



\* **IN THE HIGH COURT OF DELHI AT NEW DELHI**  
 % **Date of order : 24<sup>th</sup> May, 2023.**  
 + **O.M.P. (COMM.) 146/2017**

**DELHI TRANSCO LTD. (PREVIOUSLY DELHI ELECTRIC  
 SUPPLY UNDERTAKING DELHI VIDYUT BOARD**

..... Petitioner

Through: Mr.S.K.Singh, Ms.Pepakayala  
 Geetanjali and Ms.Vrinda Awasthi,  
 Advocates

versus

**KEC INTERNATIONAL LTD. (PREVIOUSLY SAE (INDIA)  
 LTD. & RPG TRANSMISSION LTD.)** ..... Respondent

Through: Ms.Payal Chandra, Advocate

**CORAM:**

**HON'BLE MR. JUSTICE CHANDRA DHARI SINGH**

### **ORDER**

#### **CHANDRA DHARI SINGH, J (Oral)**

1. The present petition under Section 34 of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as 'the Act, 1996') has been filed by the petitioner seeking the following reliefs:

*“(a) Set aside the impugned Award dated 29.01.2015 passed by the Ld. Arbitral Tribunal in the arbitration matter KEC International Ltd. and Delhi Transco Ltd.;  
 (b) Allow the counter claim made by the petitioner; and  
 (c) Pass such further and other orders as this Hon'ble Court in view of the facts and circumstances of this case may deem fit for which act of kindness the petitioners as in duty bound shall forever pray.”*

#### **FACTUAL MATRIX**

2. The petitioner is Delhi Transco Ltd., (DTL), a 100% owned public

**O.M.P (COMM.) 146/2017**

**Page 1 of 27**

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sector electricity transmission utility/undertaking of the Government of N.C.T. of Delhi, a company incorporated under the Companies Act, 1956 having its registered office at Shakti Sadan, Kotla Road, New Delhi. The petitioner is one of the successors of the Electricity Transmission Company of the erstwhile Delhi Vidyut Board which, in turn, succeeded Delhi Electricity Supply Undertaking.

3. The respondent is KEC International (KEC), a company incorporated under the Companies Act, 1956, having its head office at Building No. 9A, 8<sup>th</sup> Floor, Cyber City, Phase-III, Gurgaon - 122002, formerly known as SAE (India) Ltd. which subsequently became RPG Transmission Ltd. in March 1997.

4. The petitioner issued the Letter of Award (LOA) dated 21<sup>st</sup> August 1991 to the respondent for the Supply, Erection, Testing, and Commissioning of a 400KV D/C Transmission line from Mandaula to Bawana, Bawana to Bamnauli, and Bamnauli to Ballabgharh, with a total route length of 99 Kms with 268 towers at a cost of Rs. 26.15 crores.

5. The work commenced, pursuant to the said LOA dated 21<sup>st</sup> August 1991. Subsequently, the number of towers was increased to 320, whereas the route length was also changed to 113.602 km, and accordingly, the contract's value was also increased to Rs.33,28,34,1323.92.

6. The respondent vide letter dated 9<sup>th</sup> May, 2000 invoked Clause 25.2 of the General Conditions of Contract (GCC) for reasonable compensation amounting to INR 1,39,35,899 plus interest calculated @ 15% per annum for INR 58,60,372 for increased costs incurred between 1993 to 1999, owing to alleged delays by the petitioner.

7. The present Arbitral Proceedings were preceded by previous



Arbitral Proceedings commenced in 2000. The respondent filed their Statement of Claim on 30<sup>th</sup> May 2006 followed by the petitioner's Statement of Defence on 5<sup>th</sup> May 2007.

8. Learned Arbitral Tribunal passed the impugned Award on 29<sup>th</sup> January, 2015 in favour of the respondent.

9. On being aggrieved by the impugned Award dated 29<sup>th</sup> January 2015, the petitioner has approached the Court with the instant petition under Section 34 of the Act, 1996.

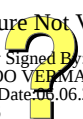
### **SUBMISSIONS**

#### **(On behalf of the petitioner)**

10. Learned counsel appearing on behalf of the petitioner submitted that the impugned Award dated 29<sup>th</sup> January 2015 is liable to be set aside on the grounds of patent illegality and being contrary to the public policy of India.

