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

RESERVED ON – 30.04.2024.

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PRONOUNCED ON – 28.05.2024.

+ O.M.P. (COMM) 418/2023, I.A. 19792/2023
MANIPAL HOSPITALS (DWARKA) PRIVATE LIMITED

..... Petitioner

Through: Mr. Sameer Rohtagi, Mr. Namit Suri,
Ms. Purnima Singh, Mr. Arjun
Kaushal, Mr. Kartikey Singh, Advs.

versus

DR SANJEEV BAGAI

..... Respondent

Through: Mr. Arun Bhardwaj, Sr. Adv. with
Mr. Vivek Sibal, Sr. Adv. with Mr.
Rahul Sharma, Ms. Anvita Mehrotra,
Mr. Shubham Shekhar, Ms. Narayani
K. Sibal, Mr. Ayush Bhatia, Mr.
Karan Bhardwaj, Advs.

CORAM:

HON'BLE MR. JUSTICE DINESH KUMAR SHARMA

J U D G M E N T

DINESH KUMAR SHARMA,J.:

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(A) FACTUAL MATRIX

1. The present petition has been filed under Section 34 of the Arbitration and Conciliation Act for setting aside of an Arbitration Award dated 24.06.2023 passed in ARB. P. 240/2019 titled as “Sanjeev Bagai vs. Manipal Hospitals (Dwarka) Private Limited” by the learned Sole Arbitrator.
2. The petitioner has challenged the said impugned award stating to be the same in contravention of the fundamental policy of Indian law and in brazen violation of the law on specific performance of employment contract, law on damages, etc.
3. The facts in brief are that the parties had entered into Key Personnel Management Agreement dated 26.02.2014 (“hereinafter referred to as "Agreement") which was subsequently amended on 15.03.2016 by an amendment agreement. As per the agreement the Respondent / Claimant was appointed as full time director and Vice Chairman in the hospital operated and managed by the Petitioner. Certain disputes arose between the Parties which led to the respondent/claimant being terminated by the Petitioner on 11.04.2019. This lead to the invocation of the Arbitration.
4. The respondent/claimant filed its statement of claim inter alia claiming unpaid salary dues for the unpaid salary dues for the unexpired lock-in period of 7 years and terminal benefits in terms of Clause1 Schedule 2 Part A and Clause 5, Schedule 2 Part A. The total claim amount as sought for by the respondent/claimant was Rs.44,94,17,020/- along with interest.
5. Learned Arbitrator framed eleven issues which are as under:



“1. Whether the subject matter of the present arbitration is not an arbitrable dispute on the grounds alleged by the respondent? OPR

2. Whether the Respondent has committed any breach of the Agreement dated 26/02/2014 as amended by the Amendment Agreement dated 15/03/2016? OPC

3. Whether the employment of the Claimant was illegally terminated by the Respondent and such termination was not in accordance with the Agreement dated 26/02/20 14? OPC

4. Whether the Claimant is entitled to an amount of 19,94,17,020/- towards compensation? OPC

5. Whether the Claimant is entitled to an amount of ₹15,00,00,000/- towards loss of terminal benefits? OPC

6. Whether the Claimant is entitled to an amount of ₹10,00,00,000/- on account of loss of reputation, harassment and opportunity loss? OPC

7. Whether the Claimant is entitled to interest as claimed at the rate of 18% per annum from 01/05/2019 till the date of realisation? OPC

8. Whether the Respondent/Counter-claimant is entitled to 11,47,20,833/- as damages towards remuneration paid? OPD

9. Whether the Respondent/Counter-claimant is entitled to 2,07,45,389/- as damages towards the loss of business opportunity? OPD

10. Whether the Respondent/Counter-claimant is entitled to ₹1,40,00,000 as damages towards loss of reputation and goodwill? OPD

11. Whether the parties or any of them are entitled to costs and, if so, to what extent? onus on parties.”



6. The perusal of the award indicate that issue number 1 was not pressed by the claimant and therefore was given up by the respondent.
7. Issue number 2 and 3 were decided in favour of the claimant holding inter alia that the petitioner had committed breach of the agreement dated 26.02.2014 as amended by the agreement dated 15.03.2016. It was further inter alia held that the employment of the claimant was illegally terminated by the respondent and such termination was not in accordance with the Agreement dated 26.02.2014.
8. Learned Arbitrator also answered issue number 4 inter alia holding that the claimant is entitled to an amount of Rs 16,02,01,966/- towards compensation (besides the component of interest which was considered under Issue 7). Learned Arbitrator also answered issue number 5 by inter alia holding that the respondent/claimant is entitled to an amount of Rs.15,00,00,000/-towards loss of terminal benefits.
9. Issue number 6 was decided against the respondent/claimant and it was inter alia held that the respondent/claimant is not entitled to the amount of Rs 10 crore or any part thereof on account of alleged loss of reputation, harassment, and opportunity loss.
10. The respondent/claimant was also awarded the interest @ 12% per annum from the due dates of the monthly payments till actual payment. The counter claims of the petitioner were dismissed while answering issue numbers 8, 9 and 10.
11. Learned Arbitration also awarded cost to the respondent/claimant to the extent of Rs. Rs 88,88,360/-. It was further inter alia held that if the petitioner fails to pay the cost awarded within thirty days, it shall be liable to pay the same with simple interest@8% per annum from the



date of the award till payment.

12. The petitioner has challenged the impugned award on the ground that the respondent/claimant sought specific performance of the agreement which was per se determinable in nature and therefore incapable of being specifically performed in view of Section 14 of the Specific Relief Act, 1963.
13. The petitioner has also challenged the impugned award on the ground that the learned Arbitrator by granting the entire compensation for the remaining lock-in period and terminal benefits in effect specifically enforced a clause in the contract by ignoring the settled principles of law which govern agreements of such nature, wherein, it has to be specifically demonstrated by a party by leading evidence seeking to specifically enforce a "lock-in" clause or terminal benefit clause that the same was a genuine pre-estimate of damages and therefore capable of being specifically enforced and granted. Learned counsel for the petitioner submitted that there was no material on record to demonstrate that the compensation for the entire lock-in period of 7 years was a genuine pre-estimate of damages.
14. The petitioner submitted that the respondent/claimant was required to plead facts and circumstances to establish that the Clause in a contract relating to lock-in period was a genuine pre-estimate of damages which the party would have suffered in case of premature exit during the lock-in period. It was further submitted that the learned Arbitrator awarded the amount relating to issue number 4 without any pleading or the material on the record. It has been submitted that the learned Arbitrator effectively granted liquidated damages without proof or quantification



of loss.

15. The petitioner further submitted that only reasonable compensation could have been awarded in absence of the material on the record. The award of liquidated damages or the amount fixed in the contract for breach of contract is penal in nature. The petitioner submitted that the amount fixed in the contract is the ceiling and not the actual amount which a party complaining of breach becomes automatically entitled to. It has been submitted that the learned Arbitrator awarded compensation for the lock-in period of 7 years simply for the reason that it was the agreed compensation between the parties and failed to consider the contours of Section 74 of the Indian Contract Act, 1872 and the principles applicable for granting the award of damages for breach of contract.
16. The petitioner further submitted that the respondent/claimant was required to prove by way of positive evidence on the record that he was not gainfully employed after the termination. It has been submitted that the reliance placed on *D.C.M. Limited v. Mahabir Singh Rana*¹ by the learned Arbitrator is misplaced as the validity of the aforesaid judgement has been questioned by this Court in *Ge Capital Transportation Financial Services Ltd. Vs Shri Tarun Bhargava* Judgment dated 20.03.2012 passed in RFA No.294/2004.
17. The petitioner further submitted that the findings of the learned Arbitrator are mutually contradictory as the learned Arbitrator on one hand holds that such Agreements are not readily available; such alternative employment did not present itself to the respondent; such

¹2009 SCC OnLine Del



employments were extremely rare by their very nature; no alternative employment existed. However on the other hand while deciding Issue number 6 inter alia held that the respondent has not produced any cogent evidence of any loss of opportunity, thereby declining respondent's claim of Rs.10,00,00,000/- towards loss of reputation, harassment and opportunity loss.

18. The petitioner submitted that the respondent/claimant was required to prove his claim by way of positive evidence. It has further been submitted that the impugned award failed to consider that the annual compensation package of the respondent/claimant of Rs. 3 Crores was an all-inclusive package for the services rendered at the Petitioner Hospital and that the premature termination allowed the Respondent to offer his services elsewhere, which in turn could have enabled the Respondent to mitigate his losses and therefore to specifically enforce clause 6.1 read with Clause A PART B of Schedule I of the Agreements is contrary to the law on mitigation of damages.
19. The petitioner submitted that the respondent/claimant was free to continue his private practice with simultaneously offering his services under the said Agreements and thus after premature termination the respondent was free to dedicate and channelize his efforts solely towards his private practice and thereby ensuring much more professional and financial gains than what the respondent/claimant would have achieved had he simultaneously carried on with his private practice alongwith offering services to the Petitioner Hospital under the said Agreements. It has been submitted that specifically enforcing clause 6.1 read with Clause a PART B of Schedule I is totally



erroneous.

20. The petitioner further submitted that the learned Arbitrator erred in granting Terminal Benefits of Rs.15,00,00,000/- as the said finding is contrary to terms and conditions of the Agreement more particularly Clause 4.2 of the Agreement read with paragraph 5 of Part A of Schedule 2. The petitioner submitted that the respondent/claimant did not fulfill the term of 7 years therefore he was not entitled for the terminal benefit. It has been submitted that the combined reading of Clause 4.2 and Clause 5 demonstrates that grant of terminal benefits were intrinsically intertwined and interlinked with the years of service rendered by the respondent. It has been submitted that the respondent having only served for less than 3 years cannot be held entitled to the terminal benefits to the tune of Rs.15,00,00,000/-.
21. The petitioner submitted that the learned Arbitrator after granting compensation for the entire lock-in period to the tune of Rs.16,02,01,966/-, could not have granted Rs.15,00,00,000/- to the Respondent as terminal benefits. It has been submitted that the award of interest is also totally illegal.
22. The petitioner has also challenged the impugned award on the ground of “Patent Illegality”. It has been submitted that the evidence of the petitioner regarding the original letter dated 01.06.2013 has not been dealt with nor the arguments of the petitioner were taken into account. The petitioner submitted that the finding of the learned Arbitrator regarding invocation of Clause 6.2(b) of the Agreement by the respondent while terminating the Agreement is erroneous. It has been submitted that use of the word “Conviction” in clause 6.2(b) would



have to be read as a conclusive finding by some authority and not necessarily by a court of law. In this regard, attention has also been invited to the Clauses 6.2(a) and 6.2(d). The petitioner submitted that the learned Arbitrator has also not taken into account the evidence of the petitioner with regard to non-adherence by the respondent to the mandatory protocols for administering admission to the Petitioner's Hospital. Similarly, the Expert Report has merely been brushed aside.

