



\$~

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
Judgment pronounced on : 11.10.2023

+ **FAO (COMM) 140/2022 & CM APPLS.41854-41857/2022**

UNION OF INDIA ... Appellant

versus

M/S TAYAL AND CO. ... Respondent

Advocates who appeared in this case:

For the Appellant : Mr. Mukul Singh, CGSC with Ms. Ira Singh, Advocate.

For the Respondent : None.

CORAM:

HON'BLE MR. JUSTICE RAJIV SHAKDHER

HON'BLE MR. JUSTICE TARA VITASTA GANJU

TARA VITASTA GANJU, J.:

TABLE OF CONTENTS

Preface.....	1
Brief facts	2
Submissions	7
Analysis	8
Conclusion.....	13
Condonation of Delay in filing the Appeal.....	24

CM APPL.41854/2022& CM APPL.41857/2022[Exemption]

1. Allowed, subject to just exceptions.

FAO (COMM) 140/2022 & CM APPL.41855/2022[Application seeking interim relief]

PREFACE:

2. The present Appeal has been filed against the Order/ Judgment dated 20.01.2022, passed by the District Judge, Patiala House Courts, New Delhi



[hereinafter referred to as “Impugned Order”] in petition under Section 34 of the Arbitration and Conciliation Act, 1996 [hereinafter referred to as “the Act”] against the Arbitral Award dated 26.03.2019 [hereinafter referred to as “Arbitral Award”].

3. The Appellant/Railways herein has prayed for the setting aside of the Impugned Order, wherein the learned District Judge upheld the Arbitral Award passed by the Sole Arbitrator in favour of the Respondent/Claimant.

BRIEF FACTS:

4. Briefly, the facts were that the Respondent/Claimant was awarded a contract for supply of 1,68,000 Sleepers valued at Rs.20,05,92,000/- by the Appellant/Railways. An agreement was executed between the parties on 08.01.2010 [hereinafter called the “Contract”] and Respondent/Claimant was to supply the sleepers by 25.12.2011.

4.1 During the term of the Contract, the Respondent/Claimant sought extension of time on more than one occasion. It was contended by the Respondent/Claimant that this extension was sought essentially due to non-supply of materials that were necessary for the manufacture of the sleepers, which were not made available for successive months by the company nominated by the Appellant/Railways.

4.2 The Respondent/Claimant addressed several communications including letters dated 09.03.2010, 22.07.2010, 11.10.2011, 20.12.2011 and 18.06.2012 wherein this factum of non-supply of cement in time and supply of insufficient quantity was brought to the attention of the Appellant/Railways. These communications additionally highlighted the problems as below:

- (i) Lack of sufficient materials, aggregated sand from Tussan



because digging of the Aravalli Hills had been banned by an order passed by the High Court of Punjab and Haryana at Chandigarh.

(ii) The SGCI Inserts required for the Sleepers were not supplied regularly and insufficient quantities by the two "approved" companies for SGCI Inserts in Northern India and this supply was the essential material for production of the sleepers.

(iii) On account of the Commonwealth Games in Delhi scheduled for October, 2010, there was a shortage of raw materials like cement, steel, aggregate sand in the open market.

(iv) The payments for Sleepers already supplied and other railway components were being delayed by Appellant/Railways for each running invoice.

4.3 The Respondent/Claimant, initially, by its letter dated 11.10.2011, requested for extension of delivery period for six months without the imposition of liquidated damages.

4.4 Thereafter, by letter dated 20.12.2011, the issues being faced by the Respondent/Claimant in adhering to the time schedule were reiterated.

4.5 The Appellant/Railways extended the delivery period up to 30.06.2012 in the first instance but imposed liquidated damages on the Respondent/Claimant for this extension.

4.6 By letters dated 30.04.2012 and 07.05.2012, the Respondent/Claimant had requested the Appellant/Railways to collect the finished 'normal sleepers and turn out sets' lying at the factory after inspection to enable them to utilize full capacity of their factory. Thereafter, the Respondent/Claimant by its communication dated 18.06.2012 requested for further extension of delivery period.



4.7 A supplementary agreement was executed by the parties on 06.11.2012 [hereinafter referred to as “Supplementary Agreement”] wherein the delivery period under the Contract was extended by the Appellant/Railways upto 31.12.2012. However, it was done on imposition of liquidated damages and without the benefit of the price escalation/variation clause.

“...The delivery period is extended up to 31.12.2012 with LD, without PVC and with denial clause. However, in case of fall in PVC indices, PVC will be applicable on negative side.

The other conditions, stipulations, rates etc. applicable to the said Original Agreement and Subsidiary letters shall also be applicable to the Subsidiary Agreement unless repugnant to or excluded by the context.....”