11. It is submitted that the decision of the learned Arbitral Tribunal is patently illegal and against the public policy with regards to the issues in respect of the limitation such as the claims raised are barred by limitation and the impugned Award in the absence of any cogent evidence, is contrary to the fundamental policy of Indian law and against the public interest.

12. Learned counsel appearing on behalf of the petitioner submitted that the claims of the respondent are barred by limitation and are not a continuous breach of action, as the respondent was well aware of the claims, which had been raised in the first letter dated 27<sup>th</sup> October, 1994 which shows that the respondent was well aware of its right in October 1994 but remained silent and issued the 2<sup>nd</sup> letter on 8<sup>th</sup> August, 1999.





13. It is further submitted that a conjoint reading of Section 3 and Article 55 of the Limitation Act, along with clause 30.4 of the GCC, would make it clear that the present claim is completely barred by limitation, as the notice under Section 21 of the Act, 1996, was issued only on 10<sup>th</sup> January, 2005.

14. It is submitted that the Arbitral Tribunal ignored the submission of the petitioner, i.e., Article 55 of the Limitation Act specified the time period within which the said claim can be filed. When the cause of action in case of a continuing breach of contract or case of a continuing tort arises, a fresh period of limitation begins to run at every moment during which the breach or tort as the case may continue.

15. It is submitted that the respondent had filed the claim in respect of the events from August 1993, when work was suspended by the respondent till December 1999 and again from January 2000 to November 2001, however, the notice invoking arbitration was issued only on 10<sup>th</sup> January, 2005.

16. Learned counsel appearing on behalf of the petitioner submitted that the issues relate to a period with effect from August 1993, even before the First Tribunal was constituted. However, the issue of late payments of progressive bills was an issue in the first arbitration that had been decided. The respondent ought to have raised the issue of the contract, over the run period, and ought to have claimed in the first arbitration proceedings, as the same was commenced on 19<sup>th</sup> April 1999 and concluded on 12<sup>th</sup> October 2009. The respondent chose to remain silent and had never brought the issue before the previous Tribunal, hence barred under Order II Rule 2 of CPC.



17. It is further submitted that in terms of Clause 30.4 of the GCC, the respondent was entitled to seek reference immediately after the expiry of the time, but the respondents have not sought an amendment of claims by incorporating additional claims based upon the above-referred letters.

18. Learned counsel appearing on behalf of the petitioner submitted that the learned Arbitral Tribunal has acted in contravention to the public policy principles, as applicable, under the Evidence Act. The respondent has failed to produce any of the audited accounts such as books of accounts, ledger, or annual tax return/balance sheet, rather chose to file only a letter dated 19<sup>th</sup> July 2003 of Chartered Accountant. The bare perusal of the letter dated 19<sup>th</sup> July 2003 of the Chartered Accountant (S.S. Kothari & Co.) states, *inter alia*, that:

*"We have verified the audited books of account, contract ledger and related documents in respect of contract No. 1264 (LOA No. XEN/400 KVITL - 11424 dated 21.8.91 of DVB) maintained by RPG Transmission Ltd. (formerly SAE India Ltd.) and certify that under the following heads, the Company has incurred a total sum of Rs. 1,96,01,545.00 (Rupees One Crore Ninety Six Lacs One Thousand Five Hundred Forty Five) in or in relation to the above contract during the period from August 1993 to December 1999 (77 months)."*

19. It is further submitted that the respondent's witness has categorically stated during the cross-examination in question no. 37 that:

*"Question No. 37: I put it to you that the claims raised not mentioned in any of the accounting records of the company w.e.f 1993 till date.  
Answer: As stated, it is not required to be shown."*

20. In view of the above, it is contested that the claims raised in the



arbitration, are completely unsubstantiated and are not borne out from any records, rather imaginary and therefore, deserve to be rejected on merits.

21. Learned counsel appearing on behalf of the petitioner also submitted that the respondent/claimant has raised the claims alleging that the petitioner is solely responsible for the delay and therefore, entitled to costs claimed. Whereas, the facts and records clearly show that there is a contributory delay, as the respondent/claimant has failed to fulfill their obligations in a time-bound manner and therefore, the petitioner cannot be burdened with all the imaginary unsubstantiated claims, which ought to have been rejected at the threshold.

