

**IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION**

APPELLATE SIDE

**FMA 1409 of 2022
With
FMA 1419 of 2022**

**M/S. B.B.M. Enterprise
Vs
State of West Bengal**

Before: The Hon'ble Justice Arijit Banerjee

&

The Hon'ble Justice Rai Chattopadhyay

For the Appellant

Mr. Malay Kr. Ghosh, Sr. Adv.
Mr. Aniruddha Mitra, Sr. Adv.
Ms. Nilanjana Adhya, Adv.

For the State

Md. T. M. Siddiqui, Sr. Adv., learned
AGP.
Mr. Tanay Chakraborty, Adv.
Mr. S. Adak, Adv.

For Judgment

24.07.2025

Arijit Banerjee, J. :-

1. These two appeals arise out of the same set of facts. Hence, the appeals have been taken up for hearing together along with the connected applications, by consent of the parties.

In Re: FMA 1409 of 2022

2. FMA 1409 of 2022 is directed against a judgment and order dated August 9, 2019, passed by the learned District Judge, Purba Medinipur in J. Misc Case (Arbitration) no. 68 of 2018 filed by the respondents herein under Section 34 of the Arbitration and Conciliation Act, 1996 (in short “the said Act”) for setting aside the arbitral award dated May 19, 2018, passed by a learned Sole Arbitrator being the Superintendent Engineer, South Western Circle, P.W.D. (Roads), Directorate., to the extent the learned Arbitrator allowed the claim of the appellant herein (hereinafter also referred to as “BBM”).

3. FMA 1419 of 2022 is directed against a judgment and order dated January 4, 2020, passed by the same learned Judge in J Misc. Case no. 69 of 2018, being an application filed by BBM challenging the same arbitral award to the extent the learned Arbitrator rejected some of BBM’s claims. The State’s application for setting aside the arbitral award was allowed by the judgment and order dated August 9, 2019. BBM’s application for setting aside the award was dismissed by the judgment and order dated January 4, 2020.

4. Appearing for BBM, Mr. Malay Kr. Ghosh, learned Senior Counsel, submitted that only one head of claim has been allowed by the Arbitrator in favour of BBM. The Arbitrator came to a finding that the respondents herein wrongfully terminated the contract in question and thereby prevented BBM from completing performance of the contract. Consequently, BBM suffered loss of profit which the Arbitrator assessed at 15 per cent of the value of the unexecuted portion of the work, following the formula adopted by the

Hon'ble Supreme Court in the case of **A. T. Brij Paul Singh & Ors v. State of Gujarat reported at AIR 1984 SC 1703**. Learned Counsel submitted that there was no ground for the learned Judge to set aside the said award to the extent it was in favor of BBM.

5. Learned Senior Counsel then referred to Clauses 2 and 3 of the general conditions of contract. Clause 2 pertains to the quantum of compensation payable by the contractor to the employer when there is delay on the part of the contractor in performing the contract. Clause 3 indicates the measures that the Divisional Officer may adopt if and when the employer becomes entitled to forfeit the whole of the security deposit. Clauses 2 and 3 are set out hereunder:-

“Clause - 2 The time allowed for carrying out the work as entered in the tender shall be strictly observed by the contractor and shall be reckoned from the date on which the order to commence work is given to the contractor. The work shall be proceeded throughout the stipulated period of the contract with all due diligence, (time being deemed to be of the essence of the contract on the part of the contractor) and the contractor shall pay as compensation an amount equal to one percent or such smaller amount as the Superintending Engineer (whose decision in writing shall be final) may decide, on the amount of the whole work as shown in the tender for everyday delay, and the days for which the work remains uncommenced or unfinished after the proper completion date. The contractors shall commence execution of such part of the work as may be notified to him within.....days from the date

of the order of commencement for work, and diligently continue such work and further to ensure good progress and during the execution of the work, he shall be bound in all cases in which the time allowed for any work exceeds one month to complete one fourth of the whole of the work before one fourth of the whole time allowed under the contract has elapsed, one half of the work before one half of such time has elapsed and three fourth of the work before three fourth of such time has elapsed. In the event of the contractor failing to comply with any of the conditions herein, he shall be liable pay as compensation an amount equal to one percent or such smaller amount as the Superintending Engineer (whose decision in writing shall be final) may decide on the said tendered amount of the whole work for every day that the due quantity of work remains incomplete. PROVIDED ALWAYS that the entire amount of compensation to be paid under the provisions of this clause shall not be exceed ten percent on the tendered amount of the works as shown in the tender.