[Emphasis is ours]

4.8 The Appellant/Railways initially cancelled supply of 8,668 Sleepers and imposed a penalty of Rs.7,77,553.35/- on 05.12.2011, and thereafter, cancelled supply of 13,354 Sleepers and imposed a penalty of Rs.12,75,387.13/- on 22.02.2012. The Appellant/Railways also imposed liquidated damages in the sum of Rs.25,10,835/- on the Respondent/Claimant.

4.9 The Respondent/Claimant requested for initiation of Arbitral Proceedings in terms of Arbitration Clause as set forth in Clause 2900 of the Indian Standard Railway Conditions of Contract, including by its letter dated 18.06.2012. The Arbitral Clause, which is reproduced below, provided for appointment of a Gazetted Railway Officer as a Sole Arbitrator by the Appellant/Railways:

“2900. Arbitration.

(a) In the event of any question, dispute or difference arising under these conditions or any special conditions of contract, or in connection with this contract (except as to any matters the decision



of which is specially provided for by these or the special conditions) the same shall be referred to the sole arbitration of a Gazetted Railway Officer appointed to be the arbitrator, by the General Manager in the case of contracts entered into by the Zonal Railways and Production Units; by any Member of the Railway Board, in the case of contracts entered into by the Railway Board and by the Head of the Organisation in respect of contracts entered into by the other Organisations under the Ministry of Railways. The Gazetted Railway Officer to be appointed as arbitrator however will not be one of those who had an opportunity to deal with the matters to which the contract relates or who in the course of their duties as railway servant have expressed views on all or any of the matters under dispute or difference. The award of the arbitrator shall be final and binding on the parties to this contract.....”

[Emphasis is ours]

4.10 The Appellant/Railways appointed Sh. Surinder Kumar, Chief Engineer, P&D, Northern Railways Headquarters, New Delhi as the Sole Arbitrator to adjudicate the disputes between the parties on 22.05.2012.

4.11 The Respondent/Claimant filed a Statement of Claim on 21.02.2013 for the following recoveries:

- (i) Claim No.1: Refund of Rs.7,77,553.35/- along with 9% interest w.e.f. date of recovery.
- (ii) Claim No.2: Deduction of Rs.12,75,387.13/- to be quashed.
- (iii) Claim No.3: Refund of Rs.25,10,835/- along with 9% interest w.e.f. date of recovery.
- (iv) Claim No.4: Payment of unpaid PVC in the sum of Rs.18,63,527.66/-along with 9% interest w.e.f. date of recovery.
- (v) Claim No. 5: Towards loss of profit.

4.12 The Appellant/Railways filed the following as its counter claims on 19.03.2014:

- (i) Counter Claim No.1: Retention of Rs.7,77,553.35/- along



with 24% interest w.e.f. date of notice of demand.

(ii) Counter Claim No.2: Recovery of Rs.12,75,387.13/- along with 24% interest from the respondent w.e.f. date of notice of demand.

(iii) Counter Claim No.3: Rs.1,25,000/- as legal expenses of Arbitration along with Rs.1,00,000/- towards legal expenses of proceedings before this Court.

5. The Respondent/Claimant contended that the delay, if any, was attributable solely to the Appellant/Railways and not on account of any failure of the Respondent/Claimant but was caused due to circumstances beyond the control of the Respondent/Claimant. It was further contended, that action of imposing and recovering penalty and liquidated damages by the Appellant/Railways was unwarranted, unlawful and unjustified.

5.1 The Appellant/Railways contended, that the delay was caused by the Respondent/Claimant and hence the liquidated damages levied and deductions made, were rightly made from the payments made to the Respondent/Claimant under the Contract.

5.2 The Sole Arbitrator published the Award on 26.03.2019 allowing Claims 1 to 4 of the Respondent/Claimant and dismissed the Counter Claims of the Appellant/Railways.

6. The Arbitral Award was challenged by the Appellant/Railways by filing a Petition under Section 34 of the Act before the District Judge.

6.1 By the Impugned Order, the District Judge dismissed the Petition holding that the Arbitral Award does not suffer from any perversity and is not against public policy. It was further held that the Petition was filed belatedly by the Appellant/Railways without sufficient cause.



6.2 Thus, the Impugned Order dismissed the petition filed under Section 34 of the Act both on maintainability and on merits as well.

SUBMISSIONS OF THE APPELLANT/RAILWAYS:

7. Learned Counsel for the Appellant/Railways raised the following contentions in this Appeal:

(i) The Arbitral Award passed by the Sole Arbitrator is *sans* merit and is in clear violation of the guidelines set forth in the Act. Relying on Section 34(2)(b)(ii) of the Act. The Arbitral Award has been passed against the public policy and hence setting aside of the Arbitral Award is warranted.