**(On behalf of the respondent)**

22. Learned counsel appearing on behalf of the respondent submitted that the petitioner has failed to prove that the Award is patently illegal, where the illegality is such that goes to the root of the matter. Moreover, the petitioner has failed to see that this Court cannot sit in appeal over an arbitration award. Errors of fact, if any, cannot be corrected under Section 34 of the Act, 1996 and the Arbitrator has the last word on facts. The petitioner has failed to set forth any errors of fact in the Award.

23. Learned counsel appearing on behalf of the respondent relied upon catena of judgments to elucidate the Wednesbury Principle, and its application while determining whether an Award is liable to be set aside on grounds of perversity. Further, the impugned Award cannot be stated to be perverse or unreasonable on the anvil of the Wednesbury principle, and, thus, the same cannot be set aside.



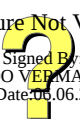
24. Learned counsel appearing on behalf of the respondent submitted that there were several breaches on the part of the claimant. Several of these breaches were continuing breaches of Contract. Thus, the breach of the obligation to supply complete stringing OSM was a continuing pre sequential obligation without which stringing could not be done by the respondent. This continuing breach of contract ceased when the petitioner made the complete supply of Stringing OSM in May 2003.

25. It is further submitted that the cause of action would arise only when the petitioner infringed the right of the respondent or threatened to infringe the right. It is submitted that when the petitioner declined to respond to the respondent's repeated reminders, the cause of action arose for the very first time, in 2003 and/or January 2004. Further, no cause of action for damages or compensation in relation to Clause 25.2 of accrued to the respondent before 2003-2004.

26. It is also submitted that the Arbitration proceedings commenced on 10<sup>th</sup> January, 2005, well within the limitation period. Thus, on merits of the case, the Arbitral Tribunal had unanimously declared that the petitioner/ respondent were in breach of contract and the breach of contract was a continuing one which ended in May 2003. The Arbitral Tribunal held that the Claims were not barred by limitation.

27. Learned counsel appearing on behalf of the respondent submitted that Order II Rule 2 of the CPC is confined to a Suit on a specific cause of action and to claims arising from that specific cause of action or to claims that could arise/from that specific action.

28. It is submitted that the cause of action for the previous arbitration was quite different from the cause of action in the present arbitration. It is





further submitted that, the cause of action for the present arbitration did not even exist at the commencement of the previous arbitration i.e. on 19<sup>th</sup> April, 1999.

29. Learned counsel appearing on behalf of the Respondent relied on ***Dolphin Drilling Ltd. v. ONGC Ltd. AIR 2010 SC 1296***, wherein the Supreme Court has held that fresh disputes arising from the same contract can be referred to separate arbitrations. The Respondent has further referred to another case, ***Telfair Shipping Corporation v. Lnersea Carriers S.A. [1983] 2 LLR 351*** where it was held:

*"The fact that the claim arises out of the same contract does not conclude the matter, for one contract can give rise to many causes of action. There has never been a rule which would oblige a party to bring forward all his causes of action in the same proceeding, even though they may arise out of the same contract or transaction."*

30. It is thus submitted that Order II Rule 2 of the CPC or any alleged principle arising therefrom or analogous to, may apply to arbitration proceedings but the same does not apply to the facts in the present case since the dispute in this case is a fresh dispute and a subsequent dispute arising for the first time, when put forward in these proceedings and the cause of action and the claim arising therefrom in arbitration is distinct, different, and subsequent. The Learned Arbitral Tribunal held in paragraph 53 of the Award that:

*"While we agree with the proposition that 'principles of constructive res judicata apply to arbitration proceedings', we don't agree that they apply in facts of the present case to bar these claims. "*





31. Learned counsel appearing on behalf of the respondent submitted that the respondent's counsel in his Cross Examination of J. Ganesh did not address any question on the veracity or sufficiency of the Certificates of the Chartered Accountants. In the Cross-Examination, Mr. J Ganesh deposed as under:

*"Q 85 Can you produce any such bills raised during the period 1993 to 2001?"*

*A. It is there in para.105, which clearly states that a claim of Rs.1,39,35,899.00 which was raised toward idle claim for the period August 1993 to December 1999 such a claim was acknowledged by the respondent and the claimant was asked to submit evidence.*