Clause - 3 In any case in which under any clauses of this contract the contractor shall have rendered himself liable to pay compensation amounting to the whole of his security deposit (whether paid in one sum or deducted by installments) the Divisional Officer, on behalf of the Governor shall have power to adopt any of the following courses as he may deem best suited to the interests of Government:-

a) To rescind the contract (of which recession notice in writing to the contractor under the hand of the Divisional Officer shall be conclusive evidence), and in which case the security deposit of the contractor shall stand forfeited and be absolutely at the disposal of Government.

b) To employ labour paid by the Public Works Department and to supply materials to carry out the work or any part of the work debiting the contractor with the cost of the labour and the price of the materials (or the amount of which cost and price a certificate of the Divisional Officer shall be final and conclusive against the contractor) and crediting him with the value of the work done in all respects in the same manner and at the same rate as if it had been carried out by the contractor under the terms of his contract: the certificate of the Divisional Officer as to the value of the work done shall be final and conclusive against the contractor.

c) To measure up the work of the contractor and to take such part thereof as shall be unexecuted out of his hands and to give it to another contractor to complete, in which case any expenses which may be incurred in excess of the sum which would have been paid to the original contractor, if the whole work had been executed by him (of the amount of which excess the certificate in writing of the Divisional Officer shall be final and conclusive) shall be borne and paid by the original contractor and may be deducted from any money due to him by Government under the contract or otherwise or from any money due to him by proceeds of sale thereof or a

sufficient or from his security deposit or the proceeds of sale thereof or a sufficient part thereof or a sufficient part thereof.

In the event of any of the above courses being adopted by the Divisional Officer, the contractor shall have no claim to compensation for any loss sustained by him by reason of his having purchased or procured any materials or entered into any engagements or made any advances on account of or with a view to the execution of the work or the performance of the contract. And in case the contract shall be rescinded under the provision aforesaid, the contractor shall not be entitled to recover or be paid any sums for any work therefor actually performed under this contract, unless and until the Sub-divisional Officer/Divisional Officer will have certified in writing the performance of such work and the value payable in respect thereof and he shall only be entitled to be paid the value so certified.”

6. Learned Senior Counsel submitted that although BBM claimed an amount of Rs. 29,76,504/- on account of loss of profit as pleaded in paragraph 40 of its statement of claim filed before the Arbitrator, on the basis of pleadings in the statement of defence filed by the respondents, learned Arbitrator found that the claimant was entitled to Rs. 59,51,032/- on account of loss of profit. Learned Senior Counsel submitted that value of the tender work was Rs. 4,23,32,607/-. According to the respondents as pleaded in their statement of defence, BBM executed work to the tune of Rs. 26,59,062/-. Therefore, value of the unexecuted portion of the work, according to the respondents, was Rs. 3,96,73,545/-. 15 per cent (going by

the formulae in ***Brij Paul Singh, Supra***) of the said sum amounts to Rs. 59,51,032/-. Therefore, according to learned Counsel, there was no error or irregularity in the learned Arbitrator awarding loss of profits to BBM in a sum higher than what BBM asked for in its statement of claim. This is because the Arbitrator proceeded on the basis of the respondent's statement that the value of the work done by the claimant is Rs. 26,59,062/-.

7. Learned Senior Counsel submitted that appreciation of facts and interpretation of clauses in a contract by the Arbitrator should not be touched by the Court while considering an application under Section 34 of the said Act. The setting aside Court does not sit in appeal over the arbitral award.

8. Mr. Ghosh then submitted that a notice dated April 17, 2012, was issued by the Executive Engineer, P.W.D., Tamluk Division calling upon BBM to show cause why action under Clause 2 of the Agreement should not be taken against BBM on account of its "dilatory method which is detrimental to the interest of the work and causing loss to Government". It was further stated in the notice that "if no cause is shown by you or if the cause shown by you is not convincing enough to satisfy me within 7 (seven) days from the date of receipt of the notice, I would take such action against you as are contemplated under Clause 2 of the said contract." Learned Counsel submitted that the Executive Engineer had no power or authority to issue such notice. It was the Superintending Engineer who was the concerned authority under Clause 2. Therefore, the show-cause notice was bad in law and the subsequent termination of the contract was also bad in

law. Therefore, learned Arbitrator rightly held that the termination of contract was wrongful.

9. Learned Senior Counsel relied on the following decisions:- **(i) Nazir Ahmad v. King Emperor, reported at AIR 1936 Privy Council 253, (ii) A.T. Brij Paul Singh & Ors. v. State of Gujarat, reported at (1984) 4 SCC 59, (iii) Associate Builders v. Delhi Development Authority, reported at (2015) 3 SCC 49, (iv) Hindustan Construction Company Limited v. National Highways Authority of India, reported at (2024) 2 SCC 613.** I will revert to these judgements if necessary.

