statement of interest and borrowing cost incurred by the company and should no be used for any other purpose or by any other person without obtaining their consent. Therefore, independency of the report is under question. Such report cannot be used as an evidence to substantiate the claim of the Claimant.*

However, according to us there should be difference of rate between borrowed sum and infusion of own resources save the period from April 1, 2018 to March 31, 2019 when matter was under consideration by the Arbitrators in which due date is fixed. Very seldom aggregate amount of loss of interest exceeds loss of capital. That apart, both loss of interest and loss of profit cannot be simultaneously sustained, particularly in this case. Since the claimant insisted for loss of interest, let us consider the same.



There is no agreed rate as such so that we can rigidly hold 13.20% p.a. will be the only basis of calculation, nothing else. Moreover, it is a matter of repudiation which gives indication of rational inference. Such rationality indicates that reasonable rate of Cost of Equity Capital will be 8% till March 31, 2018 for a sum of Rs. 50,15,46,240/- and for the further period up to March 31, 2019 at the similar rate.

We Award accordingly.”

59. It has been held by the Tribunal that it is the respondent's own case that foreclosure compensation was limited to actual cost and did not include any other cost like the cost of the capital and the finance cost. The Tribunal has rightly held that respondent is entitled to finance cost. The Tribunal has further rightly observed that the investment made by the respondent towards the capital infused with its own sources, was with a reasonable expectation of return on such investment, but due to closure of project the investment did not yield any return. This Court after looking into the reasons given, learned Tribunal regarding claim no.2, the learned Arbitral Tribunal has considered the submissions made by the parties and which were referred by them, and after considering them, has reached the conclusion that the respondent is entitled to the cost of the capital and the finance cost which has been incurred by the respondent.. In view of the above facts and circumstances, I do not find any reason to interfere in the findings given by the learned Arbitral Tribunal *qua* the claim No.2.

60. The claim No. 3 pertains to Head Office Overhead Expenditure which has been incurred by the respondent. The relevant portion of the



reasons given by the learned Arbitral Tribunal is also reproduced hereinbelow:

Claim No. 3: Head Office Overhead Expenditure

The next claim is Head Office Overhead expenditure. According to the Claimant, it had borne various office overheads expenditure due to the period of the project on notional basis at 12% of the total project cost actually incurred. This amount is fair and reasonable. The Claimant claimed Rs. 49.24 Crs towards overhead expenses, though as per calculation it appears to be Rs. 53.88 Crs. On the other hand, the Respondent contended that while working out the rate, the Respondent arrived at 7.5% as per the schedule of rates of the Government of Odisha.

According to us, the project was a Central Government project. If so, normally the overhead expenses will be calculated on the basis of the rate of Central Government.

As per 'Law Relating to Building and Engineering Contracts in India', 3rd Edition, written by G.T. Gajaria:

"The percentage used in pricing for head-office overheads and profit obviously varies from contractor to contractor, and is usually a closely guarded secret, but evidence given in litigation on many occasions may show as to what is the percentage of the total prime cost.

In this connection it will be useful to mention that the Government of India, the Ministry of Irrigation and Power, (Central Water and Power Commission), published in January 1956, after investigation and survey of the various major Irrigation projects in this country, has laid down and recommended the following percentage, of 'overheads' in the estimates to



be prepared by the various departments of the Government:

"Para 2.36.1. Overheads - An allowance of 10 per cent would be adequate for the contractor's actual expense on supervisory establishment, field office and share of head office charges, travelling expenses, publicity, interest and insurance of damage to plant and injury to labour"

Similarly regarding the contractors profit, it has been stated in the above mentioned report of the Government of India as under:

"Para 2.36.2 Profits - We believe that in normal circumstances an allowance of 10 per cent of the prime cost as contractor's profit is reasonable"

However, we have no material to ascertain the figure as per the rate of Central Government. On the other hand, since the Respondent itself suggested rate of 7.5%, we accept the same as admission of rate and pass Award on such rate. On calculation we arrived at a figure of Rs. 33.67 Crs approximately as Overhead Expenditure.

