

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

% **Reserved on : 22nd February, 2023**
Pronounced on: 26th April, 2023

+ **O.M.P. (COMM) 480/2022 & I.A. 20348/2022**

GOVT OF N.C.T. OF DELHI Petitioner

Through: **Mr. Lalitaksh Joshi, Advocate**

versus

AFCONS INFRASTRUCTURE LTD. Respondent

Through: **Mr. Abhishek Birthray, Mr. Tanmay Nandi and Mr. Addem Ahmed, 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 "Arbitration Act") has been filed on behalf of the petitioner seeking the following reliefs:-

"a. Pass an order thereby setting aside/quashing the Impugned Arbitral Award dated 13.08.2022 passed by the Ld. Sole Arbitrator Shri Dinesh Kumar in the matter of arbitration between 'M/s Afcons Infrastructure Ltd. and GNCTD' and allow the counter claim put forth by the Petitioner before the Ld. Sole Arbitrator; or in the alternative

b. Set aside the Impugned Arbitral Award dated 13.08.2022 passed by the Ld. Sole Arbitrator Shri Dinesh Kumar in the

matter of arbitration between 'M/s Afcons Infrastructure Ltd. and GNCTD' and remand the matter for fresh adjudication as may be deemed fit by this Hon'ble Court in the facts and circumstances of the present case;

c. Pass an order thereby calling for the original arbitration records;

d. Pass any other order(s) that this Hon'ble Court may deem fit in the facts and circumstances of the present case."

BRIEF BACKGROUND

2. The following course of events have led to the filing of the instant matter:-

a. The petitioner is acting through the Public Works Department and its Executive Engineer, Flyover Project Division F-123 and Executive Engineer, Flyover Electrical Division F-114. The respondent is a company registered under the Companies Act, 1956 engaged *inter alia* in the business of construction and infrastructure projects.

b. The petitioner invited tender on 2nd December 2012 for the Project of '*construction elevated road over Barapulla Nallah starting from Sarai Kale Khan to Aurobindo Marg, near INA market, New Delhi - Phase II, from Jawaharlal Nehru Stadium to Aurobindo Marg with connection at Ring Road, Lala Lajpat Rai Marg and Aurobindo Marg*'. The respondent submitted its bid vide letter dated 28th December 2012 and after negotiation, the petitioner awarded the Project to the respondent vide Letter of

Acceptance dated 1st February 2013. An Agreement was also entered into by the parties and a letter dated 8th February 2013 was issued by the petitioner for commencement of the work. As per the Agreement, the stipulated dates of commencement and completion of the work were 23rd February 2013 and 22nd May 2015.

c. During the course of the Project, certain disputes arose between the parties due to the delay caused in completion of the Project and ultimately reference was made to arbitration by way of invoking Arbitration Clause of the General Conditions of Contract vide Letter dated 10th July 2020. The arbitration proceedings were initiated and the impugned Arbitral Award was passed on 13th August 2022 by the learned Arbitrator so appointed to adjudicate the disputes between the parties.

d. The petitioner is aggrieved by the Award dated 13th August 2022 to the extent of findings *qua* Claim No. 2, 3, 4, 6, 8, 10, 11 and Counter Claim No. 1.

SUBMISSIONS

On behalf of the Petitioner

3. The learned counsel for the petitioner submitted that the impugned Award passed by the learned Arbitrator is perverse, illegal, unreasonable and arbitrary and is hence liable to be set aside. The submissions made on behalf of the petitioner are twofold. Firstly, the learned counsel has impugned the claim-wise finding and secondly, the Arbitral Award has been challenged while referring to the legal principles under Section 34 of the Arbitration Act.

Submissions on claims

4. The learned counsel for the petitioner *qua* Claim No. 2 submitted as under:

a. The impugned arbitral award is patently illegal as it is barred by the provisions of Order II Rule 2 of the Code of Civil Procedure, 1908 (hereinafter “CPC”). The impugned Arbitral Award is perverse as the learned Arbitrator had allowed a time-barred claim which is evident from the indisputable fact that the respondent had already raised this claim vide its letter dated 28th June 2014, yet it did not seek recovery thereof within the stipulated period of 3 years.

b. The learned Arbitrator has travelled beyond the four corners of the Agreement by awarding Claim No. 2 (i), despite the same being a directly covered item under the Agreement. Item no. 1.3 of Schedule of Quantity (hereinafter “SOQ”) under the Agreement expressly provides for the rates to be inclusive of fabricating, providing and driving permanent MS liner. The learned Arbitrator has given no reasons for not adhering to Item no. 1.3 of SOQ. The rate, i.e., Rs. 8500/- per MT, arrived at by the learned Arbitrator is perverse in as much as no basis or reasoning has been forthcoming for the same.

c. The Claim No. 2(ii) is barred by the provision of Order II Rule 2 CPC in as much as the respondent was aggrieved by the letter dated 17th February 2015 issued by the petitioner, however, did not raise this claim before the earlier Arbitral Tribunal which

entered reference on 18th September 2017 nor did the respondent seek leave of the earlier Arbitral Tribunal to raise this claim at a later stage. For the same reason, this claim is also time barred.

d. The learned Arbitrator has given no reasons for travelling beyond the terms of the Agreement while granting Claim No. 2 (ii) as the Agreement under Schedule F stipulates that the rate for Road & Bridges work shall be as per MoRT&H specifications Item no. 2.4(i)(13), whereas the learned Arbitrator adopted the rate from DAR on the basis of a wholly inapplicable item.

e. The impugned Arbitral Award is perverse in as much as no reasoning or basis has been furnished by the learned Arbitrator or even the respondent while assessing the additional payment, other than using the expression “reasonable”.

5. *Qua* Claim No. 3, it has been submitted as follows:-

a. The learned Arbitrator has ignored the Minutes of 36th Coordination Meeting dated 14th October 2013 which show that the respondent had deployed only 2 nos. of piling rig at site and not 6 piling rigs as wrongly held by the learned Arbitrator solely on the basis of unilaterally executed monthly progress report by the respondent.

b. The learned Arbitrator has neither observed nor furnished reason for failure to observe the sequitur of letter dated 23rd December 2013 and 14th March 2014 issued by the petitioner, whereby, the use of DMC method was approved and it was also conveyed that cost adjustment would be levied for this change. In

view thereof, the petitioner approved the minus rate of Rs. 3850/- per meter strictly in the spirit of Clause 12 of the Agreement.

c. It was the responsibility of the respondent to carefully mobilize the machinery at site in terms of with Clause 2.21.3 and 2.21.2 of the Agreement. Due consideration is to be given to the site requirement at particular point of time, in view of the terms of the Agreement that the contractor shall deemed to have the full knowledge of the site and it shall be deemed that the contractor has to satisfy himself about the site condition.

d. The learned Arbitrator granted the entire amount sought by the respondent under this claim when a mere analysis of rate submitted by the respondent shows that the rates for using DMC System were frivolous as the said rates were much higher than those for using hydraulic piling rig, whereas the prevailing market rates show that the piling by using hydraulic rig is always costlier as compared to DMC rig being sophisticated and costly rig. Learned Arbitrator has not appreciated that the rate analysis submitted by the Respondent was incorrect and fabricated.

e. The learned Arbitrator perversely accepted the rates furnished by the Respondent based on alleged work order and without any reason brushed aside the rates approved by the petitioner on the basis of DSR which is evident from Para 13.5.6 of the impugned Arbitral Award, merely by unreasonably stating that DSR, MoRT&H, etc. is not applicable.