Submission made on behalf of the State:-

10. Appearing for the State, Mr. Tanay Chakraborty, learned Counsel, made two-fold submission. Firstly, he submitted that on an erroneous interpretation of the relevant clauses of the contract between the parties, the Arbitrator came to a wrong decision that termination of the contract by the State was wrongful. He submitted that it is true that if an Arbitrator commits an error in the construction of a contract, it is an error that falls within his jurisdiction. However, the question of construction of the terms of a contract would arise only when there is vagueness or ambiguity in such terms. If the terms of the contract are crystal clear, as in the present case, no question of interpretation would arise. In such a case, an erroneous construction of the terms of the contract by the Arbitrator would be an error of jurisdiction and would be liable to be set aside. In this connection learned Counsel relied on a decision of the Delhi High Court in the case of **Jindal Rail Infrastructure Limited v. Union of India and Anr reported at 2024**

SCC OnLine Del 3065. In particular, learned Counsel relied on paragraphs 17 and 18 of the reported the judgment which read as follows:-

“17. It is trite law that an implied term is read into the contract to give it business efficacy, only if does not collide with the express terms of the contract. That said, before an implied term can be read into the contract, in addition, the following conditions must also be met: the implied term should be reasonable, equitable and something that parties always intended to agree to. In the instant case, since UOI expressly reserved the right in the subject contract to increase or decrease the ordered quantities to protect its commercial interest goes against JRIL’s submission that the 2016 tender rates should apply to the additional quantities. Any other approach would neither be reasonable nor equitable. In fact, it would lead to loss of pubic revenue.

18. The submission advanced on behalf of JRIL, that the interpretation of a contract falls within the domain of the Arbitrator, is a submission with which one cannot quibble. That said, the rules of interpretation kick in only when the contract or a particular clause is vague or ambiguous. The purpose of employing interpretation tools is to ascertain parties’ intent when they first enter into an agreement. The best tool to determine the parties’ intent is the plain words of the contract [in the give case, the words of a particular clause (s)]. If the word of the contract or a clause incorporated in the contract are clear, explicit and unambiguous, ordinarily, they have to be given their full effect.

The intention of parties is to be ascertained, in the first instance, from the meaning of the words they have used. Intention independent of that meaning is often a cause of confusion, while the process of construction is on. It is good to remember that parties who are knowledgeable and experienced, and can also have the benefit of legal advice, are taken to have intended what is stated in the contract. Therefore, the argument that the interpretation of a contract falls within the domain of an arbitrator is a submission which, in our opinion, is untenable as there was, without doubt, no scope for employing interpretation tools.”

11. The other point urged by the learned State Counsel is that the Arbitrator erred in holding that the Executive Engineer had no authority to issue show-cause notice to BBM. In fact, clause 2 of the contract does not contemplate any show-cause notice at all. Therefore, even if the Executive Engineer issued the concerned show-cause notice without any authority, the same is irrelevant and has to be ignored. By taking into consideration that the show-cause notice was without jurisdiction, the Arbitrator has decided the disputes not in accordance with the terms of the contract as there is no requirement of issuance of such show-cause notice. Hence, the impugned award falls foul of section 28(3) of the Arbitration and Conciliation Act, 1996. In this connection learned Counsel relied on a decision of the Hon’ble Supreme Court in the case of ***State of Chhattisgarh & Anr. v. Sal Udyog Private Limited reported at (2022) 2 SCC 275***. Learned Counsel referred to paragraphs 23 and 26 of the reported judgment which read as follows:-

“23. On a conspectus of the facts of the case, it remains undisputed that though the appellant State did raise an objection before the Arbitral Tribunal on the claim of the respondent company seeking deduction of supervision charges, for which it relied on Clause 6(b) of the agreement and the Circular dated 27-7-1987 to assert that recovery of supervision charges along with expenses was a part and parcel of the contract executed with the respondent company, the said objection was turned down by the learned Sole arbitrator by giving a complete go-by to the terms and conditions of the agreement governing the parties and observing that there is no basis to admit any such “indirect expenses”. The circular dated 27-7-1987 issued by the Government of Madhya Pradesh that provides for imposition of 10% supervision charges on the amounts calculated towards the cost of the Sal seeds in the expenditure incurred, was also ignored. Pertinently, the respondent company has not denied the fact that supervision charges were being levied by the appellant State and being paid by it without any demur as a part of the advance payment made on an annual basis, right from the date the parties had entered into the first agreement i.e. from 30.8.1979. This fact is also borne out from the specimen copies of the orders filed by the appellant State with the appeal that amply demonstrate that the cost of the Sal seeds required to be paid by the respondent company included supervision charges described as Paryavekshan vyay in vernacular language. It was only after the appellant State had terminated the

second contract on 21.12.1998, that the respondent company raised a dispute and for the first time, claimed refund of the excess amount purportedly paid by it to the appellant State towards supervision charges incurred for supply of Sal seeds. In our opinion, this is the patent illegality that is manifest on the face of the arbitral award inasmuch as the express terms and conditions of the agreement governing the parties as also the circular dated 27-7-1987 issued by the Government of Madhya Pradesh have been completely ignored.

26. To sum up, existence of Clause 6(b) in the agreement governing the parties, has not been disputed, nor has the application of the Circular dated 27-7-1987 issued by the Government of Madhya Pradesh regarding imposition of 10% supervision charges and adding the same to cost of the Sal seeds, after deducting the actual expenditure been questioned by the respondent company. We are, therefore, of the view that failure on the part of the learned sole arbitrator to decide in accordance with the terms of the contract governing the parties, would certainly attract the patent illegality ground”, as the said oversight amounts to gross contravention of Section 28(3) of the 1996 Act, that enjoins the arbitral tribunal to take into account the terms of the contract while making an award. The said patent illegality is not only apparent on the face of the award, it goes to the very root of the matter and deserves interference. Accordingly, the present appeal is partly allowed and the impugned award, insofar as it has

permitted deduction of supervision charges recovered from the respondent company by the appellant State as a part of the expenditure incurred by it while calculating the price of the Sal seeds, is quashed and set aside, being in direct conflict with the terms of the contract governing the parties and the relevant circular. The impugned judgment dated 21.10.2009 is modified to the aforesaid extent.”