*Q 86 I put it to you that you claim on account of idle charge is unsupported by any evidence and having not been claimed during the relevant time and therefore unjustified and unsustainable. Is it correct?"*

*A. It is not correct to say that claim is not maintainable. The necessary supportings were furnished after the respondent asked for the audited statements."*

32. It is further submitted that the Certificates of Chartered Accountants, upon verification of the audited books of account, ledger, and related documents in respect of the Contract, regarding expenses incurred in relation to the Contract under certain heads in the period August 1993 to December 1999 (77 months) and from November 2000 to October 2001 (12 months). It is submitted that it is evident from the record that the petitioner accepted the Chartered Accountant's Certificate and did not raise any objection to the contents of the Certificate issued by the Chartered Accountant after a due audit of the Account Books of the



respondent. However, by their communication dated 30<sup>th</sup> January 2004 the petitioner informed the respondent: *"In this regard, it is to inform you that the claim raised by you is not tenable. There is no such provision in the letter of Award under reference."* It is submitted that the plea of the petitioner is completely illegal, arbitrary and untenable as discussed by the learned Arbitral Tribunal.

33. Learned counsel appearing on behalf of the respondent submitted that the petitioner did not give access to the respondent, and did not make agreed payments. The completion of the works by the respondent was delayed till the completion of the entire line in August 2003. There was a delay of 10 years beyond the initial agreed completion period of the works in August 1993. This delay clearly arose from the petitioner not giving Access to the Site in its entirety and from the petitioner making Short Payments and depriving the respondent of the use of money. The respondent was in no way responsible for non-Access to the Site or for Short Payments or any alleged "contributory delay" and none was ever alleged by the petitioner. As a result the respondent was ready to complete the project till the work to the stage of commissioning and thus, suffered increased costs. Therefore, it is submitted that there was no contributory delay on the part of the respondent Award holder and the petitioner is solely responsible for whatever delay was caused.

34. Learned counsel appearing on behalf of the respondent, based on the aforementioned submissions, reiterated that there is no substance in the petition purportedly under Section 34 of the Act, 1996. As is clear from the above there is neither infirmity in the Award made by the learned Arbitral Tribunal, nor is there any illegality, far from patent



illegality, or conflict with any public policy of India or any contravention of any fundamental policy of Indian law or any conflict with the basic notions of morality or justice.

### **FINDINGS AND ANALYSIS**

35. Heard learned counsel for the parties and perused the record. I have also perused the impugned arbitral Award as well as the entire arbitral record brought on record. I have also given thoughtful consideration to the submissions advanced by the parties.

36. The challenge to the impugned arbitral Award *inter alia* has been made on the ground that the impugned Award dated 29<sup>th</sup> January 2015, is patently illegal and liable to be set aside.

37. The petitioner has sought the indulgence of this Court under Section 34 of the Act, 1996 which is reproduced hereunder:

*“34. Application for setting aside arbitral impugned Award.—*

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

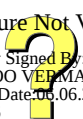
*(2) An arbitral impugned Award may be set aside by the Court only if—*

*(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 impugned 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 impugned 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 impugned Award is in conflict with the public policy of India.

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

- (i) the making of the impugned 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.]”

38. The law regarding a challenge to an arbitral Award under the Act,



1996 is no more a *res integra*. The challenge of an Award under Section 34 of the Act, 1996 arising out of Arbitration proceedings must satisfy the tests laid down by virtue of the provisions of the Act, 1996, and the law settled by way of pronouncements by the Hon'ble Supreme Court.

39. As far as Section 34 of the Act, 1996 is concerned, the position is now well-settled that the Court does not sit in appeal over the arbitral Award and may not interfere on merits. The Court may only interfere on the limited ground provided under Section 34 of the Act, 1996 i.e. if the Award is against the public policy of India. As per the legal position clarified through decisions of this Court that violation of Public Policy, in turn, includes a violation of the fundamental policy of Indian law, a violation of the interest of justice of India, conflict with justice or morality, and the existence of patent illegality in the arbitral Award. The concept of the fundamental policy of Indian law would cover compliance with statutes and judicial precedents, adopting a judicial approach, and compliance with the principles of natural justice and reasonableness.