(ii) The Appellant/Railways had calculated the penalty as per Clause 11 of the Contract, for delayed delivery which was conveyed to the Respondent/Claimant by letters dated 05.12.2011 and 22.02.2012. The letters, however, were not responded to. Hence, these amounts were rightly deducted and recovered as liquidated damages from outstanding payments of Respondents/Claimants.

(iii) Time was the essence of the Contract between the parties. The delivery dates were not adhered to by the Respondent/Claimant and time extension was granted thrice to the Respondent/Claimant. Thus, the Appellant/Railways was well within its rights to impose penalty on the Respondent/Claimant and waiver of the liquidated damages clause was not possible as was agreed to by the Respondent/Claimant in the Supplementary Agreement.

(iv) It was further contended that it was not possible in the



present case to prove actual loss and that the findings in this regard of the Sole Arbitrator which were affirmed by the learned District Judge were wrong.

(v) It was contended that the learned District Judge did not appreciate the meaning of Force Majeure Clause as provided in the Contract. The Sole Arbitrator incorrectly interpreted the Force Majeure Clause as it appears in the Contract, and the District Judge affirmed this interpretation as shortage of cement, power cuts and ban on digging in the Aravalli Hills did not fall within the meaning and ambit of the Force Majeure clause.

(vi) No document was produced before the Sole Arbitrator, evidencing the power cuts. In any event, the bidders were advised in the tender document to take into account regular power cuts while quoting for tenders. Thus, the Force Majeure clause did not apply to the contract.

(vii) The copy of Arbitral Award was received by the Appellant/Railways on 28.03.2019, the Petition under Section 34 of the Act was filed on 12.07.2019 in a delay of 11 days. Sufficient reasons for the delay were furnished in the Application for condonation of delay, despite which its Application was rejected.

8. The Appeal was listed for admission before this Court. Since there was no appearance on behalf of the Respondent/Claimant despite service, this Court proceeded to hear this matter.

ANALYSIS:

9. We have heard the Learned Counsel for the Appellant/Railways and



have perused the record as produced before us.

9.1 The record reveals that after an examination of evidence placed by the parties before it, the Sole Arbitrator reached the following conclusions:

(i) Delay in supply was largely due to delay in supply of cement, by the Appellant/Railways supplier i.e., M/s. Ambuja Cements who were the only approved supplier by the Appellant/Railways for this purpose. There was no alternative source nominated for the procurement of the cement. The Respondent/Claimant sent several communications to the Appellant/Railways including 09.03.2010, 22.07.2010, 11.10.2011 and 18.06.2012 in this regard, informing Appellant/Railways of the shortage of the cement, and other (unforeseeable) events that had occurred during the term of the Contract. However, these communications were not dealt with by the Appellant/Railways and instead communications imposing and calculating penalty for delay were sent.

(ii) The issue of delayed payment of Respondent/Claimant bills was also accepted by the Sole Arbitrator as the chart of delayed payments filed by the Respondent/Claimant with its Statement of Claim was not disputed by the Appellant/Railways apart from “*bare denial*” by the Appellant/Railways. No record was placed by the Appellant/Railways to show that they made timely payments to the Respondent/Claimant.

(iii) It was held by the Sole Arbitrator that coupled with the delay in supply for cement, there were power cuts in Haryana and Himachal Pradesh, and the State Government banned the mining



in the Aravalli Hills. Further, that the Commonwealth Games, 2010 disturbed the transportation of the Respondent/Claimant. These events would qualify as Force Majeure conditions in the Contract as the Respondent/Claimant could not have reasonably foreseen these factors.

9.2 The Respondent/Claimant raised several contentions in support of the Arbitral Award during the proceedings before the District Judge including:

- (i) The delay was attributable to the Appellant/Railways and its nominated cement company and due reasons beyond the control of the Respondent/Claimants.
- (ii) There was no equal bargaining power between the Respondent/Claimant and the Appellant/Railways and the Supplementary Agreement which provided for extension of delivery period up to 31.12.2012 with imposition of liquidated damages was executed under coercion and duress and could not be said to be binding on the Respondent/Claimant.
- (iii) The Sole Arbitrator had examined the evidence and cogent and plausible reasons have been given by the Sole Arbitrator for allowing some claims of the Respondent/Claimant and disallowing the counter-claims of the Appellant/Railways which cannot be interfered with in a Petition under Section 34 of the Act.
- (iv) The Arbitral Award has been passed in terms of the principles enunciated in *Ssangyong Engineering & Construction Co. Ltd. vs. National Highways Authority of India (NHAI)*¹, that

¹2019 SCC OnLine SC 677



a Court in a Petition under Section 34 of the Act while adjudicating an Arbitral Award on the test of “*public policy*” is not an appellate Court and does not sit in appeal over the Arbitral Award of an Arbitral Tribunal by re-assessing or re-appreciating the evidence and therefore, if the view taken by the Arbitral Tribunal is a possible one, it does not merit any interference.