Reply on behalf of BBM

12. Learned Senior Counsel for BBM submitted, by referring to the pleadings filed before the learned Arbitrator, that it was not the case of the State that no show-cause notice was required to be issued prior to termination of the contract. There is no such whisper in the pleadings filed by the State before the Arbitrator. Whether or not the termination of the contract was bad in law for not having been preceded by issuance of a show-cause notice by the competent authority, was one of the disputes that was referred to the Arbitrator and was framed as an issue by the Arbitrator. Hence, the present stand of the State is an afterthought.

Court's View

13. We are concerned with an appeal under Section 37 of the Arbitration and Conciliation Act, 1996. The appeal is directed against a judgement and order of a learned Single Judge of this Court allowing an application of the respondent/ State of West Bengal, for setting aside an arbitral award passed in favor of the appellant herein, under Section 34 of the 1996 Act. What falls for our consideration is whether or not the learned Trial Judge acted within

the parameters of Section 34 of the 1996 Act. It is established law by now that while exercising jurisdiction under Section 34 of the 1996 Act, the Court does not act as an Appellate Court. The learned Judge does not sit in appeal over the arbitral award. The learned Judge has to see only if the petitioner assailing the award has been able to make out at least one of the grounds for setting aside an arbitral award as mentioned in Section 34 of the 1996 Act.

14. Section 34 of the 1996 Act reads as follows:

“34. Application for setting aside arbitral award.—

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

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

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

(i) a party was under some incapacity, or

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

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

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

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

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

(b) the Court finds that—

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

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

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

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

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

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

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

[(2A) An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the Court, if the Court finds that the award is vitiated by patent illegality appearing on the face of the award:

Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by reappreciation of evidence.]

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal:

Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.

(4) On receipt of an application under sub-section (1), the Court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the

arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award.

[(5) An application under this section shall be filed by a party only after issuing a prior notice to the other party and such application shall be accompanied by an affidavit by the applicant endorsing compliance with the said requirement.

(6) An application under this section shall be disposed of expeditiously, and in any event, within a period of one year from the date on which the notice referred to in sub-section (5) is served upon the other party.]”

15. On a perusal of the aforesaid section it would be clear that the grounds of challenging an arbitral award have been restricted by the legislature. Under the Arbitration Act, 1940, an award could be challenged on various grounds. This resulted in prolongation of the process of resolution of disputes between the parties by resorting to arbitration as an alternative dispute resolution mechanism since in a large number of cases the arbitral award was challenged before the competent Court. Thereafter the legal process continued up to the Hon’ble Apex Court. The intention of the legislature of making arbitration an expeditious procedure for dispute resolution was often defeated. This was one of the reasons for promulgation of the 1996 Act. The grounds of challenging an arbitral award are now limited. As would appear from the opening words of sub-section (2) of Section 34 of the 1996 Act, the grounds of challenge mentioned under

Section 2 are exhaustive. An arbitral award may be set aside “only if” one or more of the grounds enumerated in sub section (2) is/are made out by the petitioner. Subsequently sub-section (2A) was introduced which provided an additional ground for setting aside an award.

16. One of the grounds for setting aside an award is, if the award is in conflict with the public policy of India. Explanation 1 under sub-section (2) clarifies when an award can said to be in conflict with the public policy of India. One such situation is when the award is in contravention of the fundamental policy of Indian law. Explanation 2 under Section 2 clarifies that in order to ascertain whether there is a contravention of the fundamental policy of Indian law, the Court shall not review the merits of the dispute.

17. Under sub-section (2A) under Section 34 of the 1996 Act, a domestic arbitral award may also be set aside if the award is found to be vitiated by patent illegality appearing on the face of the award. The proviso immediately clarifies that only because the award has resulted from an erroneous application of law, that will not be a ground for setting aside. The proviso further clarifies that the award will not be set aside on the ground of there being patent illegality on the face of the award by reappreciation of evidence.