40. It is pertinent to reiterate that the intention of the legislature while enacting the Act, 1996 was the expeditious and effective disposal of matters. The Act has been set forth with the intention to limit the interference of the courts in Arbitral Proceedings.

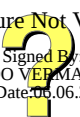
41. An unfettered scope of intervention into the functioning of the Arbitral Tribunal functioning would defeat the spirit and purpose of the Arbitration Act. Therefore, the Hon'ble Supreme Court has repeatedly reiterated that the Court's scope of intervention is limited in the cases of a challenge under Section 34.



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

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

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





*1996 Act, and contravention of the terms of the contract.”*

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

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

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

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

44. A reference to the above-stated pronouncements makes it clear that this Court while exercising its jurisdiction under Section 34 of the Act,



1996 shall not sit in appeal and/or re-examine the facts and evidence of the case.

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

46. It is crucial to elucidate on the *Wednesbury Principle* to understand the reasoning given by the learned Arbitral Tribunal while rendering the Award. This principle is also known as the principle of reasonableness. The actions of administrative authorities can be challenged based on reasonableness. Lord Green developed these principles in the famous case of *Associated Provincial Picture Houses Ltd v. Wednesbury Corporation* [1947] 2 All ER 680. The action of the administrative authorities would be declared unconstitutional if it meets the following circumstances:

1. If the action has no backing of the law;
2. There is no evidence to back the action of the authority;
3. The action is based on irrelevant and extraneous considerations;
4. The action is so outrageous and is so unreasonable that no reasonable person in their wildest of dreams would reach that particular conclusion.

47. Lord Diplock in *Council of Civil Service Unions and others v Minister for the Civil Service* [1984] 3 All ER 935 remarked that a decision will be struck down based on Wednesbury principles when it is so outrageous in its defiance of logic or of accepted moral standards that

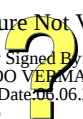


no sensible person who had applied his mind to the question to be decided could have arrived at it.

48. The Wednesbury principle in the field of Arbitration has been settled by the Supreme Court in **ONGC v. Western Geco International Ltd. (2014) 9 SCC 263**. The Court held that the Wednesbury principle would apply in the matter of setting aside an Award and further that the Wednesbury principle is treated as part of the fundamental policy of the law. The relevant paragraphs are reproduced hereinbelow:

*“39. No less important is the principle now recognised as a salutary juristic fundamental in administrative law that a decision which is perverse or so irrational that no reasonable person would have arrived at the same will not be sustained in a court of law. Perversity or irrationality of decisions is tested on the touchstone of the Wednesbury principle [Associated Provincial Picture Houses Ltd. v. Wednesbury Corpn., (1948) 1 KB 223 : (1947) 2 All ER 680 (CA)] of reasonableness. Decisions that fall short of the standards of reasonableness are open to challenge in a court of law often in the writ jurisdiction of the superior courts but no less in statutory processes wherever the same are available.*

*40. It is neither necessary nor proper for us to attempt an exhaustive enumeration of what would constitute the fundamental policy of Indian law nor is it possible to place the expression in the straitjacket of a definition. What is important in the context of the case at hand is that if on facts proved before them, the arbitrators fail to draw an inference which ought to have been drawn or if they have drawn an inference which is on the face of it, untenable resulting in miscarriage of justice, the adjudication even when made by an Arbitral Tribunal that enjoys considerable latitude and play at the joints in making awards will be open to challenge and may be cast away or modified depending upon whether the offending part is or is not severable from the rest.”*





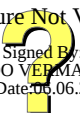
49. In order to properly adjudicate upon the instant petition and to analyse the degree of perversity or patent illegality in the impugned Award, the relevant portions of the Award are reproduced hereinbelow:

*“162. The Respondent's counsel has tried to argue before us that the Claimants have got payment of price variation during the entire period of extension which amounts to compensation. This is a simple mis-conception of the provision of price variation in a contract as per a given PV formulae. The price variation formulae takes care, of the rise/fall in unit rates of various items of work with the rise and/ or fall of different indices with reference to their values on a date prior to bid, in this case December, 1989 as discussed in para 11(iv) of this award. Price variation provision takes (partial) care of the rise in market prices and is payable even during the contractual completion period of a project work. This is in no way a compensation for the excess, extra or additional expenses and financial burden caused to and borne by a contractor during delayed period of completion of a contract work.*

