

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

% **Reserved on : 13th March, 2023**
Pronounced on: 26th April, 2023

+ **O.M.P. (COMM) 279/2019 & I.A. 15375/2019**

IRCON INTERNATIONAL LTD Petitioner
Through: Mr. Narender Hooda, Sr. Advocate
with Mr. Shaurya, Mr. Sidhant
Goel, Mr. Shubham Shankar
Saxena, Mr. Karmany Dev Sharma
and Mr. Anvit Seemansh,
Advocates

versus

AFCONS INFRASTRUCTURE LTD Respondent
Through: Mr. Manu Seshadri and Ms.
Pallavi Anand, 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 "The Act, 1996") has been filed on behalf of the petitioner seeking the following reliefs:

"a. Set aside the impugned Award dated 05.03.2019 passed by the Ld. Arbitral Tribunal and dismiss the claim of the petitioner herein qua the respondent herein;

b. Stay the execution, operation and implementation of the Impugned Award dated 05.03.2019 passed by the Ld.

Arbitral Tribunal during the pendency of the present petition;

c. Pass ad-interim relief in terms of prayer clause 'b' above;
d. Cost of the proceedings may also be awarded in favour of the petitioner;

e. Pass such other or further orders as this Hon'ble Court may just deem fit and proper in the facts and circumstances of the present case.”

FACTUAL MATRIX

2. The petitioner is a Government Company incorporated by the Central Government (Ministry of Railway) under the Companies Act, 1956 on 26th April 1976, originally under the name of Indian Railway Construction Limited, having its registered office at Palika Bhawan, Sector-XII, R.K. Puram, New Delhi. It is a leading Turnkey Construction Company in the Public Sector.

3. To provide an alternative and a reliable transportation system into Jammu & Kashmir, the Government of India planned a 326 Km. long Railway Line for joining the Kashmir valley with the Indian Railways network named as Udhampur-Srinagar-Baramulla Rail Link (USBRL Project). The project was declared a 'Project of National Importance'. From Jammu to Baramulla, the length of the new rail line is 326 Km.

4. On 2^{5th} July 2013, the petitioner invited bids for participation in tenders for the construction of Tunnel T-74R balance work from ADIT between 127/660 Km to 130/950 Km. (length 3290 meters) on the Dharam-Qazigund section of the Udhampur-Srinagar-Baramulla New BG Railway Line project, and on 7th August 2013, subsequent to the invitation

of bid, the petitioner issued Corrigendum No. 1 to Tender Documents modifying the functional requirement as provided in SCC-IIA.

5. The petitioner *vide* letter dated 25th October 2013 informed the respondent that the cycle time calculation did not match with the geological L section provided with the tender and asked for rectification.

6. The respondent, on 29th October 2013, certified that on encountering the same rock mass as stipulated in tender documents the desired rate of progress, that is, 95 m/month in the main tunnel and 110 m/month in the escape tunnel, would be achieved. The respondent further confirmed that the mobilization in all respects would be done within 60 days.

7. The bid of the respondent was accepted on 20th January 2014 *vide* Letter of Recommendation, and a Contractual Agreement dated 14th March 2014 was entered into between the parties pursuant to which the petitioner engaged the respondent as a sub-contractor for construction of the said project. As per Clause 22 of the Agreement, the work was to be completed within the stipulated time mentioned under the Agreement.

8. On 23rd April 2014, during the joint site inspection, many points were observed with respect to the functioning of the shotcrete machine deployed at the project site.

9. The petitioner, on 12th May 2014, scrutinized the progress and it was observed by the petitioner that the work was delayed as per the schedule and the respondent was directed to deploy appropriate resources as per the Contractual Clauses to achieve the required progress.

10. During the meeting conducted on 22nd May 2014, it was observed by the petitioner that the works progress as of the said date was only 62m

as against the required progress of 210.50m as per the Contract and as such there was a shortfall of 148.50m.

11. On 27th May 2014, the petitioner once again informed the respondent that the non-improvement of linear tunneling progress had not improved since 12th May 2014 and the progress is far behind the schedule stipulated under the Contract, i.e., only 69.20m instead of 221m.

12. Another meeting on 25th June 2014 was held whereby the petitioner observed that the work progress as on the said date was only 143.20m as against 324m and a shortfall of 180.80m still persisted and the respondent was again directed to mobilize the balance equipment.

13. The respondent, on 7th July 2014, proposed key dates KD-3 which was to be achieved by 8th November 2014 which was subsequently rejected by the petitioner and the key date as specified in the Contract survived.