18. We therefore see that the intention of the legislature was to reduce the role of the Court to the minimum so that there is minimal interference with the arbitral process by taking recourse to Court. The learned Single Judge has noted the decision of this Court in the case of **Laxmi Pat Surana v. Voltas Ltd., reported at 2019 SCC OnLine Cal 1008**. At paragraph 7 of that judgement, after discussing various decisions of the Hon’ble Supreme

Court and also of various High Courts, a Division Bench of this Court held as follows:

“7. We do not find it necessary to multiply the references. It is sufficient to recall some of the legal principles which have emerged from a vast body of ever-growing case law of the various High Courts and the Hon'ble Supreme Court of India pertaining to Section 34 of the Act that may be summarised as follows:-

- a) On a cumulative reading of Section 5 and Section 34 of the Act, it is now well settled that an award passed by an Arbitrator can be set aside on the limited grounds and the supervisory role of a Court is reduced to a minimum level.
- b) It is not permissible for a Court to examine the correctness of the findings of the Arbitrator as if it were sitting in appeal overj an award. As such, a Court while considering the objections under Section 34 of the Act is not expected to re-appreciate the entire findings and reassess the whole case of the parties.
- c) If the conclusion or the final decision of the Arbitrator is based on a possible view of the matter, a Court should not interfere with an award. Generally, the conclusion of the Arbitrator with regard to the construction of a contract is not to be interfered with, if there is a plausible view of the matter, and even an error relatable to interpretation of the contract by an Arbitrator is regarded as an error within its jurisdiction and as

such it is an error which is not amenable to correction by Courts.

d) “A perverse finding is one which is based on no evidence or one that no reasonable person would have arrived at. Unless it is found that some relevant evidence has not been considered or that certain inadmissible material has been taken into consideration the finding cannot be said to be perverse. A broad distinction has, therefore, to be maintained between the decisions which are perverse and those which are not. If a decision is arrived at on no evidence or evidence which is thoroughly unreliable and no reasonable person would act upon it, the order would be perverse.” But, if there is some evidence on record which is acceptable and which could be relied upon, howsoever concise it may be, the conclusions would not be treated as perverse and the findings would not be interfered with.”

19. At paragraph 8 of the impugned judgement, the learned Trial Judge has noted the citations of numerous decisions of the Hon’ble Supreme Court and the High Courts, without discussing the decisions. In all fairness, it may not have been necessary to discuss in detail all those decisions. The law on the subject is fairly clear now.

20. The learned Judge also noticed the observations of the Hon’ble Supreme Court at paragraph 33 of the reported decision in the case of ***Associate Builders v. Delhi Development Authority reported at (2015) 3 SCC 49***, which reads as follows:

“33. It must clearly be understood that when a court is applying the “public policy” test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. Thus an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score [Very often an arbitrator is a lay person not necessarily trained in law. Lord Mansfield, a famous English Judge, once advised a high military officer in Jamaica who needed to act as a Judge as follows: “General, you have a sound head, and a good heart; take courage and you will do very well, in your occupation, in a court of equity. My advice is, to make your decrees as your head and your heart dictate, to hear both sides patiently, to decide with firmness in the best manner you can; but be careful not to assign your reasons, since your determination may be substantially right, although your reasons may be very bad, or essentially wrong”. It is very important to bear this in mind when awards of lay arbitrators are challenged.] . Once it is found that the arbitrator’s approach is not arbitrary or capricious, then he is the last word on facts. In *P.R. Shah, Shares & Stock Brokers (P) Ltd. v. B.H.H. Securities (P) Ltd.* reported at (2012) 1 SCC 594:

21. A court does not sit in appeal over the award of an Arbitral Tribunal by reassessing or reappreciating the evidence. An award

can be challenged only under the grounds mentioned in Section 34(2) of the Act. The Arbitral Tribunal has examined the facts and held that both the second respondent and the appellant are liable. The case as put forward by the first respondent has been accepted. Even the minority view was that the second respondent was liable as claimed by the first respondent, but the appellant was not liable only on the ground that the arbitrators appointed by the Stock Exchange under Bye-law 248, in a claim against a non-member, had no jurisdiction to decide a claim against another member. The finding of the majority is that the appellant did the transaction in the name of the second respondent and is therefore, liable along with the second respondent. Therefore, in the absence of any ground under Section 34(2) of the Act, it is not possible to re-examine the facts to find out whether a different decision can be arrived at.”

21. The material facts of the case have been recorded above. The dispute arose between the parties upon the respondent/State terminating a contract that had been awarded to the appellant BBM. The appellant initiated an arbitration following the route under Section 11 of the 1996 Act. The Court appointed the Superintending Engineer, South Western Highway Circle, PW (roads) Directorate as the Sole Arbitrator. The claimant being the appellant herein raised a claim of Rs. 3,05,72,488/- under five different heads in its statement of claim filed before the Arbitrator. Claim number 1 was for approximately Rs. 1.97 crores for execution of work but not billed for. Claim

number 2 was for approximately Rs. 1.10 Lakh on account of compensation for idle staff. Claim number 3 was for Rs. 29.76 Lakh approximately on account of loss of profits. Claim number 4 was for Rs. 5 Lakh on account of loss of good will for illegal termination of contract. Claim number 5 was for approximately Rs. 72.12 Lakh on account of interest for delayed payment of bills. The State of West Bengal, in its counter statement made a counter claim to the tune of approximately Rs. 56.33 Lakh on account of forfeiture of fixed security deposit under clause 3 of tender agreement (Rs. 12.50 Lakh); compensation from 23.04.2012 up to 15.06.2012 at the rate of 0.85% of the tender amount (Rs. 42, 23, 261); and ancillary costs for floating new tender for residual work (Rs. 1.50 Lakh).