(B) SUBMISSIONS OF PETITIONER

23. Sh. Sameer Rohtagi, learned counsel for the petitioner asserted that the learned Arbitral Tribunal has wrongly directed the payment of the entire compensation for the remaining lock-in period and terminal benefits by specifically enforcing Clause 6.1 (read with PART B of Schedule I) and Clause 4.2 (read with para 5 of Part A of schedule 2), of the said Agreements by ignoring the settled principles of law which govern agreements of such nature, wherein, it has to be specifically demonstrated by a party by leading evidence seeking to specifically enforce a “lock-in” clause or terminal benefit clause that the same was a genuine pre-estimate of damages and therefore capable of being specifically enforced.
24. Sh. Sameer Rohtagi, learned counsel for the petitioner emphatically asserted that in the absence of any pleading showing as to how could the claimant claim the compensation for the entire lock-in period of 7 years to be a genuine pre-estimate of loss. Learned counsel submitted that the learned Arbitrator had erroneously decided Issue No. 4 in favour of the claimant granting him compensation for the entire lock-in



period. It has been submitted that the learned Arbitrator granted liquidated damages without proof of quantification of loss. Learned counsel for the petitioner submitted that liquidated damages or the amount fixed in the contract for breach of contract is penal in nature and is the ceiling and not the actual amount which a party complaining of breach becomes automatically entitled to.

25. Sh. Sameer Rohtagi, learned counsel for the petitioner submitted that an amount of Rs. 15 crores was sought by the Respondent towards loss of terminal benefits as a direct consequence of the alleged illegal termination of the said Agreements and the Impugned Award granted the aforesaid amount as loss of the payout amount which is the direct result of alleged wrongful and illegal termination. Learned counsel for the petitioner submitted that once the amount of Rs.15 crores is sought by the respondent as terminal benefits for the loss suffered on account of alleged illegal termination, it was incumbent upon him to prove the said loss by leading cogent and material evidence of the actual loss suffered by it.
26. Learned counsel for the petitioner submitted that petitioner has taken a specific plea with regard to whether the payment of salary for the remaining lock-in period can specifically be enforced without proof of loss. It has been submitted that the learned Arbitrator awarded the amount assuming that the amount so referred in the said clauses is the actual loss which the respondent has suffered without there being a shred of evidence produced by the respondent to demonstrate said loss. Learned counsel for the petitioner submitted that it was for the respondent to prove that he had availed all possible opportunities to



mitigate the loss and despite such steps he has suffered actual losses. It has been submitted that no evidence has been led by the respondent to demonstrate alleged future prospects and/or employment opportunities and the respondent could not avail those opportunities due to damage to his reputation.

27. Sh. Sameer Rohtagi, learned counsel for the petitioner submitted that it is settled preposition that the loss suffered must be proved by way of evidence by the party which alleges loss and whether the contract contains a clause of liquidated damages or not, the same will not absolve the party I.e., claiming loss from leading credible evidence to prove the same.
28. Sh. Sameer Rohtagi, learned counsel for the petitioner further submitted that only reasonable compensation can be awarded to a party who has allegedly suffered loss. It has further been submitted that the presence of a “lock-in” clause does not alter the legal position. Learned counsel for the petitioner submitted that a clause of liquidated damages contained in a contract is presumed to be penal in nature and to be regarded as the ceiling and not the actual amount which a party complaining of breach becomes automatically entitled to. Learned counsel for the petitioner submitted that the Impugned Award is in clear violation of Section 74 of the Indian Contract Act, 1872.
29. Sh. Sameer Rohtagi, learned counsel for the petitioner further submitted that the learned Arbitral Tribunal has erroneously awarded the entire amount of 7 years lock-in period despite the respondent/claimant who only served for 3 years. Learned counsel for the petitioner submitted that the impugned award suffers from severe



and patent illegality as it is based on completely incorrect legal principles pertaining to quantification and grant of loss.

30. Learned counsel for the petitioner invited the attention of the court to para-159 and 160 of the Impugned Award to show that the learned Arbitral Tribunal has proceeded on an erroneous presumption that the respondent/claimant has to be necessarily compensated for the entire remainder of the lock-in period of 7 years and that he has to be put in a position as if the Agreement had not been terminated and worked itself out over the entire course of 7 years. It has been submitted that the Award has resulted in a windfall gain in favour of the respondent/claimant even though no loss has been pleaded or proved by the respondent/claimant.
31. Sh. Sameer Rohtagi, learned counsel for the petitioner further submitted that the respondent/claimant did not lead any evidence that he was unable to seek a similar gainful employment. Learned counsel submitted that the learned Tribunal in para 165 of the impugned award has erroneously held that no duty can be casted upon the respondent / claimant to claim entitlement to damages by first establishing that he had made efforts to obtain alternative employment to mitigate the damages.
32. Sh. Sameer Rohtagi, learned counsel for the petitioner further reiterated that the award suffers from mutual inherent contradictions and invited the attention of para 46 of the claim and para 173 of the award whereby the claim of respondent of Rs.10,00,00,000/- towards loss of reputation, harassment and opportunity loss was declined.
33. Sh. Sameer Rohtagi, learned counsel for the petitioner submitted that



the test for quantifying loss is the same, whether it is for clause containing liquidated damages or unliquidated damages. Learned counsel for the petitioner submitted that the learned Tribunal in para 173 has inter alia correctly held that the claimant has not produced any cogent evidence of any quantifiable loss of reputation or opportunity. Learned counsel for the petitioner submitted that the learned Tribunal erred in granting Terminal Benefits of Rs.15,00,00,000/- as the same is contrary to terms and conditions of the Contract more particularly Clause 4.2 of the Contract r/w Para 5 of Part A Schedule 2.

34. Sh. Sameer Rohtagi, learned counsel for the petitioner submitted that by deciding Issue No. 4 and 5 in favour of the respondent/claimant, the learned Tribunal has specifically enforced certain clauses of the Contract that lead to a unilateral and unfair gain to the respondent /claimant without casting any duty on the respondent/claimant to carry out the Contract. Learned counsel for the petitioner submitted that the Impugned award is vitiated by the “Patent Illegality” for ignoring vital pieces of evidence on record and has erroneously held that the termination of respondent/claimant by the Petitioner is illegal and in breach of the said Agreement.
35. Sh. Sameer Rohtagi, learned counsel for the petitioner submitted that the learned Tribunal did not even deal with the arguments raised by the petitioner to the effect that the existence of letter dated 01.06.2013 has never been denied by the respondent/claimant and the remaining material evidence regarding handing over the said letter by the respondent/claimant to the petitioner. Learned counsel for the petitioner further submitted that learned Tribunal did not take into account that



the respondent was a sole beneficiary of letter dated 01.06.2013. It has further been submitted that the learned Tribunal did not deal with the evidence of the petitioner with regard to non-adherence by the respondent/claimant to the mandatory protocols (SOP 1184) for administering admission to the Petitioner's Hospital.

(C) SUBMISSIONS OF RESPONDENT

36. Sh. Arun Bhardwaj, learned senior counsel for the respondent in its detailed submissions asserted that the present objections are liable to be dismissed as it does not fall within the jurisdiction of this court to sit in appeal over the award. It has been submitted that the finding of facts recorded by learned Arbitral Tribunal and appreciation of the evidence by the learned Arbitral Tribunal cannot be questioned in such proceedings as the scope of jurisdiction under Section 34 of the Act is limited in nature.
37. Sh. Arun Bhardwaj, learned senior counsel for the respondent has vehemently denied that the impugned award is against "Fundamental Policy of Indian Law" or by way of the impugned award the learned Arbitral Tribunal has enforced a private contract of employment. Learned senior counsel for the respondent has also submitted that the petitioner did not plead before the learned Arbitral Tribunal that the respondent has sought specific performance of Agreement dated 26.02.2014 and the Amendment Agreement dated 15.03.2016.
38. Sh. Arun Bhardwaj, learned senior counsel for the respondent submitted that the learned Arbitral Tribunal has only awarded compensation for the direct loss suffered by the claimant due to breach



of contract by the petitioner. Reliance has been placed upon *S.S Shetty vs Baharat Nidhi Ltd.*².

39. Sh. Arun Bhardwaj, learned senior counsel for the respondent has submitted that the learned Arbitral Tribunal has rightly held that the claimant is to be put in a position as if the Agreement and Amendment Agreement had not been terminated but had worked themselves out through the entire course of 7 years with effect from 01.07.2016. It has been submitted that it is settled preposition that if there are two views possible the court cannot substitute its view with the view of the learned Arbitral Tribunal.
40. Sh. Arun Bhardwaj, learned senior counsel for the respondent submitted that there is not even an averment that the principle of natural justice has not been followed as the petitioner was given fullest opportunity. Learned senior counsel for the respondent submitted that one time payout to the claimant under Clause 5 of Schedule 2 of the Agreement is not in the nature of damages but one time pay out to the Claimant in lieu of the 3.5% shareholding vested in him at the time of signing of the Agreement dated 24.02.2014, payable at the expiry of the term of the Agreement.
41. Sh. Arun Bhardwaj, learned senior counsel for the respondent submitted that therefore the question of it being or not being a genuine pre-estimate of damages under Section 74 of the Indian Contract Act does not arise and is ex-facie misplaced. It has been submitted that since the learned Arbitral Tribunal has rightly held that the petitioner breached the agreement and termination of the agreement was illegal

²*AIR 1958 SC 12*



and wrongful, therefore, Part B of Schedule 2 would have no applicability. Learned senior counsel for the respondent submitted that Part A of Schedule 2 would apply, if it had not been an illegal termination and in that case, the respondent/claimant would have continued for the full 7 years and entitled to the payout at the end of the term. Learned senior counsel for the respondent in respect of the scope of jurisdiction has relied upon *State Of U.P Vs Allied Constructors*³ (2003) 7 SCC 396, *Mcdermott International Inc. Vs BurnStandard Co. Ltd.*⁴ (2006) 11 SCC 181, *Numaligarh Refinery Ltd. Vs Daelim Industries Co. Ltd.* (2007) 8 SCC 466⁵, *MP Housing Board Vs Progressive Writers And Publishers*⁶. Sh. Arun Bhardwaj, learned senior counsel for the respondent submitted that the same is not a compensation for breach of contract or a stipulated penalty for breach as provided for under Section 74 of the Indian Contract Act and therefore, the Claimant was not required to lead evidence to demonstrate that the onetime pay out was in any way a pre-estimate of damages.