14. During the meeting held on 25th July 2014 for reviewing the work, it was observed by the petitioner that work progress on the said date was only 239.10m as against 424.18m with a shortfall of 185.08m.

15. The respondent sought an extension of 171 days from 1st August 2014 for the completion of the work.

16. On 26th August 2014, a review meeting was conducted whereby it was observed by the petitioner that progress was slow due to the non-availability of required equipment for which the respondent was again directed to mobilize the appropriate equipment.

17. As per Clause 27.6 of the Special Condition Contract – I, the liquidated damages for delays in the achievement of the aforesaid key dates by scheduled targets shall be recovered from RA Bills.

18. On 8th June 2015, the respondent was informed that the linear progress of tunneling at Tunnel t-74RA was badly affected due to the poor performance/frequent break up of shotcrete machines affecting the work progress, and accordingly, the respondent was informed of an extension of 21 days for completion of work on 2nd July 2015.

19. On 4th July 2015, another meeting was held whereby the respondent was advised by the petitioner to expedite the work progress considering the upcoming key dates and subsequently it was again observed that progress was slow in the meeting held on 11th July 2015.

20. On 13th July 2015, the respondent was informed by the petitioner that the action had been taken and liquidated damages had been imposed as per the Contractual Provisions and that the extension of the key dated had been considered on ground reality and only for the reasons where the respondent has been found not responsible for the delays.

21. On 2nd December 2015, the respondent was again apprised that the linear progress of tunnelling at Tunnel T-74RA was badly affected in November 2015 due to poor performance of machineries deployed at site and the progress was again declared slow in the review meeting held on 3rd December 2015.

22. The respondent on 2nd February 2016 was again informed about the frequent breakdown of machines due to which work was being affected due to which the respondent again failed to adhere to the committed time of completion.

23. On 19th November 2016, the respondent invoked Arbitration Clause, and on 18th September 2017, the Arbitral Tribunal was constituted.

24. Statement of Claim was filed by the respondent on 31st October 2017 followed by a Statement of Defence by the respondent on 1st December 2017.

25. *Vide* impugned Award dated 5th March 2019, the Arbitral Tribunal allowed the claim of the respondent.

26. Hence, on being aggrieved by the impugned Award dated 5th March 2019 the Petitioner has approached this Court with the instant petition under Section 34 of the Act, 1996 seeking the aforesaid reliefs.

SUBMISSIONS

(On behalf of the petitioner)

27. Learned senior counsel for the petitioner submitted that the learned Arbitral Tribunal failed to appreciate that the claim and counter-claim are to be disposed of by pronouncement of a single final judgment in the claim, both on the original claim and counterclaim.

28. Learned senior counsel for the petitioner submitted that it had sought the extension of time due to a difference in geology/rock class encountered instead of the anticipated one. The actual geology/rock has been mentioned in the Statement of Claims.

29. Learned senior counsel for the petitioner submitted that it is clearly specified in the priority of documents that instructions to Tenderers and Appendices shall be in priority to the proposal submitted by the Tenderer.

30. Learned senior counsel for the petitioner submitted that the respondent submitted the Progress rate and Time Cycle for different anticipated rock classes. The said progress rate was erroneous and the chart depicting the same was duly submitted before the learned Arbitral

Tribunal, which in response to, the learned Tribunal failed to consider. The cycle times calculation submitted by the claimant was not in consonance with the stipulated period of completion, but after the undertaking of the claimant, the same was accepted. The Tender specifically stipulated that the progress rate should be of 95m/month in the main tunnel and 110m/month in the escape tunnel.

31. Learned senior counsel for the petitioner submitted that the anticipated geology and the actual geology encountered for ADIT (KD-03), Escape Tunnel towards Katra (KD 09) Main Tunnel towards Banihal (KD 13) was duly compared and the calculation of extended time was accepted and signed by both parties. 20 Days extension was given for ADIT, 50 days extension was given for Katra, and 18 Days extension was given for the escape Tunnel towards Katra due to no adverse geological benefit work.

32. Learned senior counsel for the petitioner submitted that the learned Arbitrator erred in accepting the wrong calculations of the respondents.

33. Learned senior counsel for the petitioner submitted that the learned Arbitrator failed to appreciate that the terms 'rock-class' and 'rock-mass' are two distinct characteristics of geology.

34. Learned senior counsel for the petitioner further submitted that a specific timeline for completion of work has been stipulated in the contract, and the work is required to be completed within the stipulated time.