22. The Arbitrator allowed only claim number 3 made by BBM. The other four heads of claim were rejected. The counter claim of the State Government was rejected in its entirety. The State filed an application for setting aside the award to the extent it allowed claim number 3 of BBM. BBM filed an application for setting aside the award to the extent that it disallowed the BBM's other claims. As indicated above, by a judgement and order dated August 9, 2019, the learned Trial Judge allowed the State's application and set aside the award made in favor of BBM. Hence, FMA 1409 of 2022 has been filed. By a judgement and order dated January 4, 2020, the learned Trial Court rejected BBM's application for setting aside the award. Hence, BBM has filed FMA 1419 of 2022.

23. I have carefully gone through the judgement and order impugned in FMA 1409 of 2022. This is the main judgement by which the State's application for setting aside the award to the extent that it allowed BBM's

claim, was allowed. Two factors weighed with the learned Judge in setting aside the arbitral award to the extent it was in favour of BBM.

24. The first thing is that the learned Judge came to a conclusion that the Arbitrator had altogether ignored the letter dated June 01, 2012, issued by the Superintending Engineer. According to the learned Judge, it was by this letter that the Superintending Engineer “practically invoked the clause 2 of the agreement and thereby asked the respondent/firm to pay compensation to the tune of Rs. 42,33,261 on account of alleged failure of the respondent/firm to complete the work as per agreement.” The learned Judge therefore concluded that clause 2 of the agreement was not invoked by the Executive Engineer by his letter dated April 17, 2012, and therefore BBM’s argument of the letter dated April 17, 2012, having been issued without authority or jurisdiction, is meritless.

25. The other point that weighed heavily with the learned Judge was that although BBM had made a claim of Rs. 29,78,504 on account of loss of profits, the Arbitrator has awarded an amount of Rs. 59,51,032 to the claimant on that account. The learned Judge found this to be perverse and shocking to the Court’s conscience.

26. Both the aforesaid grounds on the basis of which the learned Trial Judge set aside the arbitral award to the extent that it was in favour of BBM, pertain to the merits of the disputes between the parties. Firstly, it is not correct to say that the Arbitrator ignored or overlooked the Superintendent Engineer’s letter dated June 01, 2012. There is reference to the said letter in the award. Secondly, the Arbitrator on an interpretation of clauses 2 and 3 of the subject agreement, came to the conclusion that

clause 2 was invoked and a show-cause notice thereunder was issued by the Executive Engineer, which was without authority. By construing the said two clauses, the Arbitrator held that the termination of the subject contract by the State was illegal. Therefore, BBM was wrongfully prevented from completing the subject work. This resulted in loss of profit to the contractor i.e. BBM. Hence, the Arbitrator allowed the claim of BBM on account of loss of profit.

27. It is too late in the day to dispute the proposition of law that the Arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon. The finding of an Arbitrator on facts will rarely be interfered with by the Courts. Similarly, in so far as the construction of the clauses of a contract is concerned, the Arbitrator's opinion will generally be accepted. Of course, if a finding of fact or an interpretation of a contractual clause is perverse on the face of the award, the Courts may justifiably interfere.

28. In this connection one may refer to the observation of the Hon'ble Supreme Court in the case of ***OPG Power Generation Private Limited v. Enxio Power Cooling Solutions India Private Limited And Another, reported at (2025) 2 SCC 417*** wherein, at paragraph 84 of the reported judgment, it was held as follows:-

“Scope of interference with the interpretation / construction of a contract accorded in an arbitral award.

84. An Arbitral Tribunal must decide in accordance with the terms of the contract. In a case where an Arbitral Tribunal passes an award against the terms of the contract, the award would be

patently illegal. However, an Arbitral Tribunal has jurisdiction to interpret a contract having regard to terms and conditions of the contract, conduct of the parties including correspondences exchanged, circumstances of the case and pleadings of the parties. If the conclusion of the arbitrator is based on a possible view of the matter, the Court should not interfere. But where, on a full reading of the contract, the view of the Arbitral Tribunal on the terms of a contract is not a possible view, the award would be considered perverse and as such amenable to interference.”

29. In the present case, the Arbitrator has taken a particular view as regards legality or otherwise of termination of the subject agreement. The view does not seem to be *Wednesbury* unreasonable or arbitrary or preposterous or perverse. Therefore, I find no justification for the learned Trial Court to have interfered with the finding of the Arbitrator that the termination of the contract by the State Government was illegal.

30. Coming to the quantum of loss of profit awarded by the Arbitrator to BBM, I reproduce hereunder the Arbitrator’s award pertaining to BBM’s claim number 3.

“Claim No. 3 of Rs. 29,76,504/-

The Claim No.3 of Rs. 29,76,504/- is for loss of profit. If the contractor executes a work, he earns a profit. This ‘profit’ element is included in the rate of items of the tender schedule.

In the instant case, I have considered the termination of the tender by the Respondent as illegal. Here, after executing part of the work,

the Claimant was illegally prevented to complete the work. Hence, the Claimant is entitled to the profit, which he would have earned, if he was allowed to complete the job.