42. Learned senior counsel for the respondent submitted that interpretation of the contract is a matter for the arbitrator to determine and the court can interfere if the reasons are totally perverse or award is based on wrong proposition of law. Learned senior counsel for the respondent in respect of the jurisdictional scope also relied upon *K.V.Mohammed*

³(2003) 7 SCC 396

⁴ (2006) 11 SCC 181

⁵(2007) 8 SCC 466

⁶(2009) 5 SCC 678



*Zakir Vs Regional Sports Centre (2009) 9 SCC 357*⁷, *Steel Authority Of India Ltd. Vs Gupta Brother Steel Tubes Ltd. (2009) 10 SCC 63*.⁸, *Sumitomo Heavy Industries Limited Vs Oil And Natural Gas Corporation Limited (2010) 11 SCC 296*⁹, *Rashtriya Ispat Nigam Ltd. Vs Dewan Chand Ram Saran (2012) 5 SCC 306*¹⁰.

43. In respect of the alleged non-application of doctrine of mitigation of losses, learned senior counsel for the respondent submits that the person who asserts an existence of fact as to any legal right or liability must prove that those facts exist and the burden of proof lies on the person asserting the existence of those facts. Learned counsel for the respondent submitted therefore, the Petitioner was required to prove that avenues for mitigating such losses existed and that Respondent / Claimant despite existence of such avenues did not take steps to mitigate the losses. However, no such evidence was lead. Reliance has been placed upon *D.C.M Limited vs Mahabir Singh Rana*¹¹.
44. Sh. Arun Bhardwaj, learned senior counsel for the respondent submitted that the petitioner failed to show that any similar employment was available and yet not availed by the respondent/claimant. It has been submitted that the opportunity loss claimed by the respondent/claimant under Issue No. 6 was for future employment prospects, which had been adversely affected by the illegal actions of the petitioner. Learned senior counsel for the respondent submitted that there is no mutual contradiction in the award

⁷(2009) 9 SCC 357

⁸(2009) 10 SCC 63

⁹(2010) 11 SCC 296

¹⁰AIR 2012 SC 2829

¹¹2009 sec Online Del 4121



as contended by the petitioner.

45. Sh. Arun Bhardwaj, learned senior counsel for the respondent submitted that in *Para-159* of the impugned award, the learned Arbitral Tribunal had rightly held the termination of the agreement and consequently the termination of the respondent/claimant's employment, which was guaranteed for 7 years unless terminated earlier under Clause 6.2, has been found to be illegal and in breach of the said Agreements and therefore, the Claimant was found rightly and clearly entitled to be compensated for the loss of earnings for the entire duration of the 7 years. Learned senior counsel for the respondent further submitted that the interest awarded by the Tribunal is just and proper. It has been submitted that there is no "Patent Illegality" and the impugned award has been passed after detailed scrutiny and analysis of the evidence and is a reasoned award. It has been submitted that the findings on the facts cannot be looked into by this court while exercising the jurisdiction under Section 34 of the Arbitration and Conciliation Act.
46. Sh. Arun Bhardwaj, learned senior counsel for the respondent submitted that there is no illegality in the award dated 24.06.2023. Learned senior counsel submitted that even if there is an error in reaching its conclusion on a disputed question submitted to it for adjudication, it is not open for this Court to exercise its jurisdiction to interfere with the Award.
47. Sh. Arun Bhardwaj, learned senior counsel for the respondent submitted that the petitioner has failed to point out any infirmity in the Award which would warrant interference by this court. Learned senior



counsel for the respondent further submitted that the Petitioner is not claiming any incapacity nor the violation of the principle of natural justice. Learned senior counsel for the respondent submitted that the impugned award is a reasoned award which has been passed after framing issues and after providing all possible opportunities to the parties to present their case. Learned senior counsel for the respondent submitted that there is no material on the record to say that the award is perverse.

48. Sh. Arun Bhardwaj, learned senior counsel for the respondent submitted that the contention raised by the learned counsel for the petitioner that the Tribunal has in fact specifically enforced a private contract is incorrect and contrary to the fact of record. Learned senior counsel for the respondent submitted that the petitioner did not make any such pleadings before the learned Arbitral Tribunal and therefore this plea cannot be taken before this court for the first time in an objection petition filed under Section 34 of the Arbitration and Conciliation Act.
49. Sh. Arun Bhardwaj, learned senior counsel for the respondent submitted that the claim of the respondent herein was for the compensation for the loss suffered by the respondent due to breaches on part of the petitioner and due to illegal and wrongful termination. Learned senior counsel submitted that one time pay out to the Claimant under Clause 5 of Schedule 2 of the Agreement is not in the nature of damages but one time pay out to the claimant in lieu of the 3.5% shareholding vested in him at the time of signing of the Agreement dated 24.02.2014 payable at the expiry of the term of the Agreement.



50. Sh. Arun Bhardwaj, learned senior counsel submitted that it is a part of the compensation agreed to be paid by the Petitioner to the Claimant in terms of Clause 4.2 of the Agreement read with Schedule 2. Learned senior counsel submitted that the present contract does not provide for pre-estimation of damages to fall under Section 74 of the Indian Contract Act, 1872. It has been submitted that the reliance on ***Kailash Nath Associates vs. DDA***,¹² and ***Fateh Chand vs. Balkishan Das***,¹³ judgements is unwarranted. Learned senior counsel for the respondent reiterated that Schedule 2 Clause 5 of the Agreement is neither a penalty clause nor a pre-estimation of damages. It is part of compensation of the Claimant which was in the form of notional shareholding of the Claimant in the Company worth Rs. 3.50 crores as of date of signing of the Agreement in lieu of which a payout of minimum Rs. 15 crore was to be paid to the Claimant on the expiry of 7 years from the commencement date. Learned senior counsel submitted that expiry of the term does not mean that expiry by efflux of time only. Learned senior counsel submitted that if the term is curtailed by unlawful termination, the Claimant is rightly being entitled to Rs. 15 crores which he would have earned had he not been illegally terminated.
51. Sh. Arun Bhardwaj, learned senior counsel for the respondent further submitted that it is well settled that where the employment is for a fixed period, in case of illegal termination of services the employee is entitled to the salary and benefits he would have earned but for his

¹² (2015) 4 SCC 136.

¹³ (1964) 1 SCR 515.



illegal termination. Learned senior counsel for the respondent submitted that the petitioner has taken a plea that the Respondent /Claimant did not take steps to mitigate his losses and therefore the onus is on the Petitioner to show that avenues for mitigating such losses existed and that Respondent / Claimant despite existence of such avenues did not take steps to mitigate the same. Learned senior counsel submitted that such alternate employment had to be of the kind that was illegally terminated by the Petitioner. Learned senior counsel has submitted that learned Tribunal has rightly placed reliance upon **D.C.M. Ltd. (Supra)**. Learned senior counsel for the respondent has relied upon **K.G. Hiranandani vs Bharat Barrel & Drum Mfg. Co.** 1968 SCC Online Bom 26 (AIR 1969 BOM 373) and **DCM Ltd. Vs Mahabir Singh Rana** 2009 SCC Online Del 4121 in this regard.

(D) ANALYSIS AND FINDINGS

52. The relevant clauses in Key Personnel Management Agreement is as follows:

“4. Compensation

4.1 During the Term, Dr. Bagai shall be paid on the first day of each calendar month compensation as may be decided by the Company as given hereinafter. Dr. Bagai will be entitled to an all inclusive compensation amount set out in Part A of the compensation schedule attached to this Agreement and marked as Schedule I from the Signing Date till the date of commissioning of the Hospital. The yearly compensation payable to Dr. Bagai from the date of commissioning of the Hospital till the end of the Term is detailed in Part B of Schedule I.”

Schedule 1 Part A provides as under:

SCHEDULE 1



COMPENSATION SCHEDULE PART A

From the Signing Date till the date of commissioning of the Hospital

From the signing Date Dr. Bagai shall be entitled to a one time signing bonus of Rs.2,00,00,000/- (Rupees two crores).

From the signing date till the date of commission of the Hospital (i.e. till part of Revenue generating medical activity at the Hospital) Dr. Bagai shall be paid a fixed monthly compensation of Rs.6 lakhs per month.

From the signing date Dr. Bagai shall be provided all back office support. IT clerical help entertainment and travel for business development. The estimated cost towards such expenses shall be budget in consultation with the CEO of the Manipal Health Enterprises Private Limited.

Schedule 1 part B provides as under:

PART B

From the date of commissioning of the HOSPITAL

The yearly compensation payable to Dr. Bagai from the date of commissioning of the Hospital shall be as follows:

a. A fixed compensation of Rs.3,00,00,000/- (Rupees three crores) per annum for discharging the administrative responsibilities and/or practicing in the Hospital as a full time Senior pediatric consultant (together hereinafter referred to as the "Fixed Compensation") and

b. Variable compensation of Rs.50,00,000/- (Rupees fifty lakhs) per annum in the event the revenue from his complete clinical practice, consultation and referral ("Revenue Target") exceeds Rs.3,00,00,000/- (Rupees Three Crores) per annum. Escalation : Fixed Compensation shall be increased by 10% ever two years.



The aforementioned yearly compensation shall be pro-rated and paid on a monthly basis as per Clause 4.

From the date of Commissioning of the Hospital, Dr. Bagai shall be entitled to the following

Leave Entitlements	CL/SL-5 days (Jan. Dec) EL- 20 days (Leaves credited at the beginning of every calendar year)
Information System Devices	Laptop, Datacard, Blackberry, CUG connection
Group Term Life Insurance (Accident Disablement & life coverage)	10 lakhs (50% contribution by Employer and Employees)
Medi Claim insurance for Hospitalization	10 lakhs (50% contribution by Employer and Employees)
Medicare for OP benefit at Manipal Hospital at a discounted rate	
Furniture & Equipment	5 lakhs (Block period of 5 years)
Mobile Bill and Data card	As per actual
Foreign travel policy	Economy (over night flight where the employees presence in the morning is required or where the flight travel exceeds four hours) MS and above are

	entitled to Business Class Lodging and Boarding as per the policy
Domestic Travel Policy	Economy Airfare/ 1 st Class AC train
Lodging Cost	Category A : All metropolitan locations (including Bangalore, Hyderabad 10,000 per night Category B : All non metro cities or towns = 7000 per night .