We Award accordingly."

61. The learned Arbitral Tribunal has held that the respondent is entitled to Head Office Overhead Expenditure as per the rate of 7.5 % as suggested by the petitioner itself. It has rightly been held by the Arbitral Tribunal that the respondent is entitled to Head Office Overhead Expenditure since the foreclosure compensation was based on actual expenses and did not include other expenses incurred by the respondent. I do not find any reason to interfere in the findings given by the learned Arbitral Tribunal *qua* the claim no. 3 of the respondent.



Non – Adjudication of the Counter Claim

62. The objective of the Counter Claims is to save time of courts to exclude inconvenience to the parties to litigation, decide all disputes between the same parties avoiding unnecessary multiplication of judicial proceedings and prolongation of trials as held in ***Ramesh Chand v. Anil Panjwani, 2003 6 SCC 350.***

63. The issue related to counter claim was not decided by the learned Arbitral Tribunal by giving the following reasons:

“Last but not the least, as per Section 38(2) second proviso of the Act, 1996, in case a party does not pay his share of the deposit in respect of the claim or the counter claim, the Arbitral Tribunal may suspend or terminate the arbitral proceeding in respect of such claim or counter claim, as the case may be. In this case the Respondent did not pay any amount in support of its counter claim. Therefore, the counter claim of the Respondent cannot be entertained.

X X X

The counter claim appears to be counter blast as against the claim of the Claimant. We have to proceed on the basis of the reference. There is no reference available in the letter/S:of reference. Therefore, we cannot proceed with the counter claim being not a dispute under reference. Without prejudice to the above even factually Claim no. 5 is for fresh contractor's project Cost of Rs. 1383.43 Crs out of total amount of Rs. 1434.15 Crs. The Claimant cannot be held responsible for fixation of cost of project and/or for construction by the Respondent. Significantly the original project cost in favour of the Claimant was Rs. 449 Crs. The other claims are fictitious in nature. The Respondent itself had issued alignment plan by which road, alignment was



modified. As a result of which, there were trees obstructing the ROW. In such case the Respondent was to bear the cost of cutting/felling trees because the Respondent deemed to be the owner of the same. The Claimant is not liable to pay an amount of Rs. 67,96,809/-. Respondent failed to hand over almost half of the project land even after six years of signing of the CA. Lastly problems arose for lack of funding directly due to the failure on the part of the Respondent. Project road is used as a prime mineral transport corridor since decades. Heavy equipments and trucks are passing the road but unfortunately this was never maintained. Respondent failed to consider the Claimant's suggestion in this regard and now seeks to claim the maintenance cost of Rs. 31,48,60,586/- from the Claimant. Payment to the IE on account of fee and expenses has already adjusted. Respondent is not entitled to recover the cost amount incurred while undertaking shifting of any utility and would be borne by the Respondent. Respondent has filed the present claim just to hide its own delays and defaults and the same is without any basis. Moreover by the Respondent's own saying before the Arbitrators that it will not press counter claim in case the Claimant confined the claim towards foreclosure compensation and when compensation is now quantified the Respondent cannot counter claim any amount."

64. In the present petition, the petitioner has raised an objection that the Arbitral Tribunal has not adjudicated upon the counter claims filed by the petitioner. The petitioner contended that the Arbitral Tribunal fixed certain amount of Arbitral fees which included fees for both counter claims and claims. The Arbitral Tribunal without appreciation of its own order regarding payment of fees has wrongly terminated the adjudication of the counter claims under Section 38 (2) of the Act, 1996 on the ground



of non- payment of fees for the Counter Claims by the respondent. On the other hand, it is contended by the respondent on the other side that the counter claims were rejected by the Arbitral Tribunal as per second proviso of Section 38(2) of the Act, 1996 under which the Arbitral Tribunal has the power that it may suspend or terminate the arbitral proceedings if the party has not paid its share of the Arbitral fees. The petitioner has not paid any fees for counter claims or claims and hence, is not entitled to adjudication of its counter claim. The Arbitral Award has recorded has follows:—

“The Respondent did not pay a single sum on account of each Arbitrator's fees and other expenses towards proportionate establishment cost/administrative charges to the researcher-cum-assistants/associates even expenses relating to arbitration.”