From AIR 1984 SC 1703, it transpires that “damages for loss of profit on the remaining work as 15% of the price of the work is unreasonable”.

Accordingly, I hold that since the tender amount of the work was Rs.4,23,32,607/- and the value of the executed work of the Claimant is Rs. 26,59,062/-, the Claimant is entitled to the claim of 15% of (Rs 4,23,32,607/-Rs. 26,59,062), i.e., 15% of Rs 3,96,73,545/- i.e., Rs. 59,51,032/-.”

31. The Arbitrator followed a formula accepted by the Hon’ble Supreme Court in the case of **A.T. Brij Paul Singh and Others v. State of Gujarat, (Supra)**. In paragraph 11 of the reported judgement, the Hon’ble Court held as follows:-

“11. Now if it is well-established that the respondent was guilty of breach of contract in as much as the rescission of contract by the respondent is held to be unjustified, and the plaintiff contractor had executed a part of the works contract, the contractor would be entitled to damages by way of loss of profit. Adopting the measure accepted by the High Court in the facts and circumstances of the case between the same parties and for the same type of work at 15

per cent of the value of the remaining parts of the work contract, the damages for loss of profit can be measured.”

32. Therefore the percentage taken by the Arbitrator at 15% cannot be said to be arbitrary or unreasonable. The question is, 15% of what? It is 15% of the value of the unexecuted portion of the work. The tender value of the subject work was Rs. 4,23,32,607/-. Although in the statement of claim, the claimant, i.e., BBM had averred that it had executed work valued at Rs. 2, 24, 89, 243/-, in the counter statement of defence, the State of West Bengal contended that the value of the work executed by the claimant up to termination of the contract was Rs. 26,59,062/-. Therefore, going by the State's case, the value of the unexecuted portion of the work as on the date of termination of the subject contract was Rs 4,23,32,607/- less Rs 26,59,062/-, which comes to Rs 3,96,73,545/-. The Arbitrator has awarded loss of profit to the tune of 15% of this amount which comes to Rs 59, 51, 032/-.

33. Can it be said that the aforesaid approach of or procedure adopted by the Arbitrator is perverse in law? I think not. The Arbitrator followed a principle recognised by the Hon'ble Supreme Court. The Arbitrator made the computation on the basis of the value of executed portion of the work furnished by the State Government. Was it unreasonable for the Arbitrator to proceed on the basis of a figure supplied by the State Government? In my opinion, the answer must be in the negative. In this connection, one may refer to a three Judge Bench decision of the Hon'ble Supreme Court in the case of **Srinivas Ram Kumar Frim v. Mahabir Prasad and Others**,

reported at AIR 1951 SC 177. In that case, at paragraph 9 of the reported judgement, the Hon'ble Court observed, *inter alia*, as follows:-

“....The rule undoubtedly is that the court cannot grant relief to the plaintiff on a case for which there was no foundation in the pleadings and which the other side was not called upon or had an opportunity to meet. But when the alternative case, which the plaintiff could have made was not only admitted by the defendant in his written statement but was expressly put forward as answer to the claim which the plaintiff made in the suit, there would be nothing improper in giving the plaintiff a decree upon the case which the defendant himself makes. A demand of the plaintiff based on the defendant's own plea cannot possibly be regarded with surprise by the latter and no question of adducing evidence on these facts would arise when they were expressly admitted by the defendant in his pleadings.....”

34. Although the Code of Civil Procedure strictly does not apply to arbitral proceedings, the principles thereof apply, *mutatis mutandis*. I find no illegality or perversity on the part of the Arbitrator in proceeding on the basis of a figure stated by the State/respondents in their counter statement and computing the quantum of loss of profits suffered by the claimant on the basis of such figure. If by so doing, the amount of loss of profit comes to more than the amount claimed on that account in the statement of claim, there would be nothing irregular about it and there is no reason for the same to shock the conscience of the Court.

35. In this connection it may be noted that while dilating on the point of the awarded amount on account of loss of profits being higher than the amount claimed by BBM before the Arbitrator in its pleadings, the learned Trial Judge referred to paragraph 36 of the decision in the case of ***Associate Builders, (Supra)*** which reads as follows:

“**36.** The third ground of public policy is, if an award is against justice or morality. These are two different concepts in law. An award can be said to be against justice only when it shocks the conscience of the court. An illustration of this can be given. A claimant is content with restricting his claim, let us say to Rs 30 lakhs in a statement of claim before the arbitrator and at no point does he seek to claim anything more. The arbitral award ultimately awards him Rs 45 lakhs without any acceptable reason or justification. Obviously, this would shock the conscience of the court and the arbitral award would be liable to be set aside on the ground that it is contrary to ‘justice’.”

However, in the present case the awarded amount being more than the amount claimed is not without acceptable reason or justification as I have discussed above. Hence the said decision does not come to the aid of the respondent.