35. Learned senior counsel for the petitioner submitted that the impugned award is in contradiction to the provisions of the contract. It is submitted that the key dates as per the contract are independent of each

other. It is further submitted that Clause 8.6.1 of SCC-II B, while allowing 44 days caused due to Geological Over Break of fore pole section by holding that if the over breaks have resulted in forepole location but other than the crown portion, there is an additional requirement of time because of the same.

36. Learned senior counsel for the petitioner submitted that the learned Arbitral Tribunal has traveled beyond their jurisdiction with regard to 'Interpretation & meaning and intent of specification & drawings' which comes under excepted matters.

37. Learned senior counsel for the petitioner submitted that various letters, minutes of meetings, etc. are totally ignored by the learned Arbitral Tribunal.

38. It was placed on record by the petitioner that there was delay in the mobilization of necessary equipment.

39. Learned senior counsel for the petitioner submitted that the learned Arbitral Tribunal has granted an extension of more days than even sought by the claimant/respondent.

40. Learned senior counsel for the petitioner submitted that the respondent on the alleged ground of law and order is mainly related to workers' strikes for payment of wages, weekly shift change, etc. It is submitted that the said delays are not *force majeure* condition. It is further submitted that the learned Tribunal has failed to consider the hindrances register which captures all details for the affected days.

41. Hence, the learned senior counsel for the petitioner submitted that the impugned award dated 5th March 2014 may be set aside under Section 34 of the Act, 1996.

(On behalf of the respondent)

42. *Per contra*, learned counsel for the respondent submitted that the learned Arbitral Tribunal held that respondents are entitled to get an extension of 484 days.

43. Learned counsel for the respondent submitted that petitioner and respondent executed an agreement dated 14th March, 2014 for the construction of the tunnel. It is further submitted that the contract formed part of the second leg of the project between Katra and Banihal.

44. Learned counsel for the respondent submitted that as per the terms of the contract, the project was supposed to be completed within a period of 33 months.

45. Learned counsel for the respondent submitted that contract entailed the construction of ADIT, main tunnel, and escape tunnel. It is submitted that the construction works were divided into five parts.

46. Learned counsel for the respondent submitted that the progress of the works was delayed due to reasons not attributable to the respondent. And at the request of the respondent, the petitioner granted an extension of time to the respondent. It is further submitted that the petitioner granted such an extension for delays on account of adverse geology, additional works, incremental weather, and law and order problem.

47. Learned counsel for the respondent submitted that the learned Arbitral Tribunal in considering delays undisputedly determined an extension of time only for a key date.

48. Learned counsel for the respondent submitted that the learned Arbitral Tribunal held that the main tunnel - Banihal side was on the critical path to completion in line with the key dates which are being

stipulated under the contract.

49. Learned counsel for the respondent submitted that while granting an extension of time for 484 days for the main tunnel - Banihal, the learned Arbitral Tribunal was of the view that the other portions of the main and escape tunnels would also be completed within 484 days.

50. Learned counsel for the respondent submitted that the learned Arbitral Tribunal did not give any additional extension of time for the main tunnel as any extension of time for the said portions of the main and escape tunnels would have been subsumed by the extension of time granted for main tunnel.

51. Learned counsel for the respondent submitted that the learned Tribunal's interpretation of the critical path of the project was in line with the key dates under the contract.

52. Learned counsel for the respondent submitted that in any event question of delay and extension of time is a pure question of facts and the same would not constitute a ground for challenge under Section 34 of the Act, 1996.

53. Learned counsel for the respondent submitted that learned Arbitral Tribunal has rendered a well-reasoned award after appreciating the evidence led by both parties. It was further submitted by the learned counsel that the petitioner has failed to establish any grounds under Section 34 of the Act, 1996.

54. Therefore, it is submitted that the instant petition is liable to be dismissed for being devoid of any merit.

FINDINGS AND ANALYSIS

55. Heard the learned counsel for the parties at length and perused the record.

56. The petitioner has approached this Court assailing the award dated 5th March 2019 under Section 34 of the Act, 1996. The law regarding a challenge to an arbitral award under the Act, 1996 is no more a *res Integra*. The challenge of an award under Section 34 arising out of Arbitration proceedings must satisfy the tests laid down by the virtue of the provisions of the Act, 1996, and the law settled by way of pronouncements by the Hon'ble Supreme Court.

57. It is pertinent to reiterate that the intention of the legislature while enacting the Act, 1996 was the expeditious and effective disposal of matters. The Act has been set forth with an intention to limit the interference of the courts into the arbitral proceedings.

58. In order to facilitate this process and to maintain a check on it, a provision to set aside the Award was included. But even then, the award may only be set aside as it fulfils certain criteria to qualify as being bad in law.

