

IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE

BEFORE:

The Hon'ble Justice Soumen Sen

and

The Hon'ble Justice Biswaroop Chowdhury

FMAT 495 of 2019

The State of West Bengal & Ors.

Vs.

M/S M.R. Builders

For the Appellant : Mr. Priyankar Saha, Adv.,
Mr. Arindam Mandal, Adv.,
Ms. Sijani Mukherjee, Adv.,

For the Respondent : Mr. Gopal Chandra Ghosh, Sr. Adv.,
Mr. Pradip Mukherjee, Adv.
Mr. Prasanta Kr. Banerjee, Adv.
Mr. Purnakar Biswas, Adv.

Hearing concluded on : 25th July 2025

Judgment on : 10th September, 2025

Soumen Sen, J.:-

1. The present appeal filed under Section 37 of the of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the said Act) arises out of a judgment dated 28th January, 2019 passed by the Learned District Judge, Uttar Dinajpur in Misc Case No.115 of 2014 whereby the application under Section 34 of the Act filed by the appellant herein was dismissed and the Arbitral Award dated 12th July 2007 in AP No. 18 of 2000 was affirmed.

2. Shorn of details, the relevant facts are stated hereinafter.

3. The claimant contractor in the arbitration proceeding is the respondent herein and the respondent in the arbitration proceeding is the appellant herein.

4. The appellant invited sealed tender for construction of cross-drainage structure at 28.15 km of D.N.M.C. in PS Islampur, District- Uttar Dinajpur and the participating tenderers were required to submit their tender on the basis of departmental schedule of rates attached to tender papers on 'at par' or 'percentage above' or 'percentage below' basis. In pursuance to the said tender, the respondent contractor submitted his tender on 19th January, 1995 and appellant issued work order to the respondent by letter dated 10th April, 1995 for a sum of Rs. 77,13,696/- which is 18.25% less than the estimated departmental value of different items amounting to Rs. 94,35,714/-. A formal agreement was executed by and between the parties wherein it was mentioned that the work would be completed within six working months from the date of issuance of work order by the Department. The stipulated date of commencement of work was 17th April, 1995 i.e. seven days after issuance of work order and the stipulated date for completion of the work was six working months therefrom. The work was terminated by a letter dated 14th January 1998 by the Executive Engineer recommending the respondent agency be released. The prolongation period of the work in question was 31 months beyond the stipulated period.

5. Disputes having arisen between the parties with respect to execution of work and its due payments and the matter was referred to

arbitration. The total claim was for an amount of Rs. 79,84,316 along with interest at the rate of 18 % per annum.

6. The seven heads of claim were decided and awarded as follows:

Sl. No.	Head of Claim	Amount Claimed (in Rupees)	Amount Awarded (in Rupees)
1.	Amount payable for works done including extra works as indicated in 1 st to 5 th supplementary tender.	20,00,000.00	Allowed
2.	Amount payable due to short payment of extra de-watering works in excess of 10% of the tendered quantity.	26,92,412.00	Rejected
3.	Refund of security deposits.	1,00,000.00	Allowed
4.	Amount payable on a/c of rise in prices of labour and materials in respect of all spill-over-works executed after expiry of original date of completion.	12,30,000.00	Allowed
5.	Amount payable on a/c of	9,87,344.00	Allowed to the

	additional on-site and off-site expenses in the over run period i.e., after 15.2.96.		extent of Rs. 1,50,000/- along with interest @ 12% p.a.
6.	Amount payable on a/c of reduced turn over and/or extended stay loss.	9,74,560.00	Rejected
7.	Interest @ 18% p.a. on the due amount from 1 st December 1997 till payment.	As accrued.	Not considered (in view of interest at 12% p.a. till payment of sums under various heads of claims)

7. The main issue which arose for consideration in the instant appeal is whether the Learned Arbitrator exceeded his jurisdiction in allowing claim no. 4 which is on account of damages incurred due to escalation in labour and material prices and partially allowing claim no. 5 which was on account of additional work executed at site and off site.

Submissions on behalf of the Appellant

8. The learned counsel appearing on behalf of the appellants submitted that there was no prohibition on the respondent contractor to quote a price higher than the estimated price put to tender. The contract

awarded also specifically mentioned that in case the contract was prolonged, the contractor would be entitled to extension of time with the rates remaining unchanged. It was argued that since delays were a common occurrence in commercial construction contracts and where escalation of price is prohibited, the respondent contractor could not have claimed for escalation since he had entered into the contract knowing fully well that he could not claim the same in the event there was a delay in completion of the contract.