36. In any event and independent of the formula approved by the Hon’ble Supreme Court in the case of ***A.T. Brij Paul Singh, Supra***, I am of the view that the 15% formula adopted by the learned Arbitrator for making an Award on account of loss of profit, is entirely reasonable. The Arbitrator is

an Engineer and is deemed to have special knowledge and/or expertise in the field in connection with which the dispute arose. His opinion should not be brushed aside lightly. I do not think that the Award made on account of loss of profit to the tune of 15% of the value of the un-executed portion of the subject contract is so unreasonable that no reasonable person could have come to that conclusion, nor is the Award such as would shock the conscience of the Court.

37. The two decisions relied upon by learned Counsel for the State have been adverted to above. In my opinion, the said decisions do not have relevance to the facts of the present case.

38. The other point urged on behalf of the State is that the agreement between the parties did not require issuance of a show-cause notice prior to termination of the contract. Hence, it is irrelevant as to whether or not such a notice was issued. Nothing turns on whether or not the show-cause notice dated April 17, 2012, was issued by the competent person.

I am unable to accept the aforesaid submission. Firstly, it is not the case of the respondent State in its counter statement of facts filed before the Arbitrator that no show-cause notice was required to be issued prior to putting an end to the contract. Issuance of show-cause notice by an officer of the government lacking authority or competence was squarely pleaded in the statement of claim. The same was answered only by a bare denial. No case was run by the State that the contract did not contemplate issuance of a show-cause notice.

39. In any event, principles of natural justice warranted issuance of a show-cause notice by the competent officer to the contractor. Although such a notice was issued under clause 2 of the agreement which has been extracted above, the same was not by the Superintending Engineer who was the person authorised in that regard. Any act contemplated by the State or a public authority which would have civil consequences for a citizen must be preceded by a show-cause notice or a meaningful opportunity of hearing in consonance with the *audi alteram partem* rule. When the subject contract, the provisions whereof govern the relationship between the parties, expressly or by implication, require such notice to be issued by a particular authority, it is only that authority which can issue such notice. In this case the competent authority was the Superintendent Engineer. The notice was in fact issued by the Executive Engineer. The notice dated April 17, 2012, was therefore bad in law.

40. The learned Trial Judge also referred to the decision of the Hon'ble Supreme Court in the case of ***Ssangyong Engineering and Construction Co. Ltd. v. National Highways Authority of India (NHAI) reported at 2019 SCC Online SC 677***. In particular, paragraph 42 of the judgement was quoted by the learned Trial Judge wherein it was observed that 'a finding based on no evidence at all or an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside on the ground of patent illegality.' There can possibly be no dispute with such proposition of law and indeed it is the law of the land having been declared so by the Hon'ble Supreme Court and binding on all other Courts in India. However, in the present case I do not find that the arbitral award was based

on no evidence at all or that the Arbitrator ignored any vital evidence. Therefore, I am of the considered opinion that there is no perversity in the award in the sense that we understand that term and as the Hon'ble Supreme Court has clarified.

41. The learned Trial Judge while noting the relevant decisions of the Hon'ble Supreme Court which have laid down the contours of Section 34 of the 1996 Act, has however, failed to apply the correct principles of law to the facts of the instant case. The learned Trial Court acted as an Appellate Court rather than a court in seisin of an application under Section 34 of the 1996 Act performing the restricted function of deciding whether or not any of the grounds enumerated in Section 34 of the 1996 Act has been made out. In my view, the learned Trial Court has transgressed the jurisdiction with which a setting aside court is vested under Section 34 of the 1996 Act.

42. In view of the aforesaid, I have to allow this appeal. The judgment and order under appeal is set aside. The award of the Arbitrator revives.

43. The appeal and the connected application are, accordingly, disposed of. There will be no order as to costs.

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44. This appeal is directed against a judgement and order dated January 4, 2020, passed by a learned Single Judge of this Court disposing of the present appellant's application for setting aside the arbitral award to the extent the same did not allow four out of five claims of the appellant.

45. The learned Trial Judge noticed that by a judgement and order dated August 9, 2019, passed on the State's application for setting aside the

concerned arbitral award, the award had been set aside. Noticing the same, the learned Judge disposed of the appellant's application for setting aside the award with the following observations:-

“On perusal of the aforementioned judgement as passed by this Court in J. Misc. Case (Arbitration) no. 68 of 2018, it reveals to this Court that by said judgement, this Court had already set aside the arbitral award dated May 19,2018, as passed by the Arbitrator. Since the subject-matter of challenge of the instant Misc. Case is with regard to some portions of the said award and since the said impugned award has already been set aside by this Court, this court considers that there is nothing left for disposal in the instant case Misc. Case. With these observations, J. Misc. Case no. 69/2018 is disposed of.”

46. I see no reason to interfere with the order impugned in this appeal. The appeal has also not been seriously pressed.

47. Hence, there would be no order on this appeal. The appeal stands disposed of without any order as to costs.

48. Urgent Photostat certified copies of this judgment, if applied for, be supplied to the parties on compliance of all necessary formalities.

I agree.

(Arijit Banerjee, J.)

(Rai Chattopadhyay, J.)