59. The Arbitrator, who in his wisdom, passes an award, upon conducting the arbitration proceedings with the participation of parties to the dispute, considering the Statement of Claim and Statement of Defence presented by and on behalf of the parties, the relevant documents placed on record by the parties, is considered a Court for the purposes of adjudicating the dispute before him. An unfettered scope of intervention in his functioning would defeat the spirit and purpose of the Arbitration Act. Therefore, the Hon'ble Supreme Court has time and again reiterated

that the scope of intervention of the Courts is limited in the cases of a challenge under Section 34.

60. In *UHL Power Co. Ltd. v. State of H.P.*, (2022) 4 SCC 116, the Hon'ble Supreme Court reiteration the narrow scope under Section 34 of the Act, 1996 and held as under:

“16. As it is, the jurisdiction conferred on courts under Section 34 of the Arbitration Act is fairly narrow, when it comes to the scope of an appeal under Section 37 of the Arbitration Act, the jurisdiction of an appellate court in examining an order, setting aside or refusing to set aside an award, is all the more circumscribed. In MMTC Ltd. v. Vedanta Ltd. [MMTC Ltd. v. Vedanta Ltd., (2019) 4 SCC 163 : (2019) 2 SCC (Civ) 293], the reasons for vesting such a limited jurisdiction on the High Court in exercise of powers under Section 34 of the Arbitration Act have been explained in the following words : (SCC pp. 166-67, para 11)

“11. As far as Section 34 is concerned, the position is well-settled by now that the Court does not sit in appeal over the arbitral award and may interfere on merits on the limited ground provided under Section 34(2)(b)(ii) i.e. if the award is against the public policy of India. As per the legal position clarified through decisions of this Court prior to the amendments to the 1996 Act in 2015, a violation of Indian public policy, in turn, includes a violation of the fundamental policy of Indian law, a violation of the interest of India, conflict with justice or morality, and the existence of patent illegality in the arbitral award. Additionally, the concept of the “fundamental policy of Indian law” would cover compliance with statutes and judicial precedents, adopting a judicial approach, compliance with the principles of natural justice, and Wednesbury [Associated Provincial Picture Houses Ltd. v. Wednesbury Corpn., (1948) 1 KB 223 (CA)] reasonableness. Furthermore, “patent

illegality” itself has been held to mean contravention of the substantive law of India, contravention of the 1996 Act, and contravention of the terms of the contract.”

17. A similar view, as stated above, has been taken by this Court in *K. Sugumar v. Hindustan Petroleum Corpn. Ltd.* [*K. Sugumar v. Hindustan Petroleum Corpn. Ltd.*, (2020) 12 SCC 539] , wherein it has been observed as follows : (SCC p. 540, para 2)

“2. The contours of the power of the Court under Section 34 of the Act are too well established to require any reiteration. Even a bare reading of Section 34 of the Act indicates the highly constricted power of the civil court to interfere with an arbitral award. The reason for this is obvious. When parties have chosen to avail an alternate mechanism for dispute resolution, they must be left to reconcile themselves to the wisdom of the decision of the arbitrator and the role of the court should be restricted to the bare minimum. Interference will be justified only in cases of commission of misconduct by the arbitrator which can find manifestation in different forms including exercise of legal perversity by the arbitrator.””

61. Further in *Ssangyong Engg. & Construction Co. Ltd. v. NHAI*, (2019) 15 SCC 131, the Hon’ble Supreme Court went on to say that reappreciation of evidence cannot be permitted under the ground of patent illegality in a Section 34 petition under Act, 1996. The relevant portion has been reiterated below:-

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 on the face of award.”*

62. A reference to the above stated pronouncements make it clear that this Court while exercising its jurisdiction under Section 34 of the Act, 1996 shall not sit in appeal and/or re-examine the facts and evidence of the case.

63. The key grounds to examine whether the impugned Award is liable to be set aside as per Section 34 of the Act, 1996 are:

1. Whether the impugned Award is patently illegal?
2. Whether the learned Arbitral Tribunal can grant an extension of more days than sought by the claimant?

Issue no. 1 – Is the impugned Award patently illegal?