Schedule II Part A & B Provides as under:

SCHEDULE 2

PART A

FORMULA TO CALCULATE ONE TIME PAY OUT AT THE END OF THE TERM

1) Dr. Bagai is entitled to a notional shareholding worth Rs. 3,50,00,000/- (Rupees Three Crores Fifty Lakhs) in the Company.



2) *The quantum and percentage of the aforementioned notional shareholding of Dr. Bagai in the Company will be dependant on the actual capita structuring of the Company. The basis adopted for the arriving at the quantum and percentage of the notional shareholding of Dr. Bagai is explained in the example below.*

Example:

i) Based on the current estimates and indicative financial plan the overall project cost has been estimated to Rs. 184.30 crores.

ii) The Company has estimated that this will be financed by a debt contribution of Rs.111.40 crores and the balance will be equity contribution of Rs.72.90 crores.

iii) The Rs.3.50 crs worth of notional shareholding of Dr. Bagai works out to 4.80% of the share capital of Rs.72.90 crores.

(v) This 4.80% of notional shareholding is hereinafter defined as Interim Notional Shareholding Percentage.

3) *The capital structure of the Company will be determined upon achievement of financial closure i.e. once my Company has tied up the project finance for the Hospital and has received a sanction letter in this regard from a bank or a financial institution.*

4) *It is mutually agreed between the parties herein that in case of further equity infusion in the company during the term the Interim National Shareholding Percentage shall get diluted proportionately up to a maximum of one percent from the Interim National Shareholding Percentage ("Final National Shareholding Percentage") it is clarified herein that National Shareholding Percentage of Dr. Bagai in the company shall in no event be lower than the Final National Shareholding Percentage.*



5) Dr. Bagai shall be entitled to a one time pay out on the expiry of the Term unless this Agreement has been terminated earlier in accordance with the provisions of this Agreement. The quantum of the one time pay out shall be Rs. 15,00,000/- (Rupees Fifteen Crores) or value of the Final National Shareholding Percentage which ever is higher.

6) The value of the Final National Shareholding Percentage shall be determined based on the Equity Value of the Company.

i) The Equity Value of the company shall be the Enterprise Value (as defined below (less the then not debt outstanding in respect of the hospitals.

ii) The Enterprises Value of the Company shall be 8 times EBITDA (as defined below) of the Company of the Measuring Year (as defined below)

iii) The term EBITDA shall mean profit before tax plus interest depreciation adjusted for extraordinary income or an expense that is not in the ordinary course or one off event that is unlikely to be repeated.

iv) The EBITDA of the Measuring year shall be certified by the Statutory Auditor of the Company based on the audited statement of the Company duly approved by the shareholders of the Company.

v) The Measuring year shall be decided depending on the date of expiry of the term. The term Measuring year shall mean the previous financial year ending on the 31st day of March if the Term ends on or before 30th September. If the Term ends on or after 1st day of October then the Measuring year shall be the then current financial year ending on the 31 day of March.

7) On payment of the aforementioned one time payout as per the terms set out herein above, all rights of Dr. Bagai in



respect of the notional shareholding in the Company referred to in this Clause 4.3 above shall cease to exist forthwith

PART B
FORMULA TO CALCULATE ONETIME PAY OUT ON
TERMINATION
OF THIS AGREEMENT BEFORE EXPIRY
OF THE TERM

1. If this Agreement is terminated for reasons set out in Clause 6.2(e) then the Company shall pay a onetime pro rata compensation amount for the number of years completed by Dr. Bagai calculated on the assumption that the maximum entitlement of Dr. Bagai for a 7 year period is Rs. 15,00,00,000/- (Rupees Fifteen Crores).

2. If the Company terminates this Agreement for reasons set out in Clause 6.2 (a) to 6.2(d) then Dr. Bagai shall not be entitled to any one time payment.

3. In the event of any delay in payment of the aforesaid amount, the person liable to pay the amount shall also be liable to pay interest at the rate of 12% per annum from the due date till the actual date of payment of the amounts due and payable

On payment of the onetime payment detailed in point 1 of Part B of Schedule 2, all rights of Dr. Bagai in respect of the notional shareholding in the Company referred to in Clause 4.3 above shall cease to exist forthwith.

It is clarified herein that Dr. Bagai is not entitled to any one time payout for termination for reasons stated in point 2 of Part B of Schedule 2. On termination of this Agreement for reasons stated in point 2 of Part B of Schedule 2, all rights of Dr. Bagai in respect of the notional shareholding in the Company referred to in Clause 4.3 shall cease to exist forthwith.



53. It is pertinent to mention here that clause 1.1 of Key Personnel Management Agreement provides as under:

1.1 The Company hereby agrees to employ Dr. Bagai and Dr. Bagai hereby agrees to be employed by the Company for a period commencing from the Signing Date of this Agreement and ending on expiry of 7 years from the date of commissioning of the Hospital (the "Terms"), as per the the term and condition set out in this Agreement.

Clause 6 of Key Personnel Management Agreement provides the termination clause provides as under:

6. Termination:

6.1 The employment of Dr. Bagai cannot be terminated, by the Company during the Term, i.e. the lock in period, except for the reason mentioned to Clause 6.2.

6.2. In the event of any of the following acts the Company may forthwith terminate this Agreement by serving written notice of 15 days on Dr. Bagai.

a. if charges against him for, any offence involving moral turpitude are confirmed by any court of law.

b. if he is convicted for any act of dishonesty, fraud, willful disobedience, misbehaviour or breach of duty, which may adversely affect the company;

c. if he wilfully, persistently and materially breaches any of the material provisions of this Agreement and does not remedy the same within (30) days after receiving notice in writing from the Company specifying the breach;

d. if he is declared insolvent by any Court of law;

e. if he is prevented by illness for a continuous period of more than six (6) months from discharging the duties demanded by his position, or is affected by permanent



infirmary rendering him unsuited to discharge such duties.

6.3. On termination of his appointment under this Agreement (or any amendment hereto) Dr. Bagai shall forthwith deliver to the Company all books, documents, papers, software, formulations, materials; vehicle, residential accommodation (duly vacated peaceful and vacant), mobile phone and other property of any company in the Group of its which may then be in his possession or under his power or control and also will immediately surrender to the Company all notes, data, manuals, documents, records, data bases, programs, blueprints, memoranda, specifications, research notes, customer lists, financial reports and all other physical forms of expression incorporating or containing the Trade Secrets and any other confidential information, it being distinctly understood that all these writings, physical forms of expression and other things are any company in the Group's exclusive property. Dr. Bagai acknowledges that the authorised taking, use and/or publication of any of any company in the Group's Trade Secrets may be a violation of civil and criminal law, subjecting Dr Bagai to sanctions. Dr. Bagai further acknowledges that the unauthorised taking, use and/or publication of any company in the Group's Trade secret should cause the Group to move against Dr. Bagai in a civil action to recover whatever damages, awards and attorney's fees that are by law available to it.

54. It is also relevant to reproduced clause 6.4 and 6.5 which are reproduced as under:

6.4 Upon termination of his employment with the Company, Dr. Bagai shall be entitled to:

a. full salary and dues up to the date of termination; and

b. repayment of any outstanding expenses actually and reasonably incurred in connection with Company's business, in respect whereof vouchers have been submitted;



less any amount due to the Company by Dr. Bagai.

6.5 Notwithstanding anything to the contrary contained in this Agreement, upon termination of this Agreement before expiry of the Term.

a. For reasons stated in point 1 of Part B of Schedule 2, Dr. Bagai shall be entitled to get the onetime payment detailed in point 1 of Part B of Schedule 2, on payment of such amounts as specified in point 1 of Part B of Schedule 2, all rights of Dr. Bagai in respect of the notional shareholding in the Company referred to in Clause 4.3 above shall cease to exist forthwith. It is clarified herein that Dr. Bagai is not entitled to any one time payout for termination for reasons stated in point 2 of Part B of Schedule 2. On termination of this Agreement for reasons stated in point 2 of Part B of Schedule 2, all rights of Dr. Bagai in respect of the notional shareholding in the Company referred to in Clause 4.3 shall cease to exist forthwith.

b. This provision shall survive termination of the Agreement.

55. Before proceeding further, it is advantageous to have look at the impugned award passed by the learned arbitrator.

Perusal of the impugned award indicates that the claimant had claimed Rs.19,94,17,020/- detailed as under:

(I) Compensation Due and payable to the Claimant:

Year	Total Compensation due to the Claimant	Amount paid (till April, 2019)	Difference (less paid) and due to the Claimant	Interest
1	3,50,00,000/-	3,00,00,000/-	50,00,000/-	17,40,909/-
2	3,50,00,000/-	3,00,00,000/-	50,00,000/-	11,01,954/-
3	3,80,00,000/-	1,83,28,034/-	1,96,71,966/-	17,02,191/-



4	3,80,00,000/-	-	3,80,00,000/-	-
5	4,13,00,000/-	-	4,13,00,000/-	-
6	4,13,00,000/-	-	4,13,00,000/-	-
7	4,46,00,000/-	-	4,46,00,000/-	-
Total	27,32,00,000/-	7,83,28,034	19,48,71,966/-	45,45,054/-
TOTAL AMOUNT DUE AND PAYABLE			₹19,94,17,020/-	

The claimant has also claimed sum of Rs.15 crores as the terminal benefits in terms of the agreement dated 26.02.2014 and by amendment agreement dated 15.03.20216 in respect of the alleged illegal termination of the claimant/respondent, learned arbitral returned the finding in favour of the claimant.