9. It was also emphatically argued that an award could not be passed disregarding the prohibitory clauses contained in the agreement. An arbitrator is a creature of the agreement and in view thereof if an agreement contains a prohibitory clause with regard to idle labour and escalation of price, the same could not have been awarded. In this regard the following clauses were relied upon:-

- (i) Clause No. 16 of the General Terms and Conditions which is quoted below:-

"The Contractor will have to apply as per Clause 5 of 2911 or 2911(ii) as the case may be for extension of time. If the work is non-commenced or stopped or delayed due to non-receipt of Departmental materials, land acquisition or public interference etc. No compensation for idle labour establishment charges or other matters will be entertained on these accounts."

- (ii) Clause 51 of General Terms and Conditions which stipulates that no escalation of rate will be allowed for execution of work, for any increase of cost of materials, fuel and lubricant, labour

and minimum wages, which may occur during the period of execution.

- (iii) Clause Nos. 56, 57, 58 and 59 of General Terms and Conditions which have also been reproduced for convenience-

“56. The Contractor will get reasonable extension of time if applied as per Clause 5 of B, F, 2911 (i) or 2911(ii) as the case may be if the work is non-commenced or stopped or delayed due to non-receipt of Departmental materials, land acquisition or public interference etc. no claim for compensation thereof on any account will be entertained.

57. Except these terms and conditions, any of the terms and conditions as to be specifically given along with any tender will also be binding and hold good.

58. All conditions of WBF No. 2911/2911(i)/2911(ii) will be obligatory and binding.

59. No escalation of rate will be allowed for execution of the work, for any increase of cost of materials fuel and lubricant labour and minimum wages, which may occur during the period of execution.”

- (iv) Clause 25 of Additional Terms & Conditions which states that no supplementary item of work is permissible without prior written permission of the Engineer-in-charge. It was contended that the appellants did not give any written instruction on permission to the respondent for doing any extra or supplementary work in relation to the original work.
- (v) Clause 7 of Additional Terms and Conditions provides for No Claim for Escalation stating that no claim shall be entertained for any increase of railway freight and market price.

- (vi) Clause 45 of Additional Terms and Conditions also mentions that the department shall not entertain any claim whatsoever from the contractor for payment of compensation on account of idle labour on any ground.
- (vii) Clause 46 of Additional Terms and Conditions provides that there is no provision of escalation in tender. No claim whatsoever from the contractor shall be entertained for any increase in railway freight and/or market price under any circumstances.
- (viii) Clause 12 of the Conditions of Contract which mentions alteration in the works if any would be required to be done at the same rates and conditions; and the Contractor would be entitled to only increase in time period for additional works if any. (emphasis supplied)

10. Learned Advocate appearing on behalf of the appellant placed reliance on ***General Railway Manager, Northern Railway and Another vs Sarvesh Chopra***¹, for the proposition that “no-damage” clauses are used for describing a type of clause which classically grants extensions of time for completion, for variously defined “delays” including some for which, as breaches of contract on his part, the owner would prima facie be contractually responsible, but then proceeds to provide that the extension of time so granted is to be the only right or remedy of the contractor and, whether expressly or by implication, these damages or compensation are not to be recoverable therefore. He further submits that those claims which are

¹ (2002) 4 SCC 45

covered by several clauses of the Special Conditions of the contract can be categorized into two. One category is of such claims which are just not leviable or entertainable. Each of these clauses provides for such claims being not capable of being raised or adjudged by employing such phraseology as "shall not be payable", "no claim whatsoever will be entertained by the Railways", or "no claim will/shall be entertained". These are "no claim", "no damage", or "no liability" clauses. The other category of claims is where the dispute or difference has to be determined by an authority of the Railways as provided in the relevant clause. The first category is an "excepted matter" because the claim as per the terms and conditions of the contract is simply not entertainable; the second category of claims falls within "excepted matters" because the claim is liable to be adjudicated upon by an authority of the Railways whose decision the parties have, under the contract, agreed to treat as final and binding and hence not arbitrable.