Therefore, it is contended by the respondent that the Arbitral Tribunal has acted within its jurisdiction to terminate its mandate regarding the Counter Claim.

65. Before proceeding further this Court finds it necessary to briefly revisit the existing position of law with respect to the scope of Section 38 of the Act, 1996, which reads as under:

“38. Deposits.— (1) The arbitral tribunal may fix the amount of the deposit or supplementary deposit, as the case may be, as an advance for the costs referred to in sub-section (8) of section 31, which it expects will be incurred in respect of the claim submitted to it: Provided that where, apart from the claim, a counter-claim has been submitted to the arbitral tribunal, it may fix separate amount of deposit for the claim and counter-claim.



(2) The deposit referred to in sub-section (1) shall be payable in equal shares by the parties:

Provided that where one party fails to pay his share of the deposit, the other party may pay that share:

Provided further that where the other party also does not pay the aforesaid share in respect of the claim or the counter-claim, the arbitral tribunal may suspend or terminate the arbitral proceedings in respect of such claim or counter-claim, as the case may be.

(3) Upon termination of the arbitral proceedings, the arbitral tribunal shall render an accounting to the parties of the deposits received and shall return any unexpended balance to the party or parties, as the case may be.”

66. This Court has placed reliance on the judgment of Division Bench of the Bombay High Court in the case of ***Rehmat Ali Baig v. Minocher M. Deboo***, 2012 SCC OnLine Bom 914 regarding the termination of the proceedings under Section 38 (2) of the Act, 1996 if the fees of the Arbitral Tribunal have not been paid by the parties. The relevant paras of the said judgment is as follows:

“5. The Appellant was not permitted to pursue his counter claim on the ground that he failed to deposit costs as directed by the Arbitrator for adjudicating upon the counter claim. ... Despite this, the Appellant continued to assert his request to take the counter claim on record without deposit of the Arbitrator's fees. The Appellant also informed the Arbitrator that he did not wish to examine any witness.

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8. While making a reference to arbitration in terms agreed between the Appellant and the Respondent, the



Learned Single Judge of this Court by his order dated 13 October 2006 directed that the costs of the arbitration shall be borne, in the first instance, by the Respondent, subject to suitable orders that the Arbitrator may make. The arbitral Tribunal was within its jurisdiction in terms of the order of this Court in issuing a direction to the effect that the Appellant shall deposit the costs towards the Arbitrator's fees in connection with the counter claim. Even otherwise, an arbitral Tribunal is entitled under Sub-section (1) of Section 38 to fix the amount of the deposit or supplementary deposit, as the case may be, as an advance for the costs referred to in Subsection (8) of Section 31. Under Section 31(8)(a) the costs of an arbitration shall be fixed by the arbitral Tribunal unless otherwise agreed by the parties. For the purposes of clause (a), costs include reasonable costs inter alia relating to the fees and expenses of the Arbitrator. The proviso to Sub-section (1) of Section 38 enunciates that where, apart from the claim, a counter claim has been submitted to the arbitral Tribunal, it may fix a separate amount of deposit for the claim and counter claim. Under sub-section (2) the deposit referred to in subsection (1) shall be payable in equal shares by the parties. The proviso stipulates that where one party fails to deposit his share, the other party may pay that share. Under the second proviso, where the other party also does not pay the aforesaid share in respect of the claim or the counter claim, the arbitral Tribunal may suspend or terminate the arbitral proceedings in respect of such claim or counter claim, as the case may be. In the present case, in terms of the order passed by this Court initially, the Respondent was required to deposit costs subject to the orders of the Arbitrator. The Arbitrator was, in our view, within jurisdiction in requiring the Appellant to deposit an advance towards costs for adjudicating upon the counter claim. Sub-section (1) of Section 39 does make