56. In regard to the claimant's entitlement to an amount of Rs.19,94,17,020/- towards compensation, the finding of the learned tribunal are contained in para 153 onwards which are reproduced as under:

153. According to the Claimant, since the termination of Claimant's employment by the Respondent was illegal and wrongful, and the same was in violation of the terms of the Agreement (as amended by the Amendment Agreement), he is entitled to the full compensation in terms of the said Agreements for the period of seven years as per the calculation at Paragraph 51 (I) of the Statement of Claim which reads as under:-

**“(I) Compensation Due and payable to Claimant:**

Year	Total Compensation due to the Claimant	Amount paid (till April, 2019)	Difference (less paid) and due to the Claimant	Interest
1	3,50,00,000/-	3,00,00,000/-	50,00,000/-	17,40,909/-
2	3,50,00,000/-	3,00,00,000/-	50,00,000/-	11,01,954/-
3	3,80,00,000/-	1,83,28,034/-	1,96,71,966/-	17,02,191/-
4	3,80,00,000/-	-	3,80,00,000/-	-
5	4,13,00,000/-	-	4,13,00,000/-	-
6	4,13,00,000/-	-	4,13,00,000/-	-
7	4,46,00,000/-	-	4,46,00,000/-	-
Total	27,32,00,000/-	7,83,28,034	19,48,71,966/-	45,45,054/-
TOTAL AMOUNT DUE AND PAYABLE			₹19,94,17,020/-	

154. On the other hand, as per the Respondent, the Claimant is not entitled to any compensation whatsoever, much less for a sum of Rs. 19,94,17,020/- which has been claimed by the Claimant for the entire period of seven years.

155. It was submitted on behalf of the Respondent that the total compensation for the 1st and 2nd years after commissioning of the Hospital as sought under the head 'Total Compensation due to the Claimant of Rs.3,50,00,000/- (each year) was wholly erroneous and misleading. The sum of Rs.50,00,000/- was payable to the Claimant only subject to the revenue from the practice, consultation and referral ('Revenue Target') of the Claimant being beyond Rupees Three Crore. But that revenue target was not realized. Hence, according to the Respondent, in any event, the variable compensation amount of Rs 50 lakh per year is not payable by the Respondent to the Claimant

156. In respect of the 3rd year w.e.f. October 2018, it was submitted on behalf of the Respondent that the compensation package of the Claimant was restructured as per the said e-mail dated 01.10.2018 [Page 439, Documents]. It was submitted that the Claimant accepted the restructuring to his compensation package wherein a sum of Rs.1,50,00,000/- was fixed pay and the remainder Rs.1,50,00,000/- was performance-based variable pay. However, even assuming Claimant's entitlement as per the



Agreements to be Rs 3.3 crore towards fixed compensation the Claimant could at best claim Rs 1,75,08,333/- for the period 01.10.2018 to 11.04.2019 which, according to the Respondent, is the date of termination. It was contended that since the Claimant has admittedly received Rs 1,83,28,034/- for the 3rd year, the Claimant has, in fact, been overpaid a sum of Rs 8,19,701/- (Rs 1,83,28,034/- minus Rs 1,75,08,333/-).

157. It must be pointed out at this juncture itself that the date 01.10.2018 is incorrect as the reduction in compensation was sought to be illegally imposed on the Claimant with effect from that date. Since that unilateral imposition has been held to be illegal and in violation of the said Agreements, the date of 01.10.2018 for computing compensation is irrelevant. Furthermore, the date of 11.04.2019 is also not the date of termination. On 11.04.2019 the 15-day notice of termination was issued and according to it the termination would take effect on and from 26.04.2019. Anyway, since the termination was illegal these dates also become irrelevant for computing the compensation to be awarded to the Claimant.

158. As regards the remaining 4 years, it was submitted by the Respondent that the Claimant is not entitled to any compensation of any nature whatsoever as his employment was rightly terminated due to breach of terms of the said Agreements by the Claimant.

159. The termination of the Agreements and consequently the termination of the Claimant's employment, which was guaranteed for 7 years unless terminated earlier under Clause 6.2, has already been found to be illegal and in breach of the said Agreements. Hence, the Claimant is clearly entitled to be compensated for the loss of earnings for the entire duration of the 7 years. It has also been held that the unilateral reduction in the compensation of the Claimant by the Respondent was illegal. Hence, the compensation to which the Claimant would be entitled to



would have to be worked out in terms of the Agreement and the Amendment Agreement. The Claimant is to be put in a position as if the Agreement and Amendment Agreement had not been terminated but had worked themselves out through the entire course of 7 years with effect from 01.07.2016.

160. The Claimant's fixed compensation was to be Rs 3 crore per annum payable on a monthly basis. This was applicable from 01.07.2016. And it was to be increased by 10% every two years. In other words, from 01.07.2016 to 30.06.2018 (two years) the fixed compensation was Rs 3 crore; from 01.07.2018 to 30.06.2020 (two years) it would be Rs 3.30 crore; from 01.07.2020 to 30.06.2022 (two years) it would be Rs 3.63 crore; and, lastly, from 01.07.2022 to 30.06.2023 (one years) it would be Rs 3.993 crore. The total fixed compensation payable to the Claimant over the 7-year period works out to Rs 23,85,30,000/- The Claimant has admittedly received Rs 7,83,28,034/- till April 2019 (ie., till a couple of months prior to the end of the 3rd year). The balance amount of fixed compensation that the Claimant would have received had the Agreement not been wrongfully terminated comes to Rs 16,02,01,966/- (Rs 23,85,30,000/- minus Rs 7,83,28,034/-). This is a clear loss to the Claimant resulting from the wrongful and illegal termination.

161. Apart from the aforesaid loss of fixed compensation, in the Claimed amount of Rs 19,94,17,020/-, the Claimant has also included two more components: (1) variable compensation of Rs 50 lakh per year and (2) interest on the alleged balance due for the first three years. Insofar as the variable compensation is concerned, the same was payable only in the event the revenue from the Claimant's complete clinical practice, consultation, and referral ('Revenue Target') exceeded Rs.3,00,00,000/- (Rupees Three Crores) per annum. In the first two years this Revenue Target had not been achieved. Nor has it been demonstrated by the Claimant that the Revenue Target would have been met in the 3rd year, going by the figures of



the 10 months of the 3rd year (when the Agreement was terminated). The Claimant has contended that the Revenue Target could not be achieved in these years as he was prevented by the Respondent from doing so. While it may be true that the Claimant was hindered by the acts of commission and omission of the Respondent but there is no way of knowing for certain that the Revenue target would have been achieved by the Claimant in the first three years and going forward in the next four years of the 7-year period. Hence the Claimant is not entitled to anything by way of variable compensation.

162. As regards the interest claim for the first two years, the same is not tenable as the Claimant had received the full amount of the Fixed Compensation of Rs 3 crore per annum (or Rs 25 lakh per month). Furthermore, no interest on the variable compensation could be claimed as the variable compensation itself has been held to be untenable. For the third year, since the Agreement was terminated (albeit illegally) on 26.04.2019, the fixed compensation for 10 months (roughly) (from July 2018 to April 2019) would have been Rs 2.5 crore, but the Claimant has received only Rs 1,83,28,034/- leaving a balance of Rs 66,71,966/-, which amount ought to have been paid to the Claimant by April 2019. Hence, the Claimant is entitled to interest on the same. The extent of interest, however, shall be dealt with under Issue 7 below.

163. The Respondent had also taken the plea of mitigation in contending that, without prejudice to its argument that nothing is due to the Claimant by way of damages, in any event, the Claimant can only claim reasonable damages subject to mitigation of the losses undertaken by the Claimant. Several decisions were cited on behalf of the Respondent. The decisions in Manju Bagai (supra), Soril Infra (supra) and Store One Retail (supra) are all decisions pertaining to rent agreements/ landlord-tenant relationships. The considerations with regard to damages and mitigation in those cases is entirely different from a



case such as the present one. Here there was a contract for employment/services between the Respondent and the Claimant (a professional medical practitioner and administrator) for a fixed term. The Claimant was, prior to executing the Agreement, running his own clinic, and was permitted to continue to run his clinic during the subsistence of the Agreement. This is clearly spelt out in Clause 5.5 of the Agreement which reads as under:

"5.5 During the subsistence of this agreement, Dr. Bagai shall be permitted to run his clinical practice from him residential clinic which will act as feeder to the proposed Hospital. Such clinical practice from the residence shall be undertaken without impacting the designated clinical time required in the Hospital and will be undertaken only outside such defined hours of clinical time at the Hospital."

After the termination of the Agreement, the Claimant continues to run his clinic. It must also be appreciated that the type of engagement of the services of the Claimant as was available to the Claimant under the Agreement is not like taking up any ordinary or regular employment. Such contracts are not readily available as it is not every day that a hospital is to be established in the manner the Respondent's Hospital was established and run. So, there is nothing more that the Claimant could have done by way of mitigation.

164. The decision in S.S. Shetty (supra), which was relied upon by both the parties, clearly enables the grant of damages in the manner undertaken above particularly as no mitigation on the part of the Claimant was possible. In the said decision, the Hon'ble Supreme Court observed as under:

"13. If the contract of employment is for a specific term, the servant would in that event be entitled to damages the amount of which would be measured prima facie and



subject to the rule of mitigation in the salary of which the master had deprived him. (Vide Collier v. Sunday Referee Publishing Co. Ltd.) [(1940) 4 AER 234, 237]. The servant would then be entitled to the whole of the salary, benefits, etc., which he would have earned had he continued in the employ of the master for the full term of the contract, subject of course to mitigation of damages by way of seeking alternative employment."

(underlining added)

The alternative employment has to be of the kind that was terminated. Such alternative employment did not present itself to the Claimant. It must also be noted that, apart from the fact that such employments were extremely rare by their very nature, the Respondent made it more difficult for the Claimant by taking out publications in newspapers making it known to everyone that the services of the Claimant had been terminated by the Respondent.

165. The learned counsel for the Claimant had referred to a decision of the Hon'ble High Court of Delhi in the case of D.C.M. Limited v. Mahabir Singh Rana: 2009 SCC OnLine Del 4127 to submit that, in any event, it was not for the Claimant to plead and prove that there were other alternative employments available which the Claimant did not avail of but it was for the Respondent, being the party in breach, to plead and prove the same before it could take the plea of mitigation. The relevant observations of the Hon'ble High Court in DCM Limited (supra) are set out below:

"12. The Explanation to the aforesaid Section stipulates that in estimating the loss or damage arising from a breach of contract, "the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account." The aforesaid Explanation is commonly referred to as the rule of mitigation of damages. The contention of the counsel for the appellants/management is that a duty was cast on the respondent/employee to mitigate the damages and the onus



of proving that he made efforts to obtain alternative employment was on him as the plaintiff. He further submitted that the respondent/employee had not made any averments in the plaint that he really made any effort to mitigate the damages and hence he failed to discharge the onus placed upon him. Having failed to discharge the said onus, the same could not have shifted to the appellants/management and in such circumstances, the trial court ought not to have directed payment of full wages under the contract to the respondent employee.