6. The learned counsel made the following submissions regarding Claim No 4:-

a. The learned Arbitrator arrived at a perverse finding that the petitioner ignored the understanding between the parties and initiated recovery vide its letter dated 13th August 2014, without mentioning the letter / Minutes of Meeting.

b. Learned Arbitrator did not fully appreciate the 36th Coordination Meeting dated 5th October 2013 whereby the petitioner allowed the change for conducting high strain dynamic load test in lieu of static load test subject to the condition of rate adjustment. Therefore, it is perverse for the learned Arbitrator to hold that the petitioner ignored an alleged understanding while proceeding with cost adjustment.

c. Learned Arbitrator granted the rates sought by the respondent without giving any reasons and ignoring a vital observation from the analysis of rates submitted by the respondent that the rate worked out for high strain dynamic load test is higher than the rate for vertical static load test on piles.

7. *Qua* Claim No. 6, the following submissions have been made:-

a. The learned Arbitrator has held the petitioner to be in breach of its contractual obligation and responsible for causing delay in completion of the works without arriving at a finding as to which action/inaction of the petitioner was a breach or caused delay.

b. The learned Arbitrator held that there was no bearing of suspension period upon the delay in overall completion of the work without furnishing any reasons or without calling for an expert report on delay analysis.

c. The learned Arbitrator has attributed the delay caused due to restriction imposed by Railways to the petitioner which is perverse on the face of record in as much as the petitioner has neither any control nor jurisdiction over the functioning and management of the Railways. In fact, while the petitioner falls under ambit of the Government of NCT of Delhi, the Railways come under the jurisdiction of Central Government. Therefore, delay by one cannot be attributed to the other. It is pointed out that reasonable extension of time was granted by the petitioner to the respondent without levy of compensation due to delay caused by railways as per the terms of the Agreement, however, no weightage has been attached to it by the learned Arbitrator.

d. The learned Arbitrator perversely expanded the obligation of the petitioner to arrange for physical shifting of existing services under Clause 3.21 of the Agreement to imply that the petitioner is responsible for the delay in permission for shifting of such services controlled by third parties. While doing so, the learned Arbitrator has completely ignored Clause 3.22 of the Agreement.

e. Learned Arbitrator ignored vital terms of the Agreement under the garb of following substantive law contrary to the Judgment passed by Hon'ble Supreme Court in ***Ramnath***

International Construction Pvt. Ltd. vs Union of India, (2007) 2 SCC 453.

f. The learned Arbitrator held the Clause 3.22 of the Agreement to be unenforceable despite the fact that Clause 3.22 does not completely outcast the contractor from claiming any relief in case of delay in removal/shifting of existing services but merely bars the relief of compensation and provides a reasonable/suitable extension of time in its place. There were hindrances beyond the control of the PWD that led to delay in work. Even some of them are *force majeure* events. All these hindrances are covered under Clause 3.22 of the Agreement which bars the respondent contractor from raising claim on account of delay resulting from any of the hindrances.

g. The learned Arbitrator granted damages for extended stay of the respondent i.e. prolongation of the Agreement for the entire extended period from 22nd February 2015 (stipulated date of completion) till 31st July 2018 (actual date of completion) despite the fact that damages for the period upto 15th February 2018 were already granted in the earlier round of arbitration vide Arbitral Award dated 5th February 2019, which stands accepted by the petitioner in view of no challenge.

h. The learned Arbitrator effectively accepted the submission of the petitioner in relation to double jeopardy in as much as the entire amount of Rs. 13 Crore claimed was granted in the earlier Arbitral Award dated 5th February 2019 for additional costs due to

prolongation of Agreement was set off while calculating the award under Claim No. 6. However, in so far as over lapping / supervening period for prolongation is concerned, the same was ignored. The learned Arbitrator merely recorded the number of days of delay without analysing the reason behind those delays and thereafter, proceeded to hold the petitioner liable for the entire delay without furnishing any reasons.

i. The learned Arbitrator furnished no reasons for either of the calculations of award made under Claim No. 6, both of which are contrary to the terms of the Agreement, defy logic and as such are perverse.

j. While calculating the final awarded amount under Claim No. 6, the learned Arbitrator, took mitigation measures at 30%, and balance overheads of 10% without furnishing any reasons. Despite failure of respondent to prove the alleged additional cost and despite the discrepancies in evidence of CW-1, i.e. the witness of the respondent, the learned Arbitrator granted a huge sum of alleged additional cost to the respondent.

8. Regarding Claim No. 8 it is submitted as under:-

a. The learned Arbitrator held the provisions for escalations to be selectively unenforceable in as much as it has been held in the impugned Arbitral Award that the escalation provision to the extent deprives the contractor of compensation for delay is unenforceable. It is submitted that the escalation Clause 10CC & 10CA does not deprive compensation to the contractor and merely stipulates that

index applicable at the stipulated date of completion or the prevailing index of the period under consideration, whichever is less, shall be applicable. Therefore, by holding that the escalation clause deprives the contractor of compensation for delay and as such unenforceable, the learned Arbitrator has travelled beyond the terms of the Agreement.

b. The learned Arbitrator has granted Claim No. 8 in favour of the respondent herein despite indisputable fact that the petitioner paid escalation upto 59th RA bill in accordance with the relevant contractual clause. The total amount awarded by the learned Arbitrator was Rs. 8,59,27,007/- which is not as per any ground and beyond the provision of Clause 10CA and 10CC of the Agreement.

c. The compensation on account of variation in the prices of steel/cement during extended period already stood paid by the petitioner to the respondent as per the formula specified in Clause 10CA & 10CC and therefore, the respondent's demand under Claim No. 8 was not maintainable.

9. The learned counsel for the petitioner made the following submissions regarding Claim No. 10, 11 and Counter Claim No. 1:

a. Tribunal did not allow entire amount sought by the respondent in the final bill under Claim No.1 and 2, yet granted interest at 10% with effect from 14th November 2019 (date of certification of final bill) on the erroneous ground that the respondent was deprived of using its own money inasmuch as, on a

demurrer, indisputably the amounts sought by the respondent were incorrect.

b. It is submitted that no reasons have been recorded for awarding *pendente lite* interest to the respondent, except a vague observation that the respondent's "own" money was blocked by the petitioner. It is submitted that this observation is nowhere supported with a corresponding finding that the petitioner illegally withheld monies payable to the respondent.

c. The learned Arbitrator did not allow entire amount sought by the respondent in the final bill under Claim No.6 and 8, yet granted interest at 10% with effect from 10th July 2020, i.e., the date of invocation of arbitration, on the erroneous ground that the respondent was deprived from using its own money.

d. No reasons are forthcoming for awarding future interest. Moreover, no reasons have been furnished for awarding future interest @12% which is highly unreasonable. The learned Arbitrator has erroneously granted costs to the respondent solely on the ground that most of the claims were decided in favour of the respondent and without any observation to the effect that the defence raised by the petitioner was sham, etc. In absence thereof, the awards towards costs are unreasonable and perverse.

Submissions on the legality of the impugned Award

10. While referring to ***Delhi Airport Metro Express Pvt Ltd. (2022) 1 SCC 131*** and ***Associate Builders vs. DDA (2015) 3 SCC 49***, it is submitted that the learned Arbitrator has not taken a judicial approach

while passing the impugned Award. Moreover, the impugned Award is against the public policy of India and the fundamental policy of India.

11. It is also stated that the impugned Award is against the basic notions of justice, morality so as to shock the conscience of the Court. Moreover, the findings in the impugned Award suffer from illegality which goes to the root of the matter. No reasons have been furnished by the Arbitrator to arrive at conclusions in the impugned Arbitral Award. In other words, the decision arrived at by the learned Arbitrator is *dehors* any factual evidence or provisions under the Agreement.