64. In *Ssangyong Engineering & Construction Co. Ltd. (Supra)*, the Hon'ble Supreme Court while explaining the scope of the expression 'public policy of India' made the following pertinent observations:

"23. What is clear, therefore, is that the expression "public policy of India", whether contained in Section 34 or in Section 48, would now mean the "fundamental policy of Indian law" as explained in paragraphs 18 and 27 of Associate Builders (supra), i.e., the fundamental policy of Indian law would be relegated to the "Renuagar" understanding of this expression. This would necessarily mean that the Western Geco (supra) expansion has been done away with. In short, Western Geco (supra), as explained in paragraphs 28 and 29 of Associate Builders (supra), would no longer obtain, as under the guise of interfering with an award on the ground that the arbitrator has not adopted a judicial approach, the Court's intervention would be on the merits of the award, which cannot be permitted post amendment. However, insofar as principles of natural justice are concerned, as contained in Sections 18 and 34(2)(a)(iii) of the 1996 Act, these continue

to be grounds of challenge of an award, as is contained in paragraph 30 of Associate Builders (supra).

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25. Thus, it is clear that public policy of India is now constricted to mean firstly, that a domestic award is contrary to the fundamental policy of Indian law, as understood in paragraphs 18 and 27 of Associate Builders (supra), or secondly, that such award is against basic notions of justice or morality as understood in paragraphs 36 to 39 of Associate Builders (supra). Explanation 2 to Section 34(2)(b)(ii) and Explanation 2 to Section 48(2)(b)(ii) was added by the Amendment Act only so that Western Geco (supra), as understood in Associate Builders (supra), and paragraphs 28 and 29 in particular, is now done away with.

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

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

28. To elucidate, paragraph 42.1 of Associate Builders (supra), namely, a mere contravention of the substantive law of India, by itself, is no longer a ground available to set aside an arbitral award. Paragraph 42.2 of Associate Builders (supra), however, would remain, for if an arbitrator gives no reasons for an award and contravenes Section 31(3) of the 1996 Act, that would certainly amount to a patent illegality on the face of the award.

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

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

“28. In a recent judgment, *ONGC Ltd. v. Western Geco International Ltd.*, 2014 (9) SCC 263, this Court added three other distinct and fundamental juristic principles which must be understood as a part and parcel of the fundamental policy of Indian law. The Court held-

35. What then would constitute the “fundamental policy of Indian law” is the question. The decision in *ONGC [ONGC Ltd. v. Saw Pipes Ltd.]*, (2003) 5 SCC 705] does not elaborate that aspect. Even so, the expression must, in our opinion, include all such fundamental principles as providing a basis for administration of justice and enforcement of law in this country. Without meaning to exhaustively enumerate the purport of the expression “fundamental policy of Indian law”, we may refer to three distinct and fundamental juristic principles that must

necessarily be understood as a part and parcel of the fundamental policy of Indian law. The first and foremost is the principle that in every determination whether by a court or other authority that affects the rights of a citizen or leads to any civil consequences, the court or authority concerned is bound to adopt what is in legal parlance called a “judicial approach” in the matter. The duty to adopt a judicial approach arises from the very nature of the power exercised by the court or the authority does not have to be separately or additionally enjoined upon the for a concerned. What must be remembered is that the importance of a judicial approach in judicial and quasi-judicial determination lies in the fact that so long as the court, tribunal or the authority exercising powers that affect the rights or obligations of the parties before them shows fidelity to judicial approach, they cannot act in an arbitrary, capricious or whimsical manner. Judicial approach ensures that the authority acts bona fide and deals with the subject in a fair, reasonable and objective manner and that its decision is not actuated by any extraneous consideration. Judicial approach in that sense acts as a check against flaws and faults that can render the decision of a court, tribunal or authority vulnerable to challenge.

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38. Equally important and indeed fundamental to the policy of Indian law is the principle that a court and so also a quasi judicial authority must, while determining the rights and obligations of parties before it, do so in accordance with the principles of natural justice. Besides the celebrated audi alteram partem rule one of the facets of the principles of natural justice is that the court/authority deciding the matter must apply its mind to the attendant facts and circumstances while taking a view one way or the other. Non-application of mind is a defect that is fatal

to any adjudication. Application of mind is best demonstrated by disclosure of the mind and disclosure of mind is best done by recording reasons in support of the decision which the court or authority is taking. The requirement that an adjudicatory authority must apply its mind is, in that view, so deeply embedded in our jurisprudence that it can be described as a fundamental policy of Indian law.

39. No less important is the principle now recognised as a salutary juristic fundamental in administrative law that a decision which is perverse or so irrational that no reasonable person would have arrived at the same will not be sustained in a court of law. Perversity or irrationality of decisions is tested on the touchstone of Wednesbury principle of reasonableness. Decisions that fall short of the standards of reasonableness are open to challenge in a court of law often in writ jurisdiction of the superior courts but no less in statutory processes wherever the same are available. 40. It is neither necessary nor proper for us to attempt an exhaustive enumeration of what would constitute the fundamental policy of Indian law nor is it possible to place the expression in the straitjacket of a definition. What is important in the context of the case at hand is that if on facts proved before them the arbitrators fail to draw an inference which ought to have been drawn or if they have drawn an inference which is on the face of it, untenable resulting in miscarriage of justice, the adjudication even when made by an Arbitral Tribunal that enjoys considerable latitude and play at the joints in making awards will be open to challenge and may be cast away or modified depending upon whether the offending part is or is not severable from the rest.”