13. This Court is unable to persuade itself to agree with the submission of the counsel for the appellants/management that the respondent/employee was duty bound to mitigate the damages. In this regard, the judgment of a Single Judge of the Bombay

High Court in the case of K. G. Hiranandani v. Bharat Barrel and Drum Mfg. Co. Pvt. Ltd., AIR 1969 Bombay 373 followed by a Single Judge of this Court in the case of S.M. Murray v. Ferner (India) Ltd., 1986 (11) DRJ 12 is relevant. After discussing the Explanation to Section 73 of the Act, it was noted in the aforesaid judgment that the Explanation was not enacted as a sub-section or a separate paragraph to Section 73, but only appended as an "Explanation to the substantive rule in the first part of Section 73". Hence, no duty, which is actionable, can be cast on a party to claim entitlement to damages by first establishing that he had made efforts to obtain alternative employment to mitigate the damages. Reference to para 4 for the purpose of construction of Explanation to Section 73 is necessary and is reproduced hereinbelow:

"4. Before I proceed to deal with the rival contentions of the learned counsel on either side, it would be convenient to refer to material portions of Section 73 of the Contract Act which is the section which lays down what may be called the measure of damages in case of breach of contract. The substantive portion of that section lays down



the basic rule that a party who suffers by the breach is entitled to receive from the party in breach "compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach". The Explanation to the section lays down that in estimating the loss or damage arising from the breach of a contract, "the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account". Though what the Explanation enacts is popularly called the "rule" in regard to mitigation of damages and has been so referred to even in some decided cases and standard works, and though it is loosely called a "duty" to mitigate, the position really is as out legislature has rightly stated, merely this, that what the Explanation enacts is not in the nature of an independent rule or duty but is merely a factor to be taken into account in assessing the damages naturally arising from the breach, for the purpose of the main part of Section 73. That is precisely the reason why it is enacted, not as a sub-section or a separate paragraph, as an "Explanation" to the substantive rule in the first part of section 13. Support is to be found for this view which I am taking in a passage in Mayne on damages (12th ed.) para 149, point (2), in which it is stated that the expression "duty to mitigate" is the common and convenient way of stating the position, but that expression is a somewhat loose one, since there is no duty which is actionable or which is owed to any one by the plaintiff. It is further pointed out in the said message that the plaintiff cannot owe a duty to himself, and that the position is similar to that of a plaintiff whose damages are reduced because of his contributory negligence. If means existed of remedying the inconvenience caused by the breach of contract which have not been availed of by the plaintiff, the damages claimed by him cannot be said to arise "naturally" from the breach within the main part of Section 73 of the Contract Act or, to put it in another way, the means, if any, of remedying the inconvenience caused by the breach of contract are factors that go to reduce the



damages that might otherwise have been said to have arisen "naturally" from the breach, that, in my opinion, is the proper construction that should be placed upon, what is popularly called the rule in regard to mitigation of damages."

(emphasis added)"

Clearly, in view of this decision, no duty, which is actionable, was cast on the Claimant to claim entitlement to damages by first establishing that he had made efforts to obtain alternative employment to mitigate the damages. First of all, no such alternative employment existed and secondly, if it did, it was for the Respondent to establish the same, which it did not. Hence, the plea of mitigation taken by the Respondent is not tenable.

166. Thus, Issue 4 is decided by holding that the Claimant is entitled to an amount of Rs 16,02,01,966/- towards compensation (besides the component of interest which will be considered under Issue 7)."

57. Perusal of the finding indicates the learned arbitrator found the respondent/claimant entitled to be compensated for loss of earnings for the entire duration of seven years as his termination was found to be illegal and in breach of the agreement.
58. The contention put forth by the petitioner that the respondent/claimant cannot be held entitled for any compensation after his termination, was rejected. The learned tribunal was of the opinion that the services of the claimant as was available to him under the agreement is not like taking up any ordinary or regular employment and such contracts are not readily available, as it is not everyday that a hospital is to be established in the manner that the petitioner hospital is established and is being run. Learned tribunal distinguished the cases cited by the



petitioner i.e. Manju Bagai (supra), Soril Infra (supra) and Store One Retail (supra) as distinguishable. Learned tribunal inter alia held that the decision in *S.S Shetty vs Baharat Nidhi Ltd* (supra) which was relied upon by both the parties enables the grant of damages in the manner undertaken above particularly as no mitigation on the part of claimant was possible. Learned tribunal has relied upon *DCM Ltd. Vs Mahabir Singh Rana (supra)* and inter alia held that no duty, which is actionable, can be casted on the claimant to claim entitlement to damages by first establishing that he made efforts to obtain alternative employment to mitigate the damages. Learned tribunal inter alia held that it was for the petitioner to establish the same which it did not. Learned tribunal therefore taking into account the fact the claimant's fixed compensation was Rs.3 crores per annum payable on a monthly basis was applicable from 01.07.20216 and it was to be increased by 10% every two years. Learned tribunal therefore taking into account the enhancement held that the total fixed compensation payable to the claimant over the 7 years period works out to Rs.23,85,30,000/- out of which the claimant has received Rs.7,83,28,034/- and thus awarded a sum of Rs.16,02,01,966/-. In respect of claim of Rs.15 crores towards loss of terminal benefits, the learned tribunal inter alia held as under:

167. This claim has been made by the Claimant under Clause 4.2 of the Agreement read with paragraph 5 of Part A of Schedule 2 thereto. The said paragraph 5 reads as under. -

"5) Dr. Bagai shall be entitled to a one time pay out on expiry of the Term unless this Agreement has been terminated earlier in accordance with the provisions of this Agreement. The quantum of the one time pay out shall be



Rs. 15,00,00,000/- (Rupees Fifteen crores) or value of final notional shareholding percentage which ever is higher."

168. It was submitted on behalf of the Claimant that as the termination of the Agreement dated 26.02.2014 was illegal and non est, the Claimant is entitled to the amount of Rs. 15,00,00,000/- from the Respondent. It was further submitted that had it not been for the illegal termination of the Agreement, the Claimant would have served his term under the Agreement and be entitled to the agreed/promised payout.

169. On the other hand, as per the Respondent, the Claimant is not entitled to any terminal benefit as stipulated in Clause 4.2 and Clause 2 of Schedule 2 Part A of the said Agreement for the following reasons:

i. Part B of Schedule 2 of the Said Agreement clearly states that if the Respondent terminates the Agreement for reasons set out in Clause 6.2(a) to 6.2 (d) then the Claimant shall not be entitled to any one- time payment;

ii. Also, as per clarification in Part B, if the Agreement was terminated for reasons as stated in Point 2 of Part B of Schedule 2, the Claimant shall not be entitled to any one-time payout. One time payout on pro-rata basis in case of termination was only available to persons terminated under clause 6.2 (e), that is, if a person was prevented by illness for a continuous period of more than 6 months;

iii. From a reading of the abovementioned clauses, specifically, Clause 2, Part B of Schedule 2 of the said Agreement, it is beyond any cavil of doubt that the Claimant's employment having been terminated under Clause 6.2 (b) of the said Agreement, the Claimant is not entitled to any one-time payment, either in form of compensation or in the form of alleged loss of terminal benefits.

170. The Respondent's plea that the Claimant is not entitled



to the one-time payout is untenable. The said plea is predicated on the submission that the Agreement had been rightly terminated under Clause 6.2(b) of the Agreement. It has already been held under Issues 2 & 3 that the Respondent had breached the Agreement and that the termination of the Agreement was illegal and wrongful. This being the case, Part B of Schedule 2 would have no applicability. It is Part A of Schedule 2 which would apply as, had it not been for the illegal termination, the Claimant would have continued for the full 7 years and be entitled to the payout at the end of the term. This payout was the right of the Claimant, independent of the fixed and variable compensation, which he was to receive at the end of the term. This loss of the payout amount is a direct result of the wrongful and illegal termination. Hence, the Claimant is entitled to be compensated for this loss.

171. As per the said paragraph 5 of Part A of Schedule 2, the payout was to be Rs 15 crore or the value of the final notional shareholding percentage, whichever was higher. In the given circumstances, the latter could not be calculated. But that does not matter to the claim which is limited to Rs 15 crore. Hypothetically speaking, if the value of notional shareholding were to work out to be less than Rs 15 crore, then the Claimant would still be entitled to Rs 15 crore, being the higher amount. On the other hand, if the value of the notional shareholding were to work out to more than Rs 15 crore, the Claimant would still be entitled to Rs 15 crore as the claim is limited to that.

172. Hence, Issue 5 is decided by holding that the Claimant is entitled to an amount of Rs 15,00,00,000/- towards loss of terminal benefits.

59. The perusal of the award makes it clear that the learned arbitral tribunal rejected the contention of the petitioner and inter alia held that since the termination of the agreement was illegal and wrongful, therefore part B of schedule 2 will not be applicable. Learned tribunal was of the view



that Part A of Schedule 2 would be applicable, had it not been for the illegal termination, the claimant would have continued for the full 7 years and entitled to the payout at the end of the term. Learned tribunal had inter alia held that the payout was the right of the claimant, independent of the fixed and variable compensation, which he was to receive at the end of term and therefore the loss of the payout amount is a direct result of the wrongful and illegal termination. Learned tribunal further inter alia held that in view of the paragraph 5 of Part A of schedule II the payout was to be Rs 15 crores or the value of the final notional shareholding percentage, whichever was higher. It was further inter alia held that since the notional shareholding percentage could not be calculated, the claimant would be entitled to Rs.15 crores.

60. The scope of the jurisdiction under Section 34 of the Arbitration and Conciliation Act has repeatedly come up for discussion before the Courts. The Division Bench of this Court in ***Delhi Development Authority v. M/s Erore Resorts and Hotels Ltd.*** in FAO (OS)(COMM)75/2022 2022/DHC/001247, it was inter alia held as under;

“20. The endeavor of the legislation is to make arbitration more responsive to the contemporary requirement as an alternative dispute redressal mechanism. One of the objectives is to minimize the supervisory role of the Courts. It has repeatedly been held by the Constitutional Courts that a court while dealing with objections under Section 34 of the Arbitration and Conciliation Act (hereinafter referred to as „the Act) does not sit in appeal over the arbitral award. The courts can exercise their jurisdiction to interfere and can travel on the well-settled limited grounds. An award can be set aside only if it is contrary to substantive provisions of



the law or the provisions of the Act or against the terms of the contract. Interference can be made only if the award suffers from patent illegality. (M.V.Elisabeth vs. Harwan Investment and Trading Private Limited (1993) Suppl (2) SCC 433.