(v) Lastly, it was contended that the Application for condonation of delay depicts gross negligence and deliberate inaction on the part of the concerned officers of the Appellant/Railways and their Counsels and the delay in filing the Petition cannot be mechanically condoned and hence, the Petition under Section 34 of the Act was time barred as well.

9.3 The Appellant/Railways raised the contentions as have been raised by them before this Court, which have pithily been set forth hereinabove in paragraph 7.

10 It was, therefore, held by the Sole Arbitrator that since the delay was occasioned by circumstances which could not have reasonably been foreseen by the Respondent/Claimant including on account of the nominated companies of Appellant/Railways and Force Majeure events, hence the deductions were not justified.

10.1 The Counter Claim(s) of the Appellant/ Railways were rejected by the Sole Arbitrator in view of his finding that the action of the Appellant/Railways of imposing and recovering penalty and liquidated damages was unwarranted.

10.2 The Sole Arbitrator awarded the following amounts to the Respondent/Claimant:



- (i) Refund of Rs.7,77,553.35/- towards deduction/amounts withheld with interest @ 9% per annum from the date of recovery till payment in favour of Respondent/Claimant payable by Appellant/Railways;
- (ii) Quashing of deduction of Rs.12,75,387.13/- by Appellant/Railways holding Appellant/Railways is not entitled to recover it from Respondent/Claimant;
- (iii) Refund of Rs.25,10,835/- levied/recovered as liquidated damages to be reimbursed to Respondent/Claimant with interest @ 9% per annum from the date of recovery till payment by Appellant/Railways;
- (iv) Rs.18,63,527.66/- towards unpaid Price Variation Clause (in short PVC) as per the formula in the contract with interest @ 9% per annum till payment, payable by Appellant/Railways to Respondent/Claimant;
- (v) It was also directed by the Sole Arbitrator, that the Awarded sum under the Arbitral Award was payable within 45 days of Arbitral Award failing which 10% interest, compounded per month was payable by Appellant/Railways to Respondent/Claimant from date of Arbitral Award till date of payment.

11. The District Judge examined the findings of the Sole Arbitrator as well as the Arbitral Award. Relying on the reasoning and on the settled law, the District Judge found that the reasoning of the Sole Arbitrator to be logical and that all material and evidence was taken note of.

11.1 The Impugned Order found no infirmity in the Arbitral Award and



held that delay in supply of the sleepers as per the terms of the Contract, if any, was attributable to Appellant/Railways on non-supply of an alternate source of procurement of cement. It was also held that the delay did not occur due to any failure of Respondent/Claimant but had taken place due to the factors beyond the control of Respondent/Claimant and therefore, the same would qualify as a Force Majeure event. Additionally, it was also held that the Application for condonation of delay did not provide for sufficient reasons to condone the delay in filing the Petition under Section 34 of the Act.

12. Paragraph 6.3 of the Arbitral Award has found that the reasons for delay were attributable to the Appellant/Railways as well as on account of factors beyond their control as the Respondent/Claimant could not have reasonably foreseen these events. The Force Majeure clause was also held to be applicable in the Arbitral Award.

12.1 The Sole Arbitrator holding that the Respondent/Claimant had not committed any breach of the Contract awarded the amounts deducted by the Appellant/Railways as liquidated damages and payments retained and withheld to the Respondent/Claimants along with interest thereon.

12.2 The Counter-claims of the Appellant/Railways were essentially to retain payments claimed in Claims (i) and (ii) of the Respondent/Claimants and for arbitral fee. The Sole Arbitrator rejected these Counter claims.

12.3 The findings of the Sole Arbitrator were not interfered with by the District Judge in the Impugned Order, including the finding on the applicability of the Force Majeure Clause.

CONCLUSIONS:

13. The foundation of a Contract for supply of Railway sleepers has to be



the procurement of the raw materials which include cement, steel, sand, aggregate, wires, inserts etc. The Contract between the parties specifically provided that raw materials required for the performance of the Contract were to be obtained only from the nominated suppliers as below:

“4. Raw Material, Machinery and Plant:

The responsibility for procurement of all raw materials, machinery and plants required for the manufacture of goods shall rest entirely with the supplier.