12. It is settled law that actual damage and loss has to be established to be claim the same and that requirement of proof cannot be dispensed with. It is settled law that under Section 74 of the Indian Contract Act, 1872, damage or loss caused is a mandatory ingredient to grant compensation. In the present case, it is possible to prove actual damage or loss, if incurred, and as such proof thereof cannot be dispensed with. No particulars or supporting documents or documentary evidence has been filed by the Claimant to establish actual loss under the Claim no.4. Reliance has been placed upon ***Kailash Nath Associates vs. DDA, (2015) 4 SCC 36.***

13. It is settled law that the arbitrator being a creature of an agreement, must operate within the four corners of the agreement and cannot travel beyond it. More particularly, he cannot award any amount which is ruled out or prohibited by the terms of the agreement. It is settled law that no claim certificate is valid and binding when issued without any protest or in absence of any communication to the same effect. Reliance has been

placed upon the judgment passed in *ANS Constructions vs. UOI, 2016 SCC Online Del 6304*.

14. Therefore, it is submitted that the impugned Award is liable to be set aside.

On behalf of the Respondent

15. *Per contra*, the learned counsel appearing on behalf of the respondent vehemently opposed the contentions raised in the instant petition as well as the submissions made on behalf of the petitioner and submitted that there is no illegality in the Award passed by the learned Arbitrator.

Submissions on claims

16. It is submitted regarding Claim No. 2 as under:-

a. Claim No. 2 relates to deviated (increased) quantities. Claim 2(i) was for additional amount towards additional quantities for providing, fabricating and driving permanent MS Liner. Claim 2(ii) was for additional amount towards additional quantities for dismantling of cement concrete crash barrier. The increase in quantity was not in dispute. The only dispute was with regard to the rate for such additional quantities.

b. The deviation statement prepared by the petitioner had undergone three revisions and the third revision was released by the petitioner only on 25th June 2019, i.e., 11 months after the stipulated date of actual completion of work.

c. After the completion of work, the respondent had submitted these claims as part of the final bill dated 26th December 2018. The said claims were denied by the petitioner while certifying the final bill on 14th November 2019.

d. In the above circumstances, the petitioner wrongfully contended that this claim is barred by Order II Rule 2 of the CPC as well as the Limitation Act. The petitioner's case is that the cause of action for these claims had arisen in 2014 and 2015 respectively, yet the respondent omitted to raise these claims before the earlier Tribunal, which entered reference on 18th September 2017. The petitioner is mistaken because the cause of action had arisen only on 14th November 2019 when these claims were rejected by the petitioner whereas the award in the previous 5 arbitral references was pronounced on 5th February 2019. The petitioner's contention that these claims are barred by Order II Rule 2 of the CPC is meritless. The learned Arbitrator considered all facts and then decided this issue in favour of the respondent.

e. The petitioner has also erred in contending that the claims of the respondent were time-barred. This issue has been dealt with by the learned Arbitrator, who has given cogent reasons as to the time when the dispute was crystallised for holding that the claims are well within the period of limitation.

f. The petitioner has further alleged that the learned Arbitrator has not provided reasons for the computation methods used and the rates allowed under various heads. The same is incorrect as is

evident from the detailed analysis provided by the learned Arbitrator at numerous points in the award.

17. *Qua* Claim No. 3, it is submitted as under:-

a. As per the Contract, the respondent was required to carry out piling work by using available hydraulically operated rotary-type integrated piling rigs, which was mobilized by the respondent and piling work was carried out using the same except in seven locations where deployment of hydraulic rig was not possible due to petitioner's failure to remove the site hindrances. The petitioner instructed the respondent to carry out piling work in affected locations by DMC Method using conventional rigs.

b. Since mobilization of conventional rig was additional work beyond the original scope, the respondent claimed additional amount. On the contrary, the petitioner alleged that conventional rig is less expensive as compared to hydraulic rig and therefore, deducted certain amounts at the rate of Rs. 8,350 per meter for using conventional type rigs. 23. In the above circumstances, the respondent made Claim No. 3 in two parts (i) claim for additional cost for mobilization of conventional rigs; and (ii) claim for refund of amount wrongfully deducted by the Petitioner.

c. The learned Arbitrator also held that "it is not a case of replacement but a case of supplement". Moreover, the learned Arbitrator held that the petitioner could not prove any cost-benefit to the respondent on account of mobilization of conventional piling rigs, which could be passed over to the petitioner by way of

negative deviation. The learned Arbitrator ultimately directed the petitioner to refund the amounts deducted while rejecting the respondent's claim for additional amount holding that the respondent could not properly support its claim for additional cost.

d. The petitioner wrongly asserted that the learned Arbitrator has omitted to appreciate evidence and to provide reasons for his decisions with regard to the claim relating to the recovery of the amount deducted towards the extra items utilised. The learned Arbitrator has considered the material placed before him and has given reasons for its findings.

e. The petitioner's contention that the minutes of the 36th Coordination Meeting dated 14th October 2013 show that the respondent had deployed only 2 piling rigs at site is incorrect. The learned Arbitrator had considered minutes of meeting dated 14th October 2013 as also monthly progress reports. The said meeting reflects the deployment for that particular time and not overall deployment during the relevant period. The monthly progress reports were submitted contemporaneously as per the requirement of contract and remain uncontroverted. The learned Arbitrator considered the evidence placed before it and returned a factual finding in favour of the respondent. The petitioner seeks to challenge the factual findings, which requires re-appreciation of evidence, which is barred by law to be considered at this stage of challenge under Section 34 of the Arbitration Act.

f. In so far as quantification of this claim is concerned, the petitioner's challenge to that extent is misconceived. The learned Arbitrator has not awarded any amount to the respondent for mobilization of conventional piling rigs as evident from para 13.5.6 and therefore, the averments made in the petition to the effect that learned Arbitrator has fully granted the amount sought by the respondent under this claim is wholly erroneously and incorrect.

18. Regarding Claim No. 4, it is submitted as under:-

a. The respondent was contractually required to conduct Static Load Test on piles, which are time consuming. Having regard to the delay in the project hitherto the parties had a discussion and high strain dynamic pile load test was proposed. During the 36th Coordination Meeting, the petitioner requested the respondent to give consent for cost adjustment as will be decided by their competent authority. In response, the respondent by letter dated 31st January 2014 submitted cost comparison between the Static Load Test and High Strain Dynamic Load Test. The respondent informed that the latter is costly but timesaving. Thereafter, by letter dated 29th April 2014 the respondent clarified to the petitioner that it was carrying out Dynamic Pile Load Test in lieu of Static Load Test with clear understanding that it will neither charge any additional amount nor will be made liable for any cost adjustment. The respondent was allowed to carry out the work without any objection but at a later date the petitioner by letter dated 13th August 2014 sanctioned a deduction of Rs. 2,18,228 per test, which

was revised to Rs.2,57,986 per test by letter dated 2nd September 2017.

b. In any event the matter of interpretation by the learned Arbitrator of the 36th Coordination Meeting falls exclusively within the domain of the learned Arbitrator and unless perverse on the face of it, the same cannot be interfered with. Even in cases where an Arbitrator takes a plausible view, the same cannot be substituted. Thus, no interference is warranted in this case.

c. The petitioner's challenge is based on erroneous assertions. The petitioner has wrongfully contended that evidence has not been considered and reasons have not been given by the Tribunal for the rates that have been allowed. A bare reading of the impugned Award will demonstrate that the petitioner's averment is without any merit as the learned Arbitrator has duly appreciated the evidence on the record and provided reasons for his decision.