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31. The third juristic principle is that a decision which is perverse or so irrational that no reasonable person would

have arrived at the same is important and requires some degree of explanation. It is settled law that where:

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

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

66. It is therefore clear that the decisive test is that *first*, the learned arbitrator had to adopt a judicial approach; *second*, the principles of natural justice had to be upheld; *third*, the decision must not have been egregious, or rather, perverse.

67. The Privy Council in ***Champsey Bhara Company vs. The Jivraj Balloo Spinning and Weaving Company Ltd.***, AIR 1923 PC 66, held as follows:

*“The law on the subject has never been more clearly stated than by Williams, J. in the case of **Hodgkinson v. Fernie (1857) 3 C.B.N.S. 189**:-*

“The law has for many years been settled, and remains so at this day, that, where a cause or matters in difference are referred to an arbitrator a lawyer or a layman, he is constituted the sole and final judge of

all questions both of law and of fact The only exceptions to that rule are cases where the award is the result of corruption or fraud, and one other, which though it is to be regretted, is now, I think firmly established viz., where the question of law necessarily arises on the face of the award or upon some paper accompanying and forming part of the award. Though the propriety of this latter may very well be doubted, I think it may be considered as established.”

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Now the regret expressed by Williams, J. in Hodgkinson v. Fernie has been repeated by more than one learned Judge, and it is certainly not to be desired that the exception should be in any way extended. An error in law on the face of the award means, in their Lordships' view, that you can find in the award or a document actually incorporated thereto, as for instance, a note appended by the arbitrator stating the reasons for his judgment, some legal proposition which is the basis of the award and which you can then say is erroneous. It does not mean that if in a narrative a reference is made to a contention of one party that opens the door to seeing first what that contention is, and then going to the contract on which the parties' rights depend to see if that contention is sound. Here it is impossible to say, from what is shown on the face of the award, what mistake the arbitrators made. The only way that the learned judges have arrived at finding what the mistake was is by saying: "Inasmuch as the Arbitrators awarded so and so, and inasmuch as the letter shows that then buyer rejected the cotton, the arbitrators can only have arrived at that result by totally misinterpreting Cl.52." But they were entitled to give their own interpretation to Cl. 52 or any other article, and the award will stand unless, on the face of it they have tied themselves down to some special legal proposition which then, when examined, appears to be unsound. Upon this point, therefore, their Lordships think that the judgment of Pratt, J was right and the conclusion of the learned Judges of the Court of Appeal erroneous.”

68. The Hon'ble Supreme Court in *Associate Builders (supra)*, while explaining the meaning and scope of patent illegality, held as follows:

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

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

*“28. Rules applicable to substance of dispute.—
(1) Where the place of arbitration is situated in India,— (a) in an arbitration other than an international commercial arbitration, the arbitral tribunal shall decide the dispute submitted to arbitration in accordance with the substantive law for the time being in force in India;”*

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

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

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

This last contravention must be understood with a caveat. An arbitral tribunal must decide in accordance with the terms of the contract, but if an arbitrator construes a term of the contract in a

reasonable manner, it will not mean that the award can be set aside on this ground. Construction of the terms of a contract is primarily for an arbitrator to decide unless the arbitrator construes the contract in such a way that it could be said to be something that no fair minded or reasonable person could do.

69. A relevant portion of the impugned Arbitral Award has been reproduced below, to apply the test as to whether the Learned Arbitrator had erred while adjudication the Arbitral dispute:

“37. Even the present contract provides that under Clause 27 after an application for extension of time made by the Contractor the Engineer is to determine the permissible extension of time and only after the employer has become entitled to liquidated damages, the employer is to give a further notice in accordance with Clause 27.6(vii). In the present case the deduction of liquidated damages that too by un-proportional and unreasonable extent was made by the Respondent and thereafter a detailed analysis of delays was carried out. As a matter of fact, by the time the first extension of time vide letter dated 2nd July, 2015 (C-10) was intimated, liquidated damages were already deducted to the extent of more than 3.5 crores from the bills of the months of October 2014 to January, 2015. Further the first extension of time was revised by the Respondent and not merely added up while granting the second extension of time. This is evident from the fact that according to the first extension of time dated 2nd July, 2015 (C-10), only 21 days on account of inclement weather and law and order problem was not attributable to the Claimant and therefore all the key dates were extended accordingly since the effect of 21 days was in respect of KD-3 and all other key dates were subsequent thereto. Whereas it appears from the analysis of 2nd extension of time communicated vide letter dated 29th November 2016 (C -3 4) and relevant working out is available at page 2404 to page 2407 that the delay on account of geological condition was also added to the extent

the Respondent found admissible over and above the 21 days even for key date 3. This shows that & though the Respondent while granting the first extension of time did not consider geological condition as a matter of delay. But so considered while granting the 2nd extension of time and also for the works carried out within the period for which they had evaluated the first extension of time. Therefore, there is no doubt that the first extension of time was revised not for further delays in the second extension of time but ab initio.

38. Thus. it is evident before at least the second extension of time was communicated, i.e. before 29th November 2016 (C-34), nothing was finally decided by the Respondent as regards attribution of delays upon the Claimant. By November 2016 the Respondent had deducted more than 4.5 Crores from the bills of the Claimant without itself carrying out a satisfactory delay analysis.

39. We do not see any provision in the contract specifically providing for the Respondent to deduct liquidated damages and thereafter carrying out an analysis of the delays thereby granting extension of time. Even otherwise that is not a position approved in law. Every action is to be preceded by a considered decision and in the present case the primary adjudicator also did not make any decision by carrying out which according to it was a rational approach to determine extension of time.

40. The levy of liquidated damages and its deductions were therefore prima facie illegal and not in accordance with the contract.”

70. A bare reading of the aforementioned portion of the impugned Award makes it evident that the learned Arbitrator carefully considered the Contract, the communication between the parties, the deductions made by the respondent, the facts, and circumstances to adjudicate the dispute.

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

72. A bare perusal of the aforementioned judicial decisions cited, and the contents of the impugned Award, explains that under the limited scope of Section 34, the present case does not warrant the interference of this Court, as the grounds stated by the Petitioner in the instant petition do not meet the scope of this section. Accordingly, with reference to the aforesaid judgments and the impugned Arbitral Award, the Petitioner cannot have the benefit of the ‘*ground of patent illegality*’ to assail the impugned Arbitral Award under Section 34 of the Act, 1996.

Issue no. 2 - Whether learned Arbitrator granted an extension of more days than even sought by the claimant/respondent

73. The relevant portion of the impugned award is reproduced herein for clarity:

*“57. **Claim No. 1(A)** - Claim for declaration that the Claimant is entitled to an overall extension for delays in the work upto 15th September 2016 without imposition of any liquidated damages;*

58. In view of what we have found in our award in the preceding paragraphs the Claimant is entitled to complete all works up to 1121 mtrs. of underground excavation of main tunnel Banihal within 484 days, considering delays in execution of the work upto 15th September 2016. Thus, the Claimant is also entitled to complete the underground excavation of main tunnel Katra for a length of 1065 m by

484 days, escape tunnel Katra for a length of 1126 m by 484 days and excavation of escape tunnel towards Banihal for a length of 1121 m by 484 days, considering delays accrued upto 15th September 2016. The aforesaid date in aggregate is counted from the date of issue of the letter of acceptance. In view of the same the Claimant would therefore be entitled to an overall extension as worked out hereunder:

Key date	Description	Original duration	Required duration	Extention
KD-3	Completion of underground excavation of adit 1 & Junction Development (585M)	175 days		
KD-14	Completion of underground excavation of Main Tunnel Banihal (MTB) (1940 m) Proportional days for 1121 m.	613 days from completion of KD-7 (page 5 and 6 of SOC) (858-245) 354 days		
	Total days required for adit plus 1121 m of Main Tunnel Banihal	529 days	1013 days (para 56 of Award)	484 days (1013-529)

59. As we have already examined) the completion of main tunnel Banihal for delays upto 15th September 2016 is on critical path. Therefore, the overall extension which the

Claimant should therefore be entitled to will be 484 days against its Claim of 504 days for delays upto 15th September 2016.

*60. In view of above we declare that the Claimant is entitled to an overall extension of **484 days** against Claim No. 1 (A) for delays accrued upto 15th September 2016.”*

74. It can be thus understood that the learned Arbitrator had clearly considered the facts and circumstances of the matter and analyzed it thoroughly to adjudicate upon the delay and grant of extension.