a provision under which the arbitral Tribunal, subject to a provision to the contrary in the arbitration agreement, is to have a lien on the arbitral award for any unpaid costs of arbitration. That however, does not override the power of the Arbitrator under the second proviso to Sub-section (2) of Section 38 to terminate the arbitral proceedings as regards the claim or the counter claim, as the case may be, for failure to pay the advance towards deposit of costs. An Arbitrator cannot be expected to continue adjudicating upon the claim or, as the case may be, a counter claim, without parties making a deposit of costs representing the reasonable fees and expenses of the Arbitrator. Relegating the arbitrator only to a claim of lien under Section 39 will result in an abuse of the process. A party which does not comply with an order of deposit will in cases make every effort to delay the proceedings by raising frivolous objections. Absent an obligation to comply with an order of deposit, a party may misuse the arbitral process. Arbitral proceedings take place before a private tribunal of the parties' choice. Parties who opt for arbitration cannot avoid complying with an order of deposit. The amount which was fixed by the Learned Arbitrator in the present case was evidently reasonable. Where a party which has been directed to deposit an advance towards the costs fails to do so, and the other party also does not deposit his share, the Arbitrator would be justified in taking recourse to the power conferred in Section 38(2) to terminate the counter claim as was done in the present case. The judgment of the Supreme Court in Union of India v. Singh Builders Syndicate does not cover a situation such as the present. The present case involves a situation where a party has been recalcitrant in depositing his share of the reasonable costs determined by the Arbitrator towards the adjudication of the counter claim. The Arbitrator has acted fairly. Though the counter claim of the Appellant was



excluded, the Appellant participated in the adjudication of the claim and was allowed to cross-examine the Respondent's witness, as stated in the award. The Appellant did not step into the witness box.”.

67. The ***Rehmat Ali Baig (Supra)*** has been referred in the case of ***Gammon India Ltd. v. Trenchless Engineering Services (P) Ltd., 2013 SCC OnLine Bom 1720***

“7. Upon raising a query, learned counsel appearing for the respondent has reiterated the stand of the respondent that insofar as counter-claim filed by the petitioner is concerned, respondent is not willing to pay the contribution of the petitioner of fees and expenses of the arbitral tribunal.

8. Upon query of the Court whether petitioner is ready and willing to pay its contribution of fees and expenses when counter-claim would have been heard, learned counsel for petitioner did not convey any response in positive. The only submission made for consideration of this Court is that since the respondent has been paying the arbitration costs in respect of the entire matter including the counter-claim, arbitral tribunal was not justified in rejecting the counter-claim for non payment of contribution of the petitioner's fees and expenses.

9. In my view, neither the arbitral tribunal nor this Court can compel a party to deposit the contribution of fees and expenses of both parties. In my view, the arbitral tribunal was thus justified in terminating the arbitral proceedings in respect of counter-claim in view of the petitioner and respondent refusing to deposit any amount of fees and expenses for hearing counter-claim of the petitioner. Arbitral tribunal is entitled to fix a separate amount of deposit for claim



and counter-claim. I am bound by the Judgment of Division Bench of this Court in case of Rehmat Ali Baig.”

68. Furthermore the judgment of this Court deals with the same aspect, in the case of ***M/s. Chandok Machineries v. M/s. S.N. Sunderson & Co.*** **2018 SCC OnLine Del 11000**, the relevant paras of which are as follows:

“39. A reading of Section 38 would show that the Arbitral Tribunal may fix separate amounts of deposit for the claims and counter claims. Though the deposit is payable in equal shares by the parties, on the failure of a party to pay its share of the deposit, the other party may pay that share and in case of failure of the other party to pay the aforesaid share in respect of the claims or the counter claims, the Arbitral Tribunal may suspend or terminate the arbitration proceedings in respect of such claims or counter claims.