19. Qua Claim No. 6, it is submitted as under:=-

a. Claim No. 6 was for compensation for extended stay. The contract period of 24 months was extended to 62 months for reasons solely attributable to the Petitioner. The petitioner had granted unconditional time extension for the entire extended period. The last extension was granted up to 31st July 2018 vide letter dated 24th October 2019.

b. The respondent had claimed compensation for financial loss suffered by it due to prolongation. It only sought reimbursement of actual expenses incurred by it and reflected in its book of accounts.

c. The learned Arbitrator after considering the facts and circumstances of the case and the material placed before it returned a factual finding in the favour of the respondent. There is no illegality or perversity in the said finding.

d. The petitioner seeks to challenge the factual findings relating to the cause of delay and the consequence. It is settled law that when the finding of an arbitrator on the cause of delay in completion of work is under challenge, the court cannot re-evaluate the evidence and look into the material placed before the arbitrator. Reliance has been placed upon *Delhi Development Authority v. M/s Eros Resorts and Hotels Limited* 2022 SCC OnLine Del 978. Yet, the petitioner requires this Court to re-evaluate the facts and evidence by way of the present petition.

e. The petitioner has itself admitted in its petition that the project could not be completed within the stipulated time for reasons not attributable to the respondent. The petitioner has admitted that hindrances and delay were caused due to shifting of water lines of the Delhi Jal Board, shifting of service and gas pipelines, delay in approval of design by railways, delay in approval from traffic police etc. In terms of the Contract, it was the contractual obligation of the petitioner to provide hindrance-free sites, which it failed to do; as such the learned Arbitrator has rightly accepted the claim for prolongation made by the respondent. In so far as the petitioner's reliance on "no damage clause" (Clause 3.22) is concerned, the learned Arbitrator after

considering the facts of the case and the legal precedence came to the conclusion that (i) the present case cuts an exception to Clause 3.22 of the Contract and (ii) Clause 3.22 is not enforceable in terms of the judgement in the case of *Simplex Concrete Piles vs. Union of India*, 2010 SCC OnLine Del 821.

f. It is denied that claim for prolongation up to 15th January 2018 was included in the previous arbitral reference. The claim in the previous arbitral reference was a different claim altogether. After considering the facts and circumstances of the case and documents on records, the tribunal has decided this issue in favour of the Respondent.

20. The learned counsel made following submissions regarding Claim No. 8:-

a. The Contract under clause 10CA and 10CC provides for escalation based on frozen indices. The respondent's claim before the learned Arbitrator was that wrongful loss has been caused to it on account of delay attributable to the petitioner. The respondent sought damages for the loss suffered by it on account of increase in price of labour and material. The petitioner has contended that the learned Arbitrator has erred in his interpretation of the contract and has in essence gone beyond the terms of the agreement. The petitioner's contention is entirely baseless.

b. Considering the facts and circumstances of the case the learned Arbitrator has held that the respondent is entitled to compensation and to restore its original position in terms of law.

The view taken by the learned learned Arbitrator is a plausible one. The learned Arbitrator has appreciated all the evidence and law cited before him and come to the conclusion that the Contract, to the extent it deprives the respondent of compensation, is unenforceable. He has discussed the legal basis on which this view has been taken by him. Thus, it warrants no interference under Section 34 of the Arbitration Act.

21. Regarding Claim No. 10, 11 and Counter Claim 11 it is submitted as follows:-

- a. The petitioner has also challenged the award of *pendent lite* and future interest at the rates of 10 and 12 per cent respectively. The learned Arbitrator has held that the respondent was wrongly deprived of its funds and is, therefore, entitled to 10 per cent *pendent lite* interest. The respondent claimed for interest at 18 per cent per annum, however, the learned Arbitrator has only awarded interest at 10 per cent. There is no perversity or illegality. No interference is warranted insofar as award of interest and cost are awarded by the learned Arbitrator.
- b. The learned Arbitrator has awarded a reasonable rate of 12 per cent per annum by way of future interest; the said rate is also reasonable more so since the eventuality of future interest arises only if the petitioner fails to abide by the award.

- c. The petitioner has failed to make out any case for interference. The petitioner is inviting this Court to sit in appeal to make factual enquiries and re-examine the evidence, which is impermissible in law and hence, the Petition is untenable.
- d. Lastly, having no valid ground to challenge the Impugned Award, the Petitioner now for the first time seeks to invalidate the appointment of the Sole Arbitrator.

Submissions on the legality of the impugned Award

22. It is submitted that the Award has been passed by the learned Arbitrator based on the material on the record before him and on interpretation of the Contract. It is well settled that findings of fact accorded by the learned Arbitrator and the interpretation taken by the learned Arbitrator on contract are not to be interfered with in proceedings under Section 34 of the Arbitration Act.

23. It is settled law that "judicial interference with the arbitral awards is limited to the grounds in Section 34" as per ***Delhi Airport Metro Express Private Limited v. DMRC (2022) 1 SCC 131***. The grounds enumerated in the said Section "does not entail a challenge to an arbitral award on merits" as per ***Ssangyong Engg. & Construction Co. Ltd v. NHAI (2019) 15 SCC 131***.

24. The scope of review under Section 34 is supervisory and not appellate. In this regard, it was held by the Hon'ble Supreme Court that "Arbitral Tribunal is a master of evidence and the findings of fact which are arrived at by the arbitrators on the basis of evidence on record are not

to be scrutinised as if the Court was sitting in appeal.” Reliance has been placed upon the judgment of *Maharashtra State Electricity Distribution Company Limited v. Datar Switchgear Limited* (2018) 2 SCC 133.

25. An award cannot be set-aside on the ground of patent illegality by "re-appreciation of evidence" or merely because of "erroneous application of law". Patently illegal should be illegality which goes to the root of the matter. Thus, contravention of law not linked to public policy or public interest is beyond the scope of the expression 'patent illegality'.

26. Construction of the terms of a contract is primarily for an arbitrator to decide and the Courts normally do not interfere with an award for taking a "plausible view".

27. Contrary to the aforesaid legal position, the petitioner's challenge to the Award is based on: (i) re-appreciation of evidence, and (ii) reinterpretation of contract, thus, falling outside the scope of Section 34 of the Arbitration Act.

28. It is further submitted that learned Arbitrator was appointed by the Chief Engineer of the petitioner. The respondent accepted the said appointment and both the parties submitted to the jurisdiction of the learned Arbitrator on their own volition. The petitioner never raised any objection as to the appointment of the learned Arbitrator or his jurisdiction during the pendency of the arbitration proceedings. Thus, objection as to the appointment of the Arbitrator stand waived.

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

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

ANALYSIS

31. The petitioner has approached this Court assailing the Arbitral Award dated 13th August 2022 under Section 34 of the Arbitration Act. The law regarding a challenge to an arbitral award under the Arbitration Act is no more *res integra*. The challenge to an award under Section 34 arising out of arbitration proceedings must satisfy the tests laid down by virtue of the provisions of the Arbitration Act as well as the law settled by way of pronouncements by the Hon'ble Supreme Court.

32. At the very outset, it is pertinent to reiterate the intent of the legislature while enacting the Arbitration Act. The expeditious and effective disposal of matters are most certainly considered the primary objectives of the enactment of the Arbitration Act. To fulfil the objective of introducing the Arbitration Act, it has been deemed necessary by the legislature as well as the Hon'ble Supreme Court to limit interference by the Courts in the process of arbitration, whether before, during or after the conclusion of the proceedings.

33. 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.

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

“16. As it is, the jurisdiction conferred on courts under Section 34 of the Arbitration Act is fairly narrow, when it comes to the scope of an appeal under Section 37 of the Arbitration Act, the jurisdiction of an appellate court in examining an order, setting aside or refusing to set aside an award, is all the more circumscribed. In MMTC Ltd. v. Vedanta Ltd. 5, the reasons for vesting such a limited jurisdiction on the High Court in exercise of powers under Section 34 of the Arbitration Act have been explained in the following words: (SCC pp. 166-67, para 11)

“11. As far as Section 34 is concerned, the position is well-settled by now that the Court does not sit in appeal over the arbitral award and may interfere on merits on the limited ground provided under Section 34(2)(b)(ii) i.e. if the award is against the public policy of India. As per the legal position clarified through decisions of this Court prior to the amendments to the 1996 Act in 2015, a violation of Indian public policy, in turn, includes a violation of the fundamental policy of Indian law, a violation of the interest of India, conflict with justice or morality, and the existence of patent illegality in the arbitral award. Additionally, the concept of the "fundamental policy of Indian law" would cover compliance with statutes and judicial precedents, adopting a judicial approach, compliance with the principles of natural justice, and Wednesbury⁶ 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.* 7, 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”.”