4.1 Cement shall be procured by the contractor from the nominated primary/secondary source and as per the rate, terms and conditions fixed by the purchaser with cement suppliers. The contractor should always maintain a reserve buffer stock of cement adequate for at-least 2 months sleeper production:

4.2 HTS Wires shall be procured from the firms who are approved for manufacture of HTS Wire by Bureau of Indian Standards and possess a current valid BIS License for manufacture of the particular type of wire i.e. 3 x 3 mm strand, 7/7.5 mm plain wire or 9.5 mm dia strand as the case may be.

4.3 SGCI Inserts shall be procured from the firms who are approved by RDSO for the manufacture of SGCI inserts and whose approval is current and valid. SGCI Inserts can also be procured from ISO certified firms as per guidelines issued vide RDSO's letter No.QA/CT/INSP/CI/Policy dated 25.08.2008.

4.4 Aggregates shall be procured by the contractor from the RDSO approved sources.”

[Emphasis is ours]

13.1 Within a couple of months of the Contract being entered to, the Respondent/Claimant started addressing communications to the Appellant/Railways that the cement supply company is not supplying the cement in time, and from February 2010 for several months, the required quantity was not provided to them. The alternate supply as approved by the Appellant/Railways was also not provided to the Respondent/Claimant, this position remained unchanged throughout the term of the Contract.



13.2 The record shows that several communications were sent to the Appellant/Railways by the Respondent/Claimant detailing out its contentions. The Arbitral Award however states that none of these communications were responded to.

13.3 The other contention raised by the Appellant/Railways that the Supplementary Agreement executed between the parties was ignored by the Sole Arbitrator is incorrect. Paragraph 7.1.4 of the Arbitral Award refers to the Supplementary Agreement. The Sole Arbitrator reached a conclusion that the Supplementary Agreement was entered into by the Respondent/Claimant under duress and without which the Respondent/Claimant was refusing to extend the delivery period. Placing reliance on the *NTPC vs. Reshmi Construction*², the Sole Arbitrator has held the Supplementary Agreement, based on an examination of the evidence, was not executed under free consent and hence cannot be relied upon.

13.4 The Appellant/Railways contended that it was practically not possible to assess the actual damage caused to the Appellant/Railways, and the deductions made by the Appellant/Railways on account of liquidated damages were in terms of the Contract/Supplementary Agreement. The Sole Arbitrator in Paragraph 7.1.6 of the Arbitral Award, however, has held that Clause 11 of the Contract is penal in nature and that the Appellant/Railways has failed to establish that the amounts claimed by it are a pre-estimate of the damages it will suffer and sustained the damages claimed.

13.5 We find no perversity in these findings of the Sole Arbitrator.

²AIR 2004 SC 1330



14. The Appellant/Railways contended that frequent power cuts, ban on digging and the shortage of cement does not fall within the definition of Force Majeure as set forth in the Contract and hence the Arbitral Award suffers from patent illegality.

14.1 Clause 17 of the Contract refers to Force Majeure reads as follows:-

"In the event of any unforeseen event directly interfering with the supply of stores arising during the currency of the contract, such as war, insurrection, restraint imposed by the Government, act of legislature or other authority, explosion, accident, acts of public enemy, acts of God, the contractor shall within a week from the commencement thereof notify the same in writing to the purchaser with reasonable evidence thereof.

If the force majeure condition(s) mentioned above be in force for a period of 90 days or more at any time, the purchaser shall have the option to terminate the contract on expiry of 90 days of commencement of such force majeure by giving 14 days notice to the contractor in writing. In case of such termination, no damages shall be claimed by either party against the other save and except those which had accrued under any other clause of this agreement prior to such termination."

[Emphasis is ours]

14.2 A plain reading of this clause shows that an unforeseen event which directly interferes with the supply of sleepers could be a Force Majeure event/condition. It includes restraints imposed by Government or acts of Parliament or other Authorities. The Force Majeure clause is however subject to the Respondent/Claimant notifying the Appellant/Railways within one week from its commencement with reasonable evidence thereof.

14.3 This clause also gives the Contractor, i.e. Respondent/Claimant, the option to terminate the Contract, if the event of Force Majeure lasts more than 90 days.

14.4 Admittedly, the Contract was not terminated by the Respondent/Claimant, and it did supply the revised quantities of sleepers



albeit belatedly, and after extension of time was granted by the Appellant/Railways.

14.5 The communications sent by the Respondent/Claimant to the Appellant/Railways although mention power cuts, ban on digging and interference in transportation on account of Commonwealth Games, 2010 as reasons faced for delay in supply, the Respondent/Claimant, did not specifically notify the Appellant/Railways that these events are Force Majeure events.

14.6 There is also no discussion in the Arbitral Award of these events being intimated as such to the Appellant/Railways with evidence thereof, which is the pre-requisite for Clause 17 of the Contract.