*Similarly, writing of a letter by the Claimant for release of final bill/payment does not amount to any waiver of its right to lawful claims. The Respondent has not adduced any evidence to show that the Claimants had ever given any discharge certificate or waiver of their rights for any compensation payable under Law. As such the logic advanced by Respondent on this score does not stand to reasons and is not tenable and maintainable.*

*163. We have discussed in detail with facts and figures, the inordinate delay caused in completion of the entire contract work for which the Respondents happen to have been mainly and mostly responsible.*

*164. It can be inferred with a fair amount of common working knowledge and experience of contract execution that a contractor who had contracted to complete a work in a period 23 months shall definitely suffer losses and incur extra and excess financial expenses if he gets tied up for an*





*inordinately long duration of more than ten years beyond the specified period of completion. A contractor while making a response and offer against the invitation of tenders, would naturally base all his calculations of investment, expenses and other inputs of men and material considering period of completion as contained in the tender documents.*

*165. The nature of construction of Power Transmission Line is such that the site of work is not localised at one place. The work sites are as many as the number of towers when the foundations and tower erections are done it is spread over the entire length of the line. Each site i.e. tower location has to be visited and construction/erection work has to be undertaken at least three times with tools & tackles, men and materials and special equipments at the time of foundation, tower erection and stringing. For the stringing work to be done the work site becomes continuously spread over the entire length of the line, in this particular case to a long distance of about 113 kms through a variety of terrain and topography of land. The conductor and earthwire can be laid, spreading (which in technical terms is called 'paying out') can be done, and stringing and tensioning can be undertaken and performed when kilometers of area at a stretch is available without any obstruction. It is a very complex combination of various activities of complicated and intricate nature. The stringing work can be taken up only and only when all the Owner supplied materials and accessories, numbering about two dozen items, are made available simultaneously before planning to begin it.*

*Part materials and accessories cannot do. Also, this stringing work can be done between two angle or tension towers that too on 'anchoring' at both the ends of a particular stringing stretch for countering and balancing the tension on either side. The Learned Advocate for the Respondent tried to inform and impress upon us that there were occasions when a number of towers stood erected but the Contractor did not do the stringing work contributing to avoidable delay and cost. In fact, he quoted figures from periodical progress reports to demonstrate such situations.*



*However, as pointed out above, the stringing work of the Transmission Line could be taken up only when a continuous stretch of the line (i.e. work site) was made accessible and approachable and Conductor and earth wire with all the required accessories and fittings, to be supplied by the Owner, in adequate quantities, were available.*

*166. Due to elongation of the period of completion, various items of expenses had to increase burdening the claimant financially. For example erection insurance including storage insurance was to be taken by the contractor. In place of 23 months it had to cover a period of 12 years and more.*

*Similarly, the stores at various places had to be maintained and the contractor had to ensure the safe custody of owner's supplied materials and their own materials tools and tackles for a period of more than 12 years instead of 23 months.*

*As per clause 2.2 and clause 15 of SCC, "the contractor shall take delivery of owner supplied items listed in the technical specification, ensure their safe custody and shall incorporate the same in the transmission line"*

*"The contractor shall be responsible for the proper handling and storage of these materials from the time of their receipt up to the time of taking over of the completed line by the Engineer"*

*"Store yards provided by the contractor for stacking and storage of material shall be open for inspection by the owners as and when required. The cost of handling and storage shall be to contractor's account"*

*The contractor had to maintain its stores for the 1st section of the line i.e.Mandaula-Bawana for an extra period of about 54 months (September, 1993 to March, 1998).*

*For the second section i.e. Bawana-Bamnauli the stores had to be maintained for an extra period of about 88 months (September, 1993 to December, 2000).*

*For the third section i.e.Bamnauli-Ballabgarh this extra period was for about 120 months (September, 1993 to September, 2003).*

*These extra and additional expenses were incurred on hiring of store and store-yards, wages of store keepers and watch*



*and ward for safety of materials for elongated period beyond the specified contractual completion time.*

*Similarly the bank guarantees had to be kept alive for an additional period of more than ten years, causing extra expenditure on bank commission.*

*Insurance expenses were to be borne by the contractor. Maintaining insurance cover for an additional period of above ten years meant extra expenses.*