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

“28. The limited grounds available to Courts for annulment of arbitral awards are well known to legally trained minds. However, the difficulty arises in applying the well established principles for interference to the facts of each case that come up before the courts. There is a disturbing tendency of Courts of setting aside arbitral awards, after dissecting and reassessing factual aspects of the cases to come to a conclusion that the award needs intervention and thereafter, dubbing the award to be vitiated by either perversity or patent illegality, apart from the other grounds available for annulment of the award.”

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

37. Moreover, the Section 34 of the Arbitration Act also explicitly limits the grounds available with a party challenging an arbitral award. The relevant part of the provision is reproduced hereunder:-

“34. Application for setting aside arbitral award.—

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

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

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

(i) a party was under some incapacity, or

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

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

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award

which contains decisions on matters not submitted to arbitration may be set aside; or

arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

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

(b) the Court finds that—

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

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

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

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

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

(iii) it is in conflict with the most basic notions of morality or justice.

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

[(2A) An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside

by the Court, if the Court finds that the award is vitiated by patent illegality appearing on the face of the award: Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by reappreciation of evidence.] ...”

38. The contents of the provision clearly show that the intention of legislature while enacting the Arbitration Act, as well as while carrying out amendments to the same, was that there should be limited intervention of the Courts in arbitral proceedings, especially after the proceedings have been concluded and an Award thereto has been made by the concerned learned Arbitrator. Any claim brought forth a Court of law under Section 34 of the Arbitration Act shall be in accordance with the principle of the provisions laid down under the Arbitration Act as well as interpreted by the Hon’ble Supreme Court.

39. The words used in the provision are “*An arbitral award may be set aside by the Court only if*”, which signifies the intent of limiting the scope of interference by Courts in an Arbitral Award, passed after thorough procedure, involvement of parties, and appreciation of facts, evidence and law, “only” in the event of the circumstances delineated in the provision being met. The limited grounds which may invite the intervention and action thereupon by the Courts are explicitly laid down under the provision. What is to be seen by a Court exercising jurisdiction under Section 34 of the Arbitration Act is that an Award passed by an learned Arbitrator may only be set aside if it is patently illegal, against the public policy of India, based on no evidence and delineates no reason for passing the Award. Hence, this Court being bound by the jurisdictional limits shall also not examine or reappreciate evidence by acting as an

appellate court and shall limit itself to the findings of the learned Arbitrator.

40. The petitioner has invoked Section 34 of the Arbitration act and challenged the findings in the impugned Award. The claim-wise submissions have already been laid out in the section above and to adjudicate the grounds invoked against the Award, this Court shall delve into the observations and findings made in the impugned Award.

41. The learned counsel for the petitioner assailed the findings under Claim Nos. 2, 3, 4, 6, 8, 10 and 11 and Counter Claim No. 1. This Court deems it necessary to reiterate/reproduce the findings of the learned Arbitrator *qua* the claims challenged by the petitioner to evaluate whether the grounds as provided under Section 34 of the Arbitration Act are being met making the impugned Award liable to be set aside.

42. With reference to Claim No. 2, which pertained to payment against the deviation items the findings of the learned Arbitrator are reproduced to evaluate whether the grounds invoked against the Award are tenable to set aside the Award:-

Claim No. 2(i)

“11.5.7. I am thus convinced with the argument that the respondent within a reasonable time should have at least refuted the claim if not determined the rate. In the present case the respondent neither approved nor refuted the Claimant’s rate within the period of one month as specified in the Clause 12.2. of GCC. I have therefore no hesitation to hold that the Claimant is entitled to payment of the deviated quantity in dispute.

11.5.8. On merit, I have also compared the rate analyses of both, the claimant and the respondent and have taken a note that the Claimant has considered transportation charges from vesting yard to site, testing charges @2% and liner driving cost which the respondent did not consider. As regards to transportation charges, I have no hesitation to consider the transportation charges to shift the permanent liner after fabrication at casting yard to site. I am convinced that on account of space constraints at site due to ongoing traffic condition, it is not possible to fabricate liner at site.

11.5.9. Regarding driving of permanent liner, it is observed that as per working drawings, the permanent liner was to be driven up to 15 meter from the pile cut-off level whereas the temporary liner was to be driven up to 1.5 meter below ground level. I am therefore convinced to include the cost of driving permanent liner in the rate of the subject deviated item. Supporting documents for driving permanent liner is also on record. I also find that it is reasonable to include testing charged @2% of the material cost in the determination of subject rate of deviated item.

11.5.10. It is noted that while deriving a market rate always there is a scope of estimation and difference in opinion. Thus, minor variation of about 10% is always there which should be ignored.

11.5.11. I have taken note of the fact that the claimant did not give any set-off towards the cost of using temporary liner whereas, the respondent has considered @2% of the cost of permanent liner. More so, the claimant did not produce offer proper justification for not giving such set-off. I find that since SOQ item no. 1.2 and SOQ item No. 1.3 are related, set off for not using temporary liner should be applied. I therefore think that end of justice will be met if the claimant is paid an additional payment for the deviated quantity of 444.98 MT at the rate of ₹8,500/- per MT which works out to $444.98 \times 8,500/-$ i.e., equal to ₹37,82,330/-."

Claim No. 2(ii)

“12.5.2. The respondent vide letter dated 17.02.2015 determined the rate of the deviated quantity under Deviation Statement No. 2 (CD-1/155-160). The Deviation Statement No. 2 underwent another two revisions, and the third revision was only on 25.06.2019 (CD-10/2389) i.e., almost 11 months after actual completion of work. Claimant included the claim in the final bill dated 26.12.2018 but the respondent denied the payment while certifying the final bill dated 14.11.2019. I am therefore convinced that question of application of Limitation Act and Order II Rule 2 of CPC does not arise.

12.5.3. The Claimant cited the judgment in the case of Khetra Mohon Banargee, the Supreme Court and in the case of H.M. Serene v. State of Himachal Pradesh, the Himachal Pradesh High Court it was held that the Respondent within a reasonable time should at least refute the claim if not at all determine the rate. I have noted in the present case also the Respondent neither approved nor refuted the Claimant's rate within the period of one month as specified in Clause 12.2. of GCC. Thus, Clause 12 has not been followed properly by both the parties.

12.5.4. On merit, I have noted that for determination of the market rate for the deviated quantity of SOQ item no. 8.9, the Claimant had followed rate analysis of Item no. 15.59 of DAR 2010 (page 53, Annexure R-6) and the respondent followed rate analysis of item no 2.4.(ii)(B) of MORT&H Data Book (page 55, Annexure R-6). Schedule F of the Contract provides both the references for determination of market rate for deviated terms.

12.5.5. I have observed that item No. 15.59 of DAR 2010 id for demolishing Cement Concrete (C.C.)/ Reinforcement Cement Concrete (R.C.C.) work which in my view necesarrily include SOQ item 8.9 is for dismantling of RCC crash barrier. On the other hand, Item no. 2.4(ii)(B) of MORT&H Data Book is general in bature which include dismantling of masonry, woodwork, and steel work also along with dismantling of cement concrete.

I am therefore convinced with the claimant's contention to apply rate analysis of item no. 15.59 of DAR 2010 for determination for deviated quantity of subject SOQ item no. 8.9. The Claimant is therefore entitled for additional payment. But, while deriving market rates always there is scope of difference in opinion. I Assess that additional payment of at the rate of ₹ 650 per cum will be reasonable, thus, claimant is entitled to additional payment of 3471.94 x 650 i.e., ₹22,56,761/-."