14.7 This aspect has not been discussed in the Impugned Order either.

15. Black's Law Dictionary defines Force Majeure as follows:

"In the law of insurance, superior or irresistible force. Such clause is common in construction contracts to protect the parties in the event a part of the contract cannot be performed due to causes which are outside the control of the parties and could not be avoided by exercise of due care... Typically, such clauses specifically indicate problems beyond the reasonable control of the lessee that will excuse performance."

[Emphasis is ours]

15.1 The Supreme Court in *Energy Watchdog v. Central Electricity Regulatory Commission*³, has, while deciding an Appeal against a judgment of the Appellate Tribunal for Electricity, where a claim of a party was not held to be admissible on the grounds of Force Majeure and/or change in law, laid down the principles of impossibility of performance and Force Majeure, to hold that the doctrine of frustration of a contract does not apply where the

³(2017) 14 SCC 80



fundamental basis for the contract remains unaltered :

“34. “Force majeure” is governed by the Contract Act, 1872. Insofar as it is relatable to an express or implied clause in a contract, such as the PPAs before us, it is governed by Chapter III dealing with the contingent contracts, and more particularly, Section 32 thereof. Insofar as a force majeure event occurs dehors the contract, it is dealt with by a rule of positive law under Section 56 of the Contract Act. Sections 32 and 56 are set out herein:

“32. Enforcement of contracts contingent on an event happening.—Contingent contracts to do or not to do anything if an uncertain future event happens, cannot be enforced by law unless and until that event has happened.

If the event becomes impossible, such contracts become void.

56. Agreement to do impossible act.—An agreement to do an act impossible in itself is void.

Contract to do act afterwards becoming impossible or unlawful.—A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.

Compensation for loss through non-performance of act known to be impossible or unlawful.—Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know, to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise.”

.....

36. The law in India has been laid down in the seminal decision of Satyabrata Ghose v. Mugneeram Bangur & Co. [Satyabrata Ghose v. Mugneeram Bangur & Co., 1954 SCR 310 : AIR 1954 SC 44] The second paragraph of Section 56 has been adverted to, and it was stated that this is exhaustive of the law as it stands in India. What was held was that the word “impossible” has not been used in the section in the sense of physical or literal impossibility. The performance of an act may not be literally impossible but it may be impracticable and useless from the point of view of the object and purpose of the parties. If an untoward



event or change of circumstance totally upsets the very foundation upon which the parties entered their agreement, it can be said that the promisor finds it impossible to do the act which he had promised to do. It was further held that where the Court finds that the contract itself either impliedly or expressly contains a term, according to which performance would stand discharged under certain circumstances, the dissolution of the contract would take place under the terms of the contract itself and such cases would be dealt with under Section 32 of the Act. If, however, frustration is to take place de hors the contract, it will be governed by Section 56.

15.2 It was further held in the *Energy Watchdog* case that merely because the performance of a Contract becomes onerous, on account of unforeseen events, it is not frustrated.

37. In *Alopi Parshad & Sons Ltd. v. Union of India* [*Alopi Parshad & Sons Ltd. v. Union of India*, (1960) 2 SCR 793 : AIR 1960 SC 588] , this Court, after setting out Section 56 of the Contract Act, held that the Act does not enable a party to a contract to ignore the express covenants thereof and to claim payment of consideration, for performance of the contract at rates different from the stipulated rates, on a vague plea of equity. Parties to an executable contract are often faced, in the course of carrying it out, with a turn of events which they did not at all anticipate, for example, a wholly abnormal rise or fall in prices which is an unexpected obstacle to execution. This does not in itself get rid of the bargain they have made. It is only when a consideration of the terms of the contract, in the light of the circumstances existing when it was made, showed that they never agreed to be bound in a fundamentally different situation which had unexpectedly emerged, that the contract ceases to bind. It was further held that the performance of a contract is never discharged merely because it may become onerous to one of the parties.

38. Similarly, in *Naihati Jute Mills Ltd. v. Khyaliram Jagannath* [*Naihati Jute Mills Ltd. v. Khyaliram Jagannath*, (1968) 1 SCR 821 : AIR 1968 SC 522] , this Court went into the English law on frustration in some detail, and then cited the celebrated judgment of *Satyabrata Ghose v. Mugneeram Bangur & Co.* [*Satyabrata Ghose v. Mugneeram Bangur & Co.*, 1954 SCR 310 : AIR 1954 SC 44] Ultimately, this Court concluded that a contract is not frustrated merely because the circumstances in which it was made are altered. The courts have no general power to absolve a



party from the performance of its part of the contract merely because its performance has become onerous on account of an unforeseen turn of events.