21. In Oil and Natural Gas Corporation Ltd. vs. Saw Pipes Limited 2003 SCC online SC 545, it was inter alia held that the award would be set aside if it is contrary to (a) fundamental policy of Indian law, or (b) the interest of India: or (c) justice or morality; or (d) in addition, if it is patently illegal. It was further inter alia held that illegality must go to the root of the matter. If the illegality is of trivial nature it cannot be held that award is against the public policy. The Apex Court said that Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the Court and the award is opposed to public policy and is required to be adjudged void. It is also a settled proposition that interference under Section 37 of the Act by the appellate court also cannot travel beyond the restrictions laid down under Section 34 of the Act. [MMTC Limited vs. Vedanta Limited (2019) 4 SCC 163] The scope of jurisdiction under Section 37 of the Act also came up for consideration before the Supreme Court in UHL Power Company Ltd. vs. State of Himachal Pradesh 2022 SCC OnLine SC 19 wherein it was inter alia 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 Limited v. Vedanta Limited, the reasons for vesting such a limited jurisdiction on the High Court in the exercise of powers under Section 34 of the Arbitration Act has been explained in the following words: —



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

17. A similar view, as stated above, has been taken by this Court in K. Sugumar v. Hindustan Petroleum Corporation Ltd. , where it has been observed as follows:

“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.”

18. It has also been held time and again by this Court that if there are two plausible interpretations of the terms and conditions of the contract, then no fault can be found, if the learned Arbitrator proceeds to accept one interpretation as against the other. In Dyna Technologies (P) Ltd. v. Crompton Greaves Ltd. , the limitations on the Court while exercising powers under Section 34 of the Arbitration Act has been highlighted thus:

“24. There is no dispute that Section 34 of the Arbitration Act limits a challenge to an award only on the grounds provided therein or as interpreted by various Courts. We need to be cognizant of the fact that arbitral awards should not be interfered with in a casual and cavalier manner, unless the Court comes to a conclusion that the perversity of the award goes to the root of the matter without there being a possibility of alternative interpretation which may sustain the arbitral award. Section 34 is different in its approach and cannot be equated with a normal appellate jurisdiction. The mandate under Section 34 is to respect the finality of the arbitral award and the party autonomy to get their dispute adjudicated by an alternative forum as provided under the law. If the Courts were to interfere with the arbitral award in the usual course on factual aspects, then the commercial wisdom behind opting for alternate dispute resolution would stand frustrated.”

19. In Parsa Kente Collieries Limited v. Rajasthan Rajya Vidyut Utpadan Nigam Limited , adverting to the previous decisions of this Court in McDermott International Inc. v. Burn Standard Co. Ltd. and Rashtriya Ispat Nigam Ltd. v. Dewan Chand Ram Saran , wherein it has been observed that an Arbitral Tribunal must decide in accordance with the terms of the contract,



but if a term of the contract has been construed in a reasonable manner, then the award ought not to be set aside on this ground, it has been held thus:

“9.1It is further observed and held that construction of the terms of a contract is primarily for an Arbitrator to decide unless the Arbitrator construes the contract in such a way that it could be said to be something that no fair-minded or reasonable person could do. It is further observed by this Court in the aforesaid decision in paragraph 33 that when a court is applying the —public policy‖ test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the Arbitrator on facts has necessarily to pass muster as the Arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. It is further observed that thus an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score.

9.2 Similar is the view taken by this Court in *NHAI v. ITD Cementation (India) Ltd.*, (2015) 14 SCC 21, para 25 and *SAIL v. Gupta Brother Steel Tubes Ltd.*, (2009) 10 SCC 63, para 29.”

[emphasis
supplied]

20. In *Dyna Technologies (P) Ltd.* (supra), the view taken above has been reiterated in the following words:

“25. Moreover, umpteen number of judgments of this Court have categorically held that the courts should not interfere with an award merely because an alternative view on facts and interpretation of contract exists. The courts need to be cautious and should defer to the view taken by the Arbitral Tribunal even if the



reasoning provided in the award is implied unless such award portrays perversity unpardonable under Section 34 of the Arbitration Act.”

21. *An identical line of reasoning has been adopted in South East Asia Marine Engg. & Constructions Ltd. [SEAMAC Limited] v. Oil India Ltd. and it has been held as follows:*

“12. It is a settled position that a court can set aside the award only on the grounds as provided in the Arbitration Act as interpreted by the courts. Recently, this Court in Dyna Technologies (P) Ltd. v. Crompton Greaves Ltd. [Dyna Technologies (P) Ltd. v. Crompton Greaves Ltd., (2019) 20 SCC 1 : 2019 SCC OnLine SC 1656] laid down the scope of such interference. This Court observed as follows : (SCC pp. 11-12, para 24)

“24. There is no dispute that Section 34 of the Arbitration Act limits a challenge to an award only on the grounds provided therein or as interpreted by various Courts. We need to be cognizant of the fact that arbitral awards should not be interfered with in a casual and cavalier manner, unless the Court comes to a conclusion that the perversity of the award goes to the root of the matter without there being a possibility of alternative interpretation which may sustain the arbitral award. Section 34 is different in its approach and cannot be equated with a normal appellate jurisdiction. The mandate under Section 34 is to respect the finality of the arbitral award and the party autonomy to get their dispute adjudicated by an alternative forum as provided under the law. If the Courts were to interfere with the arbitral award in the usual course on factual aspects, then the commercial wisdom behind opting for alternate dispute resolution would stand frustrated.”



13. *It is also settled law that where two views are possible, the Court cannot interfere in the plausible view taken by the arbitrator supported by reasoning. This Court in Dyna Technologies [Dyna Technologies (P) Ltd. v. Crompton Greaves Ltd., (2019) 20 SCC 1 : 2019 SCC OnLine SC 1656] observed as under : (SCC p.12, para 25) 25. Moreover, umpteen number of judgments of this Court have categorically held that the Court should not interfere with an award merely because an alternative view on facts and interpretation of contract exists. The Courts need to be cautious and should defer to the view taken by the Arbitral Tribunal even if the reasoning provided in the award is implied unless such award portrays perversity unpardonable under Section 34 of the Arbitration Act. [emphasis supplied]*

22. *It was also inter alia held in UHL Power Company Ltd."s case (supra) that if the view taken by the arbitrator regarding the interpretation of the relevant clauses is both possible and plausible then merely because another view could have been taken, can hardly be a ground to interfere with the Arbitral award. Thus, a bare perusal of the settled legal proposition, it is crystal clear that the scope of the jurisdiction under Section 37 of the Act of this Court is very limited. Thus, we have to see whether, within this limited jurisdiction, the case of the appellant is sufficient to exercise that jurisdiction."*

61. Thus, it is no longer *res integra* and position is well settled that there has to be minimal/minimum judicial intervention in this regard, the reference can also be made to Section 5 of the Arbitration and Conciliation Act, 1996 (Act). The Court can set aside the award only on the grounds which are available in Section 34(2) of the Arbitration and Conciliation Act. The Court keeping in mind, the contours of its jurisdiction has examined the award.



62. Before proceeding further, it is also necessary to dwell on an issue that whether the Court in a given case whether the Court while exercising its jurisdiction can incise the award or can take recourse to partially setting aside the impugned award. This issue came up for consideration before the Co-ordinate Bench of this Court in ***National Highways Authority of India v. Trichy Thanjavur Expressway Ltd.*** 2023 SCC OnLine Del 5183 in OMP (COMM) 95/2023 dated 21.08.2023,. The Court after taking into account, the entire law on this issue inter alia held that though the Courts are mandated to follow the minimalist intervention route it would be a travesty of the justice, if the Courts fail to intervene where the circumstances warrant and demand for correcting measures being adopted. It was inter alia held as under;-

“G. Undoubtedly, an award may comprise a decision rendered on multiple claims. Each claim though arising out of a composite contract or transaction may be founded on distinct facts and flowing from separate identifiable obligations. Just as claims may come to be preferred resting on a particular contractual right and corresponding obligation, the decision which an AT may render on a particular claim could also be based on a construction of a particular covenant and thus stand independently without drawing sustenance on a decision rendered in the context of another. If such claims be separate, complete and self-contained in themselves, any decision rendered thereon would hypothetically be able to stand and survive irrespective of an invalidity which may taint a decision on others. As long as a claim is not subordinate, in the sense of being entwined or interdependent upon another, a decision rendered on the same by the AT would constitute an award in itself.

H. While awards as conventionally drawn, arranged and prepared may represent an amalgam of decisions rendered



by the AT on each claim, every part thereof is, in fact, a manifestation of the decision rendered by it on each claim that may be laid before it. The award rendered on each such claim rules on the entitlement of the claimant and the right asserted in that regard. One could, therefore, validly, subject of course to the facts of a particular case, be entitled to view and acknowledge them as binding decisions rendered by the AT on separate and distinct claims.

I. Once an award is understood as consisting of separate components, each standing separately and independent of the other, there appears to be no hurdle in the way of courts adopting the doctrine of severability and invoking a power to set aside an award partly. The power so wielded would continue to remain one confined to "setting aside" as the provision bids one to do and would thus constitute a valid exercise of jurisdiction under Section 34 of the Act.

J. The Supreme Court in M. Hakeem, has enunciated the setting aside power as being equivalent to a power to annul or setting at naught an Arbitral Award. It has essentially held that bearing in mind the plain language of Section 34 coupled with the Act having desisted from adopting powers of modification or remission that existed in the erstwhile 1940 Act, a court while considering a challenge under Section 34 would not have the power to modify.

K. The expression "modify" would clearly mean a variation or modulation of the ultimate relief that may be accorded by an AT.

However, when a Section 34 Court were to consider exercising a power to partially set aside, it would clearly not amount to a modification or variation of the award. It would be confined to an offending part of the award coming to be annulled and set aside. It is this distinction between a modification of an award and its partial setting aside that must be borne in mind.



L. The power to partially sever an offending part of the award would ultimately depend on whether the said decision is independent and distinct and whether an annulment of that part would not disturb or impact any other finding or declaration that may have been returned by the AT. The question of severability would have to be decided bearing in mind whether the claims are interconnected or so intertwined that one cannot be segregated from the other. This for the obvious reason that if the part which is sought to be set aside is not found to stand independently, it would be legally impermissible to partially set aside the award. A partial setting aside should not lead to a component of the award being rendered vulnerable or unsustainable. It is only when the award relates to a claim which is found to stand on its own and its setting aside would not have a cascading impact that the Court could consider adopting the aforesaid mode.