40. In view of the above provision, no fault can be found in the direction issued by the Arbitral Tribunal with respect to its fee. A party cannot lay exorbitant claims on the premise that the cost would be shared by the opposite party, and when the opposite party refuses to share such cost, claim bias as it has been made to share the entire cost of such exorbitant claim. An innocent party, whose claims are genuine, is in case protected as such costs can be awarded in its favour by the Arbitral Tribunal in exercise of its powers under Section 31(8) read with Section 31A of the Act. I may only note that in the order dated 19th October, 2016 it had been “agreed/decided” that the claimant shall pay Arbitral fee on his claims and the respondent shall pay Arbitral fee on its counter claim. Therefore, even otherwise, the petitioner cannot be now heard to complain of this course adopted by the Arbitral Tribunal.”



69. It is therefore a settled position of law that under second proviso of Section 38 (2) of the Act, 1996 if the parties to the Arbitral Proceedings have not paid the Arbitral Fees for its Claim or Counter Claim, the Tribunal is entitled for termination of the proceedings of such Claim or Counter Claim. It is further held by the aforesaid judgments that the parties cannot be entitled to adjudication of their dispute despite not paying the Arbitral fees.

70. Under the second proviso of Section 38 (2) of the Act, 1996 the Arbitral Tribunal has the power that it may suspend or terminate the arbitral proceedings if the party has not paid its own share of the Arbitral fees in respect of Claim or Counter Claim. The Tribunal has given various opportunities to the petitioner for the payment of the arbitral fees but nothing has been paid by the petitioner. Hence, the Arbitral Tribunal cannot adjudicate the petitioner's counter claim without paying the requisite fees of the Arbitral Tribunal. This Court has relied on the judgment of Bombay High Court in the case of **Rehmat Ali Baig (Supra)** wherein the Court held that mandate of the Tribunal to adjudicate upon the Counter Claims has been rightly terminated by the Arbitral Tribunal under second proviso of Section 38 (2) of the Act, 1996 as the respondent had not paid the Arbitral fees. Therefore, the Arbitral Tribunal has correctly held that under second proviso of Section 38 (2) of the Act, 1996 due to non-payment of arbitral fees the petitioner is not entitled for adjudications its counter claim. After looking into the reasons given above by the learned Arbitral Tribunal and the judgment of Bombay High Court in the case of **Rehmat Ali Baig (Supra)**, this Court is thus of the view, that the Arbitral Tribunal has acted as per the provisions of the



second proviso of Section 38 (2) of the Act, 1996 wherein the Tribunal had the power to terminate the proceedings for counter claim upon non-payment of the fees .I do not find any reason to interfere in the award passed by the learned Arbitral Tribunal *qua* Counter Claims of the respondent.

CONCLUSION

71. In the instant case, the learned Arbitral Tribunal has gone into the issues and facts thoroughly, applied his mind to the pleadings and evidences before him, as well as the terms of the Contracts, and then passed a duly considered award. In view of the foregoing analysis, this Court is of the opinion that the petitioner has failed to make out any case for interference under Section 34 of the Act. As noticed above, the grounds which were urged before this Court by the learned counsel for the petitioner in assailing the award have no force.

72. In line with the aforesaid discussion, the view of the learned Arbitral Tribunal while awarding the impugned award is undoubtedly a plausible view. Consequently, the instant petition has no merit and must fail. Accordingly, the same is dismissed with no cost.

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

74. The judgment be uploaded on the website forthwith.

(CHANDRA DHARI SINGH)
JUDGE

MAY 26, 2023



Sv/db