39. It has also been held that applying the doctrine of frustration must always be within narrow limits. In an instructive English judgment, namely, *Tsakiroglou & Co. Ltd. v. Noble Thorl GmbH* [*Tsakiroglou & Co. Ltd. v. Noble Thorl GmbH*, 1962 AC 93 : (1961) 2 WLR 633 : (1961) 2 All ER 179 (HL)] , despite the closure of the Suez Canal, and despite the fact that the customary route for shipping the goods was only through the Suez Canal, it was held that the contract of sale of groundnuts in that case was not frustrated, even though it would have to be performed by an alternative mode of performance which was much more expensive, namely, that the ship would now have to go around the Cape of Good Hope, which is three times the distance from Hamburg to Port Sudan. The freight for such journey was also double. Despite this, **the House of Lords held that even though the contract had become more onerous to perform, it was not fundamentally altered. Where performance is otherwise possible, it is clear that a mere rise in freight price would not allow one of the parties to say that the contract was discharged by impossibility of performance.**

40. This view of the law has been echoed in *Chitty on Contracts*, 31st Edn. In Para 14-151 a rise in cost or expense has been stated not to frustrate a contract. Similarly, in *Treitel on Frustration and Force Majeure*, 3rd Edn., the learned author has opined, at Para 12-034, that **the cases provide many illustrations of the principle that a force majeure clause will not normally be construed to apply where the contract provides for an alternative mode of performance.** It is clear that a more onerous method of performance by itself would not amount to a frustrating event. The same learned author also states that a mere rise in price rendering the contract more expensive to perform does not constitute frustration. (See Para 15-158.)”

[Emphasis is ours]

15.3 The Sole Arbitrator held that the power cuts in Haryana and Himachal Pradesh, the State Government ban of digging in the Aravalli Hills and the Commonwealth Games, disturbing transportation would constitute a Force Majeure condition under Clause 17 of the Contract.

15.4 As discussed earlier, the Respondent/Claimant did not terminate the Contract on account of Force Majeure, but delayed performance thereof.



The Sole Arbitrator has concluded that the delay in performance was not on account of any failure of the Respondent/Claimant but due to factors beyond the control of the Respondent/Claimant.

15.5 While we agree that these events could not have reasonably been predicted by the Respondent/Claimant, and would have made performance on time difficult, we are unable to agree on the interpretation of the Force Majeure clause given by the Sole Arbitrator, that power cuts, State Government ban on digging and the disturbance in transportation, would qualify as Force Majeure events.

15.6 Force Majeure as defined in Clause 17 of the Contract states war, insurrection and acts of governmental authorities. These would not include power cuts or shortage of materials on account of Commonwealth Games 2010 or ban on digging in the Aravalli hills.

15.7 In any event, power cuts could not be a cause for frustration of the Contract as the tender document executed between the parties admittedly sets forth that regular power cuts were to be taken into account by bidders, i.e., the Respondent/Claimant herein. The ban on digging in Haryana was imposed much prior to the date of the Contract⁴. Further, as discussed above, the steps of intimation to the Appellant/Railways within a week, of the occurrence of a Force Majeure event with evidence thereof, was not followed by the Respondent/Claimant.

16. In exercise of powers under Section 37 of the Act, the scope of interference of the Courts is narrow. The law is no longer *res integra*. Where the Arbitrator has assessed the evidence and material placed before him while considering the objections to the Award, the Court does not sit as a

⁴ See: *M.C. Mehta v. Union of India*, (2009) 6 SCC 142; judgment dated 08.05.2009.



Court of Appeal or re-appreciate and re-assess the evidence. Unless there is a patent illegality or perversity, interference by the Court is not warranted. Merely because another view is possible, the Court will not interdict the Award. The Courts should only interfere if such Award “*portrays perversity unpardonable*” under Section 34 of the Act. Reference is made to the Supreme Court’s decision in the *Dyna Technologies Pvt. Ltd. v. Crompton Greaves Ltd.*⁵

16.1 Mere erroneous interpretation of a clause by a Sole Arbitrator does not call for an interference of the Award on the ground of patent illegality. The interpretation should be as such which goes to the root of the matter.

16.2 The Courts are required to show restraint while examining Arbitral Awards which have examined the evidence and documents placed before it and have interpreted the Contract in a reasonable manner, lest such interference defeats the very object of the Act.

16.3 The Supreme Court in *Delhi Airport Metro Express (P) Ltd. v. DMRC*⁶, has held that the Arbitral Tribunal holds the final authority in both facts and law and contravention of law not linked to public policy is beyond the scope of judicial interference under “*patent illegality*”:

“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,

⁵2019 SCC Online SC 1656

⁶(2022) 1 SCC 131



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”.”