43. While considering the Claim No. 2, the learned Arbitrator considered that the respondent neither approved nor refuted the Claimant's rate within the period of one month, which was specified in the Clause 12.2. of the GCC. Further, it was noted that the variation in the rates were minor and could have been ignored since there is always scope for variation while deriving the market rate. The learned Arbitrator also observed that the claimant, i.e., the respondent herein did not give any set-off towards the cost of using temporary liner and did not produce offer proper justification for not giving such set-off. Therefore, the claimant was found entitled to be paid an additional payment for the deviated quantity. Moreover, it is observed that the claimant provided three revisions for the deviations, which were neither approved nor refuted by the petitioner herein. Hence, by finding the respondent entitled for the payment against deviation, the learned Arbitrator awarded the Claim in favour of the respondent. For the same, the learned Arbitrator gave extensive reasoning while referring to the communications regarding deviation in rates provided in the Data Book, DAR 2010, and also while considering the scope of deviation in market rate.

44. Therefore, it cannot be said that the learned Arbitrator has not considered the submissions of the parties or the material on record.

45. *Qua* the Claim No. 3, by which the learned Arbitrator considered the claim for payment of boring *cast-in-situ* piles with conventional piling rig, the following observations were made:-

“13.5.2. I have taken note that in terms of clause 7.8.4 of the contract hydraulic integrated piling rig was to be used for carrying out piling works. From the documents on record, I have observed that in Ramp C, high tension electrical line was encountered which could not be shifted due to height restriction available hydraulic integrated piling rig could not be used for piling works of seven (7) locations.... The claimant vide letter dated 18.12.2013 (CD-1/81) intimated that conventional piling system using Direct Mud Circulation (DMC) was instructed to be used for the aforesaid locations.

13.5.4. The Claimant vide letter dated 15.04.2014 (CD-1/94) informed that no payment for executed quantity of piling works using DMC method was released by the respondent. The claimant did not agree with the cost adjustment proposal and vide letter dated 29.04.2014 (CD-1/96) intimated that available integrated rig could not be used and claimant is carrying additional expenditure on account of mobilization of additional DMC piling system and its slow rate of progress. The Claimant submitted that it would claim the additional expenditure in due course and requested to release payment of already executed quantity of 238.5 meter at SOQ rate and vide letter dated 22.11.2014 (CD1/112-130) submitted its detailed rate analysis.

13.5.6. To over the obstruction, the claimant was instructed to bring additional piling system. The claimant has made additional arrangement for carrying out 817 meter piling work at obstructed site despite adequate availability of

integrated piling rigs at site to carry out the job of 817 meter piling work at much lesser time. It is admitted position that conventional piling system by DMC method was used for construction of 7 locations of piles on account of obstructions and respondent could not prove any cost benefit to the claimant which could be passed over to the respondent by creating a deduction or minus item. Comparison of any standard rate analysis like DSR, MORT&H Data Book etc. Would not be applicable in the matter giving special facts and circumstance i.e., obstruction of height restriction at site. In absence of obstruction of height restriction, the claimant could have carried out the piling work by using available rotary hydraulic rig. In my considered opinion it is not a case of replacement but a case of supplement. I, therefore, held that the recovery made by the Respondent is wrongful and the claimant is at least entitled to release of the recovered payment on account of carrying out piling work using DMC method. I could have happened but, the Claimant could not properly support its claims for additional cost and hence I reject claim no. 3(i) of the Claimant. ”

46. The learned Arbitrator after making the above mentioned observations awarded a sum of Rs. 31,45,642/- to the claimant, while also rejecting the part of the claim. The findings in the Award observed that the respondent initiated negative extra item and also sanctioned a deduction vide its communications to the petitioner. It was further noted that the respondent as per its own convenience did not shift the high-tension electric line and thereafter, sought to take the advantage of its own convenience. A perusal of the findings as aforesaid reveals that the learned Arbitrator considered the facts and circumstances, the communications between the parties, the deductions made by the respondent in the standard rates.

47. The analysis drawn by the learned Arbitrator in the quoted paragraphs as well as the other findings in the impugned Award with respect of the Claim No. 3 were supported by elaborated reasoning, based on documents and contentions of the parties.

48. The petitioner has also assailed the findings in the impugned Award *qua* Claim No. 4 by which the learned Arbitrator adjudicated the claim for refund of the amount deducted towards the extra item for conducting the High Strain Dynamic Load test in lieu of the Vertical Static Load test on the working pile. The relevant portion under the claim is reproduced hereunder:-

“14.5.1. I find that the Claimant was carrying out SOQ item no. 1.2 for piling works and was also carrying out 2% routine static vertical load test. As static load test is time consuming, high strain dynamic pile load test was proposed for discussion and approval of the Consultant and the Respondent.

14.5.2. During the 36th Coordination meeting dated 05.10.2013, the matter of approval for conducting high strain dynamic load test in lieu of static load test was discussed with the consultants, M/s VKS and M/s CCPL. Further, the respondent requested the Claimant to give consent for cost adjustment as will be decided by the competent authority. Claimant while submitting cost comparison vide letter dated 31.01.2014 (CD-1/83), submitted that dynamic pile load test is although costly by as it is time saving no additional payment for conducting dynamic load test will be charged. Claimant vide letter dated 29.04.2014 (CD-1/97) categorically notified that “we are carrying out dynamic pile load test in lieu of static load test with clear understanding that neither we will be charging any additional payment nor we will be liable for any cost adjustment.”

14.5.3. I have observed that the Respondent ignoring the understanding initiated minus extra item vide letter dated 13.08.2014 (CD1/99). Respondent vide letter dated 17.02.2015 (CD1/148) sanctioned the deduction of ₹2,18,228/- per number. However, vide letter dated 22.09.2017 (CD1/207) respondent revised the rate to ₹2,57,986 per number and recovered the amount.

14.5.4. I have taken note of the fact that the claimant did not consent for any cost adjustment. On the other hand, the dynamic load tests were conducted by the Claimant with clear understanding that neither it would be charging any additional payment, nor it would be liable for any cost adjustment. The respondent never refuted such understanding but ultimately made the cost adjustment and recovered an amount of ₹15,47,916/- (₹2,57,986 per number for 6 nos.) ignoring the understanding and after the work was completed. Further the Respondent sought cost comparison before approval, the Claimant submitted the cost comparison vide letter dated 31.01.2014. The Respondent did not comment on the cost comparison but approved the change unconditionally without any cost adjustment. The deduction appeared to be based on unqualified assumptions of the Respondent. I therefore have no hesitation to hold the recovery made by the Respondent as unjustified without giving any weightage to the benefit of doing dynamic load test.

14.5.5. ... Under the facts and circumstance, Respondent could not also prove any cost benefit to the claimant which could be passed over to the respondent by creating a deduction or minus item. On this ground also, the recovery made by the Respondent is not justified particularly as the Respondent is also benefited by saving of time.

49. Based on the findings above, the learned Arbitrator awarded a sum of Rs. 15,47,916/- to the claimant. The learned Arbitrator considered the deficiencies on the part of the respondent despite the agreement that neither party would charge any additional payment for the dynamic load

tests. The learned Arbitrator considered, in entirety, the circumstances in the alternative testing. The deduction made by the petitioner was not found to be in accordance with the terms decided between the parties and hence, the respondent was found to be entitled for the sum of Rs. 15,47,916/-. This Court finds that Claim No. 4 was decided while examining the material before the learned Arbitrator and after hearing the parties at length on the challenge.

50. Challenge has also been brought before this Court regarding the findings of the Court regarding Claim No. 6 where the sum payable towards damages of extended stay on account of overhead charges and plant and equipment was adjudicated upon.