M. The Court is thus of the firm opinion that the power to set aside an award in part would have to abide by the considerations aforesaid mindful of the imperatives of walking a line which would not dislodge or disturb another part of the award. However as long as the part which is proposed to be annulled is independent and stands unattached to any other part of the award and it could be validly incised without affecting the other components of the award, the recourse to partial setting aside would be valid and justified.”

63. Though the Court shall not have the power to modify the award, but if the award is such that it can be and it is severable as the finding on the different claims are independent, there is no restriction on the power of the Court to set aside the finding given on a particular case, while keeping the finding on other claims intact.
64. In **ONGC v. Saw Pipes** (203) 5 SCC 705 the court determine the contours of public policy, wherein an award can be set aside if it



violative of “The fundamental policy of Indian law”, ‘The interest of India, ‘Justice or morality’ or leads to a ‘Patent Illegality’ was discussed. It is a settled proposition that in order to fulfill the condition of ‘the fundamental policy of India and law’, the tribunal should adopt a judicial approach and the award must be fair, reasonable and objective. The requirement of law is that the award must be reasoned award substantiated by the evidence.

65. The Apex Court in *Ssangyong Engineering and Constructions Co. Ltd. NHAI* (2019) 15 SCC 131, inter alia held that for an award to fall into the category of ‘Patent Illegality’, the illegality should be such which goes to the root of the matter. The ‘Patent Illegality’ cannot be invoked if it is mere erroneous application of the law. It was inter alia held that if the award is not hit by the fundamental policy of Indian law i.e. the contravention of a statute not linked to public policy or public interest cannot be invoked for setting aside an award on the ground of patent illegality. The Apex Court inter alia held that the Court while exercising its jurisdiction under Section 34 of the Act cannot be permitted to re-appreciate the evidence on the premise of ‘patent illegality’.
66. It is also pertinent to mention here that the construction of the term of the contract also falls within the exclusive domain of the arbitrator. The Court can interfere only if the construction / interpretation of the terms of the contract is such that no fair minded, reasonable person could have interpreted in such a manner. Thus, it can be said that the view taken by the arbitrator can only be set aside if such a view is an impossible view. It can also be reiterated even at the cost of the bravery



that the awards can be set aside if the learned arbitrator travels beyond the terms of the contract or passes an award on the matter which was on the points which were not even referred for the arbitration. The premises for such is that the arbitrator is a creature of the agreement between the parties and thus, the arbitrator cannot return a finding on an issue which was not even agreed upon between the parties. It would amount to an error of the jurisdiction. The award which is based on no evidence or if vital piece of evidence has been ignored, such an award also can be set aside on the ground of patent illegality.

67. In the present case, primarily, the finding of the learned Arbitrator, which is under challenge is regarding issue Nos. 4 and 5 vide which the learned arbitrator held the respondent/claimant entitled to an amount of Rs. 16,02,01,966/- towards compensation besides the component of interest and passing an award inter alia holding the claimant entitled to an amount of Rs.15 crores towards the loss of terminal benefits. It is pertinent to mention here that while deciding issue No. 2 and 3, the learned Tribunal has inter alia held that services of the respondent was terminated illegally in the breach of the agreement dated 26.02.2014 as amended by the amendment agreement dated 15.03.2016.
68. The petitioner's case is that the respondent/claimant is not entitled to compensation or any claim on the loss of terminal benefits, in view of the Schedule –II part-B. Per contra, the case of the respondent is that the learned Tribunal has rightly held that but for the illegal termination of the agreement, the claimant would have served his term under the agreement and be entitled to the one-time payout, as referred to in paragraph 5 of part-A of Schedule –II. The findings of the learned



arbitrator in this regard has been reproduced hereinabove, and therefore, it would suffice to say that the learned Tribunal was of the view that since the petitioner had breached the agreement and termination of the agreement was illegal and wrongful, part-B of Schedule-II would have no applicability.

69. The petitioner has challenged the award on the ground that the compensation awarded by the respondent is illegal and falls within the category of 'patent illegality' since the respondent-claimant had not adduced any evidence that the onetime pay out was in the nature of a genuine pre-estimate of losses. The case of the petitioner is that the loss suffered must be proved by way of evidence by the parties which alleges loss and whether the contract contains a clause of liquidated damages or not, the same do not absolve party claiming loss from leading credible evidence to prove the same. The plea of the petitioner is that only reasonable compensation can be awarded. It has been submitted that the clause of liquidated damages contained in a contract is presumed to be penal in nature and to be regarded as the ceiling and not the actual amount which a party complaining of breach becomes automatically entitled. The plea of the petitioner is that awarding one time payout of Rs.15 crores is a gross unjust enrichment. The award has also been challenged on the ground of non application of doctrine of mitigation of losses.
70. The respondent/claimant has defended the award on the ground that since the termination was found to be illegal, the tribunal has rightly held the respondent entitled to onetime payout. The case of the respondent/claimant that one time payout to the claimant under



Paragraph-5 of Part-A Schedule –II of the agreement is not in the nature of damages but one time payout to the claimant in lieu of the 3.5% shareholding vested in at the time of signing of the agreement dated 24.02.2014 payable at the expiry of the terms of the agreement.

71. The respondent's case is that a question of it being or not being a genuine pre-estimate of damages under Section 74 of the Indian Contract Act, 1872 does not arise and it ex facie misplaced. The respondent has further submitted that one time payout to the claimant under clause-5 of Schedule –II of the agreement is not in the nature of damages, but one time payout to the claimant in lieu of 3.5 % shareholding vested in at the signing of the agreement dated 24.02.2014 payable at the expiry of term of the agreement and therefore, it is not a compensation for breach of the contract or stipulated penalty for breach as provided for under Section 74 of the Indian Contract Act that is the part of the compensation agreed to be paid by the petitioner to the respondent/claimant in terms of clause -4.2 of the agreement read with Schedule –II.
72. As far as the finding of learned Tribunal on issue No.4, the Court considers that the award of Rs. 16,02,01,966/- towards the compensation is a reasoned award and is just and fair. Once the termination has been held to be illegal, the claimant has rightly been held to be entitled for the salary as agreed upon between the parties for the reminder period in 7 years after the illegal termination. The finding on illegal termination of law also cannot be interfere with and has actually been half-heartedly challenged by the petitioner.



73. However, this Court has serious doubt over the award passing an award of Rs.16,02,01,966/- towards the loss of terminal benefits. If we re-visit the provisions of the key personnel/personal management agreement, clause-4.2 provides that the claimant would be entitled to one time payout on the expiry of the term i.e. at the end of the first 7 years from the date of commissioning of the hospital as detailed in part-A of Schedule –II. It further provides that on earlier termination of this agreement, the onetime payout if any, will be calculated as detailed in the part-B of Schedule-II. It further provides that on payment of onetime payout if any, due and payable as set out in Schedule –II, all rights of claimant in respect of notional shareholding in the company shall forthwith cease to exist. Clause- 4.3 provides that the onetime payout at the end of the term shall be calculated as per the formula provided in part-A of Schedule –II based on a notional shareholding of claimant Dr.Bagai in the company worth of Rs.3,50,00,000/- as on the signing date. If we come to the Schedule –I and II, part-A of Schedule-I is in respect of terms till the date of commissioning of the hospital. On the facts of this case, part-A of the Schedule-I is not relevant as part-B of Schedule – I is regarding the compensation which has already been upheld.
74. The heart of the controversy is schedule –II. Part-A of Schedule –II starts with the entitlement of the claimant to a notional shareholding worth of Rs.3,50,00,000/- in the company. Paragraph-2 provides that the quantum and percentage of notional shareholding of Claimant /Dr. Bagai in the company will be dependent on the actual capital



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structuring of the company. It further provides the basis for arriving at the quantum and percentage of the notional shareholding.

75. Now coming to the Clause-5 of the Schedule-II that that the claimant shall be entitled to onetime payout on the expiry of the term unless the agreement is terminated earlier in accordance with the provisions of this agreement. The bare reading of this clause makes it clear that prima facie Dr. Bagai/claimant was held entitled to one time payout on the expiry of 7 years of term subject to the exception that the agreement has been terminated earlier in accordance with the provisions of the said agreement.
76. It is pertinent to mention here that the learned Tribunal has given a reasoned and detailed finding that the termination was illegal and in breach of the agreement and the Court finds no reason to interfere with these findings. The respondent/claimant would not have been entitled to a one time pay out only if the agreement had been terminated on the grounds mentioned in clause 6.2 (a to e). Schedule-2 Part-B in fact does not visualize a situation where the agreement is terminated by the employer except for the reasons mentioned in Clause 6.2. It also does not provide the mechanism for such an eventuality. It is also relevant to note that Clause-6 of the Personnel Management Agreement provides that services cannot be terminated except for the reasons provided in Clause-6.2. There is substance in the argument of the petitioner that in fact by awarding compensation under Schedule-2 Part-B learned Arbitrator has enforced contract of service which is not permissible. In this regard Clause-6.5 is also important which does not provide for



terminal benefit in case of termination for reasons other than provided in Part-1 and 2 and Schedule-2 Part-B.

77. The award under issue 5 has been passed by the learned Arbitrator merely on the premises that the services of the respondent were terminated wrongfully and illegally. Beyond this, there is no other reason mentioned in the award for granting of Rs.15 crores. The finding of learned arbitrator on this issue to the effect that as the notional shareholding percentage could not be calculated, the claimant would still be entitled to Rs.15 crores being the higher amount is again presumptive. It is also necessary to note that the learned arbitrator had already passed an award in the sum of Rs.16,02,01,966/- along with interest which has been found to be reasonable by this Court. Thus, I consider that the finding of the learned Arbitrator in respect to issue No.5 holding the claimant entitled to Rs.15 Crores as a one-time payout is unjust and independent and severable. Thus, the finding of the learned Arbitrator on issue No. 5 is liable to be set aside.
78. In the circumstances, the petition is disposed of by upholding the award except for the finding on issue No.5 and finding in issue No.7 regarding the award of interest on Rs.15 Crores.
79. Thus, the present petition along with pending application stands disposed of.

DINESH KUMAR SHARMA, J

May 28, 2024

AR/Pallavi/Rb/dg

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