[Emphasis is ours]

16.4 Interpretation of a contract is a matter for an Arbitrator to determine. Even if such interpretation gives rise to an erroneous application of law, the Courts will generally not interfere, unless the error is palpably perverse or illegal and goes to the root of the matter. It is therefore to be seen whether the interpretation of the Force Majeure clause is such that a fair minded or reasonable person could conclude as well, or if the interpretation by the Sole



Arbitrator is patently illegal.

17. The Arbitral Award has interpreted the Contract and its provisions including Force Majeure and has correctly found that the delay and the defaults were on account of the Appellant/Railways. The Sole Arbitrator has thus held that deductions made by the Respondent/Claimants on account of penalty, liquidated damages and non-grant of price escalation were unjustified. The claim of loss of profits of the Respondent/Claimants was rejected as not proved, since no evidence was lead by the Appellant/Railways. The Counter-claims of Appellant/Railways were based on the Claims. Since Claims (i) and (ii) of the Respondent/Claimants were allowed, Counter-claims (i) and (ii) were automatically rejected. Thus, Counter-claim (iii) of the Respondent/Claimants being costs was also rejected.

17.1 The interpretation given by the Sole Arbitrator and the conclusions reached are a reasonable and fair interpretation of the Contract, based on the evidence produced and thus would not fall in the scope of patent illegality as has been interpreted by the Courts.

17.2 The Sole Arbitrator and the District Judge have wrongly interpreted that the Force Majeure Clause. However, this interpretation at best this could be an erroneous interpretation of the clause, which would not qualify as patent illegality. This interpretation also does not go to the root of the matter as in the opinion of this Court, the final conclusions reached by the Sole Arbitrator are not erroneous.

18. The Appeal is accordingly dismissed and CM APPL.41855/2022 is also dismissed. There shall, however, be no Orders as to costs.

CM APPL. 41856/2022*[Application seeking condonation of delay]*



19. This is an Application seeking condonation of delay filed by the Appellant/Railway seeking condonation of delay of 65 days in filing of the present Appeal. The reasons as set forth in the Application is that the delay was caused due to time taken in departmental procedures obtaining legal opinions from Railway Advocates and other legal advisors and Ministry of Legal Affairs, Law and Justice and Ministry of Railways.

19.1 Reliance has been placed by the Appellant on the Judgment of the Supreme Court in the *In Re suo moto W.P.(C) 3/2020*⁷, to submit that for the purposes of limitation, the period up to 28.02.2022 has been excluded by the Supreme Court and a 90-day extension is granted from 01.03.2022 for limitation, which would expire on 29.05.2022.

20. An Appeal under Section 37 of the Act must be filed within a period of 60 days in terms of the provisions of Section 13(1A) of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 [hereinafter referred to as “Commercial Courts Act”].

20.1 The record shows that the present Appeal was filed on 19.09.2022. Thus, even the 90 days extension period as provided by the Supreme Court in the *In Re Suo Moto* case has been breached by the Appellant/Railways.

20.2 Learned Counsel for the Appellant/Railways contends that the delay in filing of the present Appeal, neither unintentional nor willful but due to the reasons as set forth in the present Application. Reliance is placed on a tabular chart filed by the Appellant/Railways setting forth the movement of the ‘file’ between various governmental bodies during the period from 07.02.2022 and 29.06.2022.

21. The Supreme Court in the case of *State of Maharashtra v. Borse*

⁷(2022) 3 SCC 117



Bros. Engineers & Contractors (P) Ltd.⁸ and ***Basawaraj V. Land Acquisition Officer***⁹, held that condonation of delay in filing an Appeal under Section 37 of the Act, beyond the period provided in the Act, may be granted only upon ‘*sufficient cause*’ shown by the party.

22. The Supreme Court in ***State of M.P. v. Bherulal***¹⁰, while relying on the judgment of the Supreme Court in ***Postmaster General and Others. Vs. Living Media India Limited and Another***¹¹ has categorically held that the law of limitation binds everybody including the Government and there is no separate statute of limitation provided for governmental Appeals. The ***Postmaster General*** case further states that delay cannot be mechanically condoned, in the absence of plausible and acceptable explanation, merely because the Government or a wing of the Government is a party.

23. However, in view of the fact that the Appeal has been dismissed, there is no requirement to adjudicate the present Application. Hence, the Application is closed.

TARA VITASTA GANJU, J
(JUDGE)

RAJIV SHAKDHER, J
(JUDGE)

OCTOBER 11, 2023
SA/ ha

⁸ (2021) 6 SCC 460

⁹ (2013) 14 SCC 81

¹⁰ (2020) 10 SCC 654

¹¹ (2012) 3 SCC 563