51. While coming to the conclusion under Claim No. 6, the learned Arbitrator referred extensively to the provisions under the Indian Contract Act, 1872, (hereinafter “Contract Act”) specifically Sections 51 to 54. It was noted that as per Section 52 of the Contract Act, reciprocal promises shall be performed in order of which the nature of transaction requires when the order in which the reciprocal promises to be performed is not expressly fixed by the contract. In the instant matter it was found that in light of said provision and the facts of the cases it was the duty of the respondent to perform its obligations and non-fulfilment amounted to a breach. The said obligations on the part of the respondent included handing over of possession of site, delivery of work drawings, issuance of necessary instruction for carrying out the work, non-interference with the progress of work and permitting the contractor to carry out the whole of the work.

52. The contract period for completion of work in the case at hand was of 24 months which was extended up to 66 months. There was a delay of 41 months and the learned Arbitrator examined whether the same was attributable to the respondent. After an elaborate and comprehensive appreciation of the facts, circumstances, contentions, terms of the contract and the stipulated therein, to this effect, the learned Arbitrator observed as under:-

“16.5.9. From the above analysis and examination of plethora of documents, I find that Work fronts were handed over in piecemeal manner with inordinate delay. The available work fronts were also not workable and full of hindrances. There were inordinate delays I supply of construction drawings and the drawings were not supplied in consonance with the programme. Substantial delay was observed in approval of design/drawings for flyover portion in the Railway land which respondent contended as third-party delay. I however do not find any merit in that argument.”

53. Referring to Clause 11 of the NIT, Clause 4.1.4 of the Scope of Work, Clause 3.5 of the Special Conditions of Contract, Clause 11 of the GCC, Clause 8.1 of the Particular Specification of Contract, the learned Arbitrator noted that the respondent was under obligation to make 90% of the site available at the time of award of the work, the work was to be carried out as per the designs/drawings finalized by the respondent, the contractor was not allowed to deviate from such designs, the respondent was to furnish one copy of contract document with specifications to the contractor and the work was to be carried out in accordance with the Good for Construction drawings. Accordingly, the learned Arbitrator held

that the respondent was liable for the delay caused in the work for the delay at the abovesaid stages.

54. While observing that the respondent was also liable for wrongful stoppage of work, the learned Arbitrator referred to ***K.N. Sathyapalan vs. State of Kerala, (2007) 13 SCC 43*** passed by the Hon'ble Supreme Court. It was found that the respondent failed to perform its duty to provide the necessary supports for immediate recommencement of work. The learned Arbitrator also referred to the Arbitral Award passed in the first round of arbitration between the parties while substantiating his findings. Finally, it was observed as under:-

“16.5.26. I have already taken the view that the delay of 882 days was attributable to the Respondent. The Respondent includes GNCTD, Delhi Police, Railways all other Central Government Departments, PSUs etc. which are part of UOI. No individual can be held responsible for delays of the project as it was the system as while is responsible and the Claimant cannot be held responsible for the same. This fact which is also accepted by the Respondent by granting unconditional time extension for the entire extended period. The last extension was granted up to 31.07.2018 vide letter dated 24.10.2019 (CD-6/1442). The Claimant is entitled to damages/compensation for the financial loss suffered by it due to prolongation of the contract.”

55. After holding so, the learned Arbitrator made careful deliberation towards the quantification of the claim and after recording extensive reasoning for the same, awarded the sum of Rs. 45,40,36,914/-. The learned Arbitrator appreciated all the expenses, compensations, damages, expenditure, costs incurred and after comprehensive corroboration arrived at the amount so awarded.

56. This Court, after perusal of the findings qua Claim No. 6, finds that there is no scope for interference in the same since the findings of the learned Arbitrator are based on elaborate reasoning which is based on thorough examination of the material on record.

57. Claim No. 8 was decided in reference to the sum payable against damages during extended stay on account of uncovered price escalation of reinforcement bars, labour, construction material. *Qua* Claim No. 8, the learned Arbitrator referred to the judgments of ***P.M. Paul vs. Union of India***, AIR 1989 SC 1034 and ***Delhi Jal Board vs. Subash Pipes Ltd.***, 2005 SCC OnLine Del 180.

58. It was further observed that the contract clauses which bar compensation for breach are unenforceable being contrary to the provisions under the Contract Act. The learned Arbitrator in his comprehensive findings regarding delay already observed that the petitioner was responsible for the delay caused in the work and accordingly, he found that on the account of delay and failure on the part of the petitioner for performance of its obligations and breach of contract, the petitioner was liable to pay the compensation for the losses suffered by the respondent.

59. The learned Arbitrator again referred to and appreciated all the relevant documents and pleadings including Office Memorandums, provisions of the contract, letters/communications between the parties to reach the conclusion and only thereafter, awarded the sum of Rs. 8,59,27,007/- to the respondent herein.

60. On the question of simple interest for the period of pre-reference, *pendente lite* and future from the date of the cause of action, which was raised under Claim No. 10, the learned Arbitrator observed as under:-

“20.5.1. It is also noticeable that the agreement does not expressly prohibits the payment of interest. Section 31(7) (a) of Arbitration and Conciliation Act also mandates inclusion of interest unless otherwise agreed by the parties for the period between date on which cause of action has arisen and the date on which award is made by the Arbitral Tribunal where award is for payment of money subject to decision of Hon’ble Tribunal in this regard. It is a settled law that Arbitrator appointed with or without intervention of the court, has jurisdiction to award interest, on the sums found due and payable, for the pre-reference period, in the absence of any specific stipulation or prohibition in the contract to claim or grant any such interest.

20.5.2. The claimant is a business entity and his money now being awarded by this tribunal was blocked for a considerable period and he was deprived of using his own money by the respondent for his business and to make further profit by circulation of money. Thus, it is considered appropriate that, the ends of justice will be met only if the interest is awarded to the claimant on his blocked capital.

20.5.3. So far as the rate of interest is concerned, this tribunal is fully convinced that the judgment being relied upon by the claimant to justify his demand of rate of interest as 15% is not applicable in the present case since in that case the principle of equity was applied when the rate of interest was provided under the contract.

20.5.4. Thus, I feel it appropriate to allow the rate of interest on the principle of equity as demanded by the claimant. The rate of interest provided under the contract under clause 10 B (ii) for mobilisation advance is 10%. But, at the same time the said amount if interest is to be recovered on the monthly basis (since intermediate bills are to be paid monthly). But it

is not so in the present case. Moreover, the mobilisation advance is a secured loan not unsecured loan. Also, the period of the agreement is also pre-fixed for 10% interest against mobilisation advance. Above all, the respondent in this case is the public authority and if he had not given the mobilisation to the claimant, the respondent was not expected to earn profit by using the said money in business like the claimant who is a business entity.

20.5.5. in view of the above findings. Accordingly, as per my assessment, I decide that it will be reasonable to allow the claimants a simple interest @10% per annum against this claim.”

61. After looking into the reasons given above by the learned Arbitrator, it is clear that he has taken into account the submissions made by the parties as well as the documents which were referred by them, and after considering them, has reached to the conclusion that the respondent herein was entitled for the interest. It is not the case that the conclusion or the Award by the learned Arbitrator was based on the case of no evidence and there are clear and certain findings on the aspect of grant of interest which are also supported by the reasoning.

62. Finally, the petitioner is aggrieved by the findings in the Claim No. 11 and the Counter Claim No. 1 wherein the cost of arbitration was discussed. The learned Arbitrator held as under:-

“21.4.1. After overall analyses of the record placed before this tribunal, it is found that the Claimants had to undergo arbitration for their claims which have been found payable to them. Although Claimant claims are found slightly exaggerated, some of them also found justified on merits. Accordingly, the claim of cost is also not unjustified. Therefore they are entitled to be compensated for the cost of arbitration.”