*Similar extra expenses on other items like extra expenses on travelling and conveyance, vehicle running and maintenance etc had to be incurred for the additional period of ten years and more.*

*The claimants have explained that the staff salary and related costs included the salary of Project Manager, Engineers and supervisors and staff professionally skilled for transmission line erection, stringing and associated works borne on their roll. It also included the amounts paid to such employees towards bonus, HRA, transportation and benefits like PF, ESI gratuity etc. payable to such regular employees placed at work site.*

*Wages and related costs represent the wages paid to the company's gang as well as the temporary working gangs engaged from time to time for execution of the work. These gangs were engaged mostly for tower erection and stringing and the expenses in respect of engagement of such gangs were debited as and when incurred i.e. at the time of engagement and dis-engagement as required.*

*167. We have very carefully examined and considered the items of claims put up by the Claimants and are of the opinion that the same are reasonably justified in view of the facts and circumstances as discussed earlier by us.*

*About the amounts payable under various heads we proceed as follows:*

*168. The Claimants, on demand by the Respondents for reasonable and demonstrable compensation for the delays caused by the owner, submitted their Chartered Accountants certificates as per the books of Accounts (for the project) as*



*below, vide their letter TEN/RD/C-1264 dated July 24, 2003 (pages 45-50 of statement of claims).....*

*XXXXXX*

*169. Interest on loss of Profit on account of delayed performance of the Contract*

*(a) The Claimants have argued that, had the contract work been completed within the specified contractual period of 23 months, they would have got the total payments by August, 1993 allowing about a month's time margin for making payment as per terms of the contract. They could have earned profit of 20% on this total payment of contract value by August, 1993 itself which could not be possible due to breach of contract and acts of omission on part of the Respondent. This was reasonably expected arising in usual course of matter and was within the contemplation of the parties at the time of LOA/Contract. This loss of profit is a reasonable expectation as per established norms, "taking into account the usages of the trade applicable to the transaction".*

*(b) In present case the loss. by reason of delay in the performance of contract by the respondent leading to delay in progressive payments and the final payment was clearly loss in the natural course of things.*

*The government notifications have allowed an amount equal to 20% of works cost as the amount for profit and overheads'. Following two notifications substantiate allowing 20% as profit and overheads.*

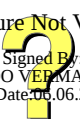
*(i) The Cost Committee Report of the Ministry of Irrigation and Power (Central Water and Power Commission) of the Government of India in a report in January 1956 set out compensation for the Contractor under two heads, overheads and profits.*

*"Contractor's Overhead and Profits :*

*For any job analysis the following two aspects are to be considered:*

*(a) Items charges to work*

*(b) Managerial charges*





*The items, and charges to works, are the preliminary and enabling works such as ramps, work sheds, water supply, electrification arrangements, plant foundation and erection etc. Whereas the managerial charges which constitute the contractor's overhead should include (i) Emoluments of managerial and clerical staff and (ii) General establishment. watch and ward, sanitation and mess etc. (iii) local conveyance (iv) Travelling expenses (v) Medical and Sanitation (vi) Social Welfare (vii) Office Expenses and (viii) Share of head office expenses. The interest of all types and Bank Guarantee Charges are considered direct charges and rightly debitable to work.*

*In addition to the contractor's overheads, a reasonable percentage of profit be allowed to the contractor. Since it is difficult to identify the overheads and profit precisely, both those together may be provided at 20% of the prime cost in the analysis of rates.*

*In the case of departmental work, it is expected that additional departmental charges, which may not include profit, would also be about 20%.*

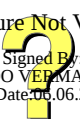
*(ii) The Central Water Commission of the Government of India in its Guidelines for River Valley Projects of March 1997 set out the Contractor's Overheads and Profit as under:*

*"Contractor's Overheads and Profit:*

*The contractor's overhead cost include (i) office expenses (ii) share of head office expenses (iii) Legal charges (iv) Travelling expenses (vii) social-Welfare (viii) Salaries of Managerial Staff etc. (ix) Publicity etc.*

*In addition to overhead expenses, the contractor has to be allowed certain amount towards his profits. This is usually expressed as a percentage of the total estimated cost of the job. This percentage varies from job to job but usually a 15% profit is anticipated by the contractors. On large jobs a lesser percentage of profit may be adequate.*