75. The Learned Sole Arbitrator has clearly resorted to a Judicial approach while adjudicating upon such an issue. The Arbitral Tribunal is a creature of Contract, and the Contract is the only basis on which the Learned Tribunal should adjudicate, apart from the general provisions of law and jurisprudence.

76. It must be duly noted that the learned Arbitrator upheld the principles of Natural Justice and warranted that the parties are granted relief.

77. In the case of ***Delhi State Industrial & Infrastructure Development Corpn. Ltd. v. Well Protect Manpower Services (P) Ltd., 2022 SCC OnLine Del 901***, the High Court of Delhi held as under:

“34. The scope of examination under Section 34(2-A) of the A&C Act is limited. This Court is not required to reevaluate and reappreciate the evidence and supplant its opinion over that of the Arbitral Tribunal. Unless the decision is found to be patently illegal, no interference with the Arbitral Award is called for. In Delhi Airport Metro Express (P) Ltd. v. Delhi Metro Rail Corpn. Ltd. [Delhi Airport Metro Express (P) Ltd. v. Delhi Metro Rail Corpn. Ltd., (2022) 1 SCC 131 : (2022) 1 SCC (Civ) 330] , Supreme Court had authoritatively explained that even an erroneous view would

not vitiate the Arbitral award on the ground of patently illegality unless the error is manifest and one that strikes at the root of the matter. It is trite law that an Arbitral Tribunal is a final adjudicator of the evidence and its conclusion cannot be interfered with except where it is found to be patently illegal or in conflict with the public policy of India. In Dyna Technologies (P) Ltd. v. Crompton Greaves Ltd. [Dyna Technologies (P) Ltd. v. Crompton Greaves Ltd., (2019) 20 SCC 1] , the Supreme Court had held that courts would not interfere merely because an alternative view on facts exists. Similarly, in Associate Builders v. DDA [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , the Supreme Court had observed that “a possible view by the Arbitrator on facts has necessarily to pass muster as the Arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his Arbitral award”.”

78. In view of the aforementioned judgment, it is evident that the Arbitrator, being the ultimate master of the Arbitration, can adjudicate the claims in a manner that is on the lines of basic tenants of Law and the Principles of Natural Justice and Jurisprudence. As long as the Award does not shock the conscience of the Court, it warrants no interference of the Court.

79. In the instant case, a perusal of the award, as well as the findings which have also been reproduced above, shows that the learned Arbitrator has passed an extremely elaborate and comprehensive Award after dealing with each claim raised on behalf of the parties, the facts of the case, the material on record, including documents referred to, the precedents cited on behalf of the parties.

80. The Arbitral Award only needed to be supported by reasoning, the validity of which is not for this Court to test. There is no doubt that the award is reasoned and is supported by extensive findings.

81. Therefore, as discussed in the foregoing paragraphs, in the present petition, the Learned Arbitrator had clearly referred to the evidence on record, as reproduced above, and made his observations within the ambit of the contract.

CONCLUSION

82. In light of the facts, submissions, and contentions in the pleadings, this Court finds that the Petitioner has failed to corroborate with evidence how the Learned Arbitrator had erred in adjudicating the dispute.

83. The law which has been settled by the Hon'ble Supreme Court is that the scope of interference with an Arbitral Award under Section 34 of the Act, 1996 is fairly limited and narrow. The Courts shall not sit in an appeal while adjudicating a challenge to an Award which is passed by an Arbitrator, the master of evidence, after due consideration of facts, circumstances, evidence, and material before him.

84. In the instant petition, it was argued that the impugned Award was patently illegal and thus liable to be set aside. As stipulated by the aforementioned precedents, it is essential that there be illegalities or deficiencies at the face of the Award and/or shock the conscience of the Court in order for it to qualify to be set aside by this Court.

85. The petitioner has failed to make out such a case and was unable to show that the Award is patently illegal on the face of the record.

86. A perusal of the impugned award makes it evident that there is no patent illegality or error apparent on the face of the record. The learned arbitrator has passed the impugned award after considering all the relevant material placed before it during the arbitral proceedings. The award is well-reasoned and is not in contravention of the fundamental policy of Indian law, and thus there is no reason for interfering in the impugned Award.

87. The petitioner has failed to show that any grounds that are stipulated under Section 34 of the Arbitration Act are being met.

88. In view of the above discussion of facts and law, this Court finds no reason to set aside the Impugned Arbitral Award.

89. The petition is, accordingly, dismissed.

90. Pending application also stands dismissed.

91. The judgment be uploaded on the website forthwith.

(CHANDRA DHARI SINGH)
JUDGE

APRIL 26, 2023
Dy/AS