63. The learned Arbitrator after considering the entire findings made in the Award and referring to the judgment of this Court in *Rail Vikas Nigam vs. Simplex Infrastructure Limited*, 2020 SCC OnLine Del 2101 held the petitioner liable to pay a sum of Rs. 40,00,000/- towards the arbitrator's fee.

FINDINGS

64. The law, as elaborated above, is settled that there is limited scope when it comes to the jurisdiction of this Court under Section 34 of the Arbitration Act. The Courts, limiting themselves to examining the Award itself and not the facts of the case. A Court shall not conduct a roving enquiry into the facts and evidence of the matter and neither shall the Court sit in appeal against the Award of the Arbitrator.

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

66. There is an extent to the accountability put upon an Arbitrator while passing an Award. This is evident from the fact that with the enforcement of the Arbitration and Conciliation Act, 1996, an Arbitrator needs only to adhere to and fulfil the requirements under Section 31 of the Act. In addition to the requirements laid down under the provision, an arbitrator, although acting in accordance with the requirements of the Arbitration Act, need not act as a formal Court while adjudicating a

dispute and pass an Award which is detailed or speaking. The Hon'ble Supreme Court has reiterated that an Award which is not speaking shall be set aside by the Court only in exceptional cases. While considering a challenge to an Arbitral Award where private parties are involved, the Court need not examine the validity of the findings or the reasoning behind the findings given by an Arbitrator. The extent to which a Court may exercise supervisory powers in this respect is limited to examining whether the Award and the conclusion drawn therein is supported by findings and not whether the findings themselves are erroneous or sound.

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

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

“33 When the parties to the dispute insist upon reasons being given, the arbitrator is, as already observed earlier, under an obligation to give reasons. But there may be many arbitrations in which parties to the dispute may not relish the disclosure of the reasons for the awards. In the circumstances and particularly

having regard to the various reasons given by the Indian Law Commission for not recommending to the Government to introduce an amendment in the Act requiring the arbitrators to give reasons for their awards we feel that it may not be appropriate to take the view that all awards which do not contain reasons should either be remitted or set aside.”

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

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

“37. There is, however, one aspect of non-speaking awards in non-statutory arbitrations to which Government and governmental authorities are parties that compel attention. The trappings of a body which discharges judicial functions and is required to act in accordance with law with their concomitant obligations for reasoned decisions, are not attracted to a private adjudication of the nature of arbitration as the latter, as we have noticed earlier, is not supposed to exert the State's sovereign judicial power. But arbitral awards in disputes to which the State and its instrumentalities are parties affect public interest and the matter of the manner in which Government and its instrumentalities allow their interest to be affected by such arbitral adjudications involve larger questions of policy and public interest. Government and its instrumentalities cannot simply allow large financial interests of the State to be prejudicially affected by non-reviewable---except in the limited way allowed by

the statute-non-speaking arbitral awards. Indeed, this branch of the system of dispute resolution has, of late, acquired a certain degree of notoriety by the manner in which in many cases the financial interests of Government have come to suffer by awards which have raised eyebrows by doubts as to their rectitude and propriety. It will not be justifiable for Governments or their instrumentalities to enter into arbitration agreements which do not expressly stipulate the rendering of reasoned and speaking awards. Governments and their instrumentalities should, as a matter of policy and public interest-if not as a compulsion of law-ensure that wherever they enter into agreements for resolution of disputes by resort to private arbitrations, the requirement of speaking awards is expressly stipulated and ensured. It is for Governments and their instrumentalities to ensure in future this requirement as a matter of policy in the larger public interest. Any lapse in that behalf might lend itself to and perhaps justify, the legitimate criticism that Government failed to provide against possible prejudice to public interest.”

9. Reference may also be made to the Arbitration and Conciliation Act, 1996 which has repealed the Arbitration Act, 1940 and which seeks to achieve the twin objectives of obliging the Arbitral Tribunal to give reasons for its arbitral award and reducing the supervisory role of courts in arbitration proceedings. Section 31(3) of the said Act obliges the Arbitral Tribunal to state the reasons upon which it is based unless the parties have agreed that no reasons be given or the arbitral award is based on consent of the parties. There is, therefore, a paradigm shift in the legal position under the new Act which prescribes a uniform requirement for the arbitrators to give reasons except in the two situations mentioned above. The change in the legal approach towards arbitration as an alternative dispute resolution mechanism is perceptible both in regard to the requirement of giving reasons and the scope of interference

by the court with arbitral awards. While in regard to requirement of giving reasons the law has brought in dimensions not found under the old Act, the scope of interference appears to be shrinking in its amplitude, no matter judicial pronouncements at time appear to be heading towards a more expansive approach that may appear to some to be opening up areas for judicial review on newer grounds falling under the caption "public policy" appearing in Section 34 of the Act. We are referring to these developments for it is one of the well-known canons of interpretation of statutes that when an earlier enactment is truly ambiguous in that it is equally open to diverse meanings, the later enactment may in certain circumstances serve as the parliamentary exposition of the former.

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

68. 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. No argument or claim was left unheard by the learned Arbitrator which is evident from the 159-page Award.

69. As stated above, the learned Arbitrator 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.

70. The petitioner invoked the ground of patent illegality, however, the law has also been settled regarding the grounds under Section 34 of the Arbitration Act. In order to set aside an Award under Section 34 the petitioner must show that illegality which has been alleged goes to the root of the matter and is not an illegality of trivial nature. In failure of the same the impugned Award cannot be held to be against the public policy. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court. Such award is opposed to public policy and is required to be adjudged void. Reference in this regard is made to the judgment passed in *BCCI vs. Cricket Association & Ors.* (2015) 3 SCC 251 and *State of Chhattisgarh vs. Sal Udyog (P) Ltd.*, (2022) 2 SCC 275 by the Hon'ble Supreme Court.

CONCLUSION

71. The law which has been settled by the Hon'ble Supreme Court is that the scope of interference with an Arbitral Award under Section 34 of

the Arbitration Act is fairly limited and narrow. The Courts 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 after facts, circumstances, evidence and material before him.

72. To argue that the impugned Award before this Court is liable to be set aside in the instant petition, it has been submitted that the findings of the learned Arbitrator are patently illegal and against the fundamental policy of India. As stipulated by the aforementioned precedents, the words are not to be construed in their plain meaning, but the essence which to be appreciated while adjudicating a challenge under Section 34 of the Arbitration Act is that the illegalities or deficiencies are such that they are apparent on the face of record and/or shock the conscience of the Court and can in no manner be sustained. In the case at hand, the petitioner has not been able to show that the impugned Award suffers from such illegality that is apparent on the face of record and upholding the same would be against the law.

73. A perusal of the impugned award makes it evident that there is no patent illegality or error apparent on the face of 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, detailed, is not in contravention of fundamental policy of Indian law, and thus, there is no reason for interfering in the impugned Award.

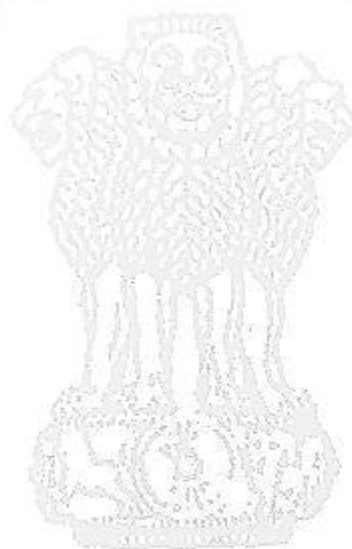
74. The petitioner has failed to show that any grounds that are stipulated under Section 34 of the Arbitration Act are being met. Therefore, the petition stands dismissed for being devoid of any merit.

75. Pending applications, if any, also stand disposed of.

76. The judgment be uploaded on the website forthwith.

(CHANDRA DHARI SINGH)
JUDGE

APRIL 26, 2023
gs/ms



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