*Since it is difficult to identify overheads and profits precisely, both these together may be provided at 20% of the*





*prime cost/ or as per State Government norms in the analysis of rates.*

*In the case of departmental works it is expected that additional departmental charges would also be about 20%." Thus, it would appear that 20% is the norm.*

*(c) However, M/s KEC have not claimed and pressed for the loss of profit. What they have claimed is the interest on 20% of the amounts received beyond August, 1993 progressively till the final payment in February 2004. The interest has not been claimed on the amount which the contractor had received till August, 1993 (the contractually prescribed time of completion).*

*(d) An advance of 10% had already been received by the Claimants as per terms of payment already referred to by us earlier against equivalent amount of BGs. furnished by them. 10% (ten per centum) of the payment was to be retained by the owner from progressive work bills till expiry of the performance guaranty /warranty period for which necessary performance BG (Bank Guarantee) had been given. As such, 80% of the payment of the work value less payments already received till August, 1993, were made to the Contractor between September, 1993 and the date of final payment. The Claimants have claimed interest only for the period for which the respective payments were delayed. For example, if they received a payment of Rs. 1,00,000.00 in April, 1994, they have claimed interest on 20% of it this amount from September, 1993 to April, 1994 @20%. Similarly, if another subsequent payment was received by them in October, 1994, interest only on 20% of the same for the period from September, 1993 to October, 1994 only has been claimed. Thus they have put up a claim of interest only on the profit element of the delayed payments."*

50. A bare reading of the impugned Award makes it evident that according to the majority view of the learned Arbitral Tribunal, there were several breaches on the part of the claimant and that these were continuing breaches of Contract. The learned Arbitral Tribunal has taken



the books of accounts into consideration to grant the compensation of the delays as per the Statement of Claims.

51. It is evident that the learned Arbitral Tribunal considered the Clause 2.2 and 15 of the Special Conditions of Contract to properly adjudicate upon the claims and hold the concerned party responsible for the same.

52. The Award is observed to be well-reasoned and as the respondents have submitted, errors of facts, of any, cannot be corrected under Section 34 of the Act, 1996. The learned Arbitral Tribunal has the last word on the facts and thus, this Court may not sit in appeal and reappraise evidence to verify facts.

53. It is clear that the impugned Award cannot be stated to be perverse or unreasonable on the anvil of the Wednesbury principle, and, thus, the same cannot be set aside under Section 34 of the Act, 1996 in the absence of patent illegality or perversity on the face of the Award.

54. Thus, the Award has clearly been in consideration of the facts and submissions on record. The learned Arbitral Tribunal had considered the contractual clauses which adjudicating upon the claims laid down by the claimant.

55. Following the triple test of perversity, it is evident that the Arbitrator, being a creature of the contract, has rightfully stayed between the lines of the Contract to adjudicate the dispute. The facts of the matter have been harmoniously applied with the parallel reading of the Contractual clauses.

56. The learned Arbitral Tribunal has clearly adopted a judicial approach and adjudicated the dispute whilst keeping the principles of



jurisprudence and natural justice alive.

57. Thus, the learned Arbitral Tribunal has considered the positions of the parties and adjudicated the dispute in the most appropriate manner.

### **CONCLUSION**

58. In light of the facts, submissions, and contentions in the pleadings, this Court finds that the petitioner has failed to corroborate with evidence on how the Learned Arbitral Tribunal had erred in adjudicating the dispute.

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

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

61. The petitioner has failed to make out such a case and was unable to show that the Award is patently illegal on the face of it. A perusal of the impugned Award makes it evident that there is no patent illegality or error apparent on the face of the record. The learned Arbitral Tribunal has passed the impugned Award after considering all the relevant material placed before it during the arbitral proceedings. The Award is well-reasoned and is not in contravention of the fundamental policy of Indian



law, and thus there is no reason for interfering in the impugned Award.

62. The petitioner has failed to show that any grounds that are stipulated under Section 34 of the Act, 1996, are being met.

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

64. Accordingly, the instant petition stands dismissed along with pending applications, if any.

65. The order be uploaded on the website forthwith.

**CHANDRA DHARI SINGH, J**

**MAY 24, 2023**

Sv/AS

*Click here to check the corrigendum, if any*

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