11. It was submitted by the learned counsel that the learned arbitrator had allowed Claim No. 4 for escalation in toto without any discussion as to why despite the said prohibitory clauses, the award had been granted in favour of the respondent. In the same breath it was contended that Claim No. 5 had been awarded to the extent of Rs. 1,50,000/- despite the aforementioned prohibitory clauses. Reliance was put in this regard on the cases of **Chairman Board of Trustees for**

Shyamaprasad Mukherjee Port v Universal Sea Port Pvt. Ltd.² and ***Gopal Chandra Mukherjee v Food Corporation of India***³

12. To buttress the submissions, the learned counsel relied on the case of ***State of Rajasthan v Nav Bharat Construction Co.***⁴ to place the observation of the Apex Court that an arbitrator cannot go beyond the terms of the contract between the parties. In the guise of doing justice, he cannot award contrary to the terms of the contract. If he does so, he will have misconducted himself. Of course, if an interpretation of a term of the contract is involved then the interpretation of the arbitrator must be accepted unless it is one which could not be reasonably possible. However, where the term of the contract is clear and unambiguous the arbitrator cannot ignore it.

13. The decision in ***New India Civil Erectors Pvt. Ltd. v Oil and Natural Gas Corporation***⁵ was placed to submit that the arbitrator being a creature of the agreement, must operate within the four corners of the agreement and cannot travel beyond it. More particularly, he cannot award any amount which is ruled out or prohibited by the terms of the agreement. In that case, the agreement between the parties clearly stated that in measuring the built-up area, the balcony areas should be excluded. The Court held that the arbitrators could not have acted contrary to the said stipulation and awarded any amount to the appellant on that account. Furthermore, in that case a claim was also made on account of escalation in the cost of construction during the period subsequent to the expiry of the

² (2022) SCC OnLine Cal 4477

³ AIR 2017 Cal 110

⁴ 2006 (1) SCC 86

⁵ 1997 (11) SCC 75

original contract period. However, due to an express stipulation in the contract that “*the above price is firm and is not subject to any escalation under whatsoever ground till the completion of the work*” it was observed that in the face of the express stipulation between the parties, the appellant could not have claimed any amount on account of escalation and the arbitrators could not have awarded any amount on the ground that the appellant must have incurred extra expense in carrying out construction after the expiry of the original contract period and the stipulation between the parties was binding upon them both and the arbitrators.

14. ***State of Orissa v Sudhakar Das***⁶ was relied upon to draw attention to the Supreme Court’s observation that in the absence of any escalation clause, an arbitrator cannot assume any jurisdiction to award any amount towards escalation. The part of the award which granted escalation charges was held to be unsustainable and suffering from a patent error. The decree, insofar as the award of escalation charges was concerned was not hence sustained.

15. The case of ***Bharat Coking Coal Limited v Annapurna Construction***⁷ was cited to submit that an arbitrator cannot act arbitrarily, irrationally, capriciously or independent of the contract. It was opined that there lies a clear distinction between an error within the jurisdiction and error in excess of jurisdiction and the role of the arbitrator is to arbitrate within the terms of the contract. He has no power apart from what the parties give him under the contract. Halsbury’s Laws of England was also

⁶ 2000 (3) SCC 27

⁷ 2003 (8) SCC 154

referred for the proposition that since an arbitrator obtains his jurisdiction solely from the agreement for his appointment, it is never open to him to reject any part of that agreement or to disregard any limitations placed on his authority. In that case, the arbitrator had failed and/or neglected to take into consideration the relevant clauses of the contract and had neither taken into consideration the relevant materials for the purpose of arriving at a correct finding and hence such an order was deemed to be a misdirection in law.

16. The learned counsel placed reliance on the case of ***Ramnath International Construction Pvt. Ltd. v Union of India***⁸ and ***Associated Engineering Co. v Government of Andhra Pradesh and Anr.***⁹ to submit that where a contract prohibits compensation or delay, the contractor could only claim for extension. Escalation could not be granted dehors the contract between the parties.

17. The case of ***Union of India v Varindera Constructions Limited and Ors.***¹⁰ was also cited to submit that the Supreme Court has opined that there cannot be any scope for escalation where the contract does not allow for the same. It was observed that the terms of the contract ought to be construed by the courts after having regard to the intention of the parties. Courts cannot take an alternative view as it may cause prejudice to either of the parties.

18. The learned Advocate has placed reliance on ***PSA Sical Terminals Private Limited v Board of Trustees of V.O. Chidambranar***

⁸ 2007 (2) SCC 453

⁹ (1991) 4 SCC 93

¹⁰ 2018 (7) SCC 794

Port Trust Tuticorin and Others¹¹, to submit that an arbitrator cannot rewrite the contract and cannot travel beyond the terms of the contract.

19. It was argued that the contractual period for completion of the work was 6 months from 17th April, 1995, i.e., 16th February, 1996. However, the respondent completed the work after 31 months. Thus, there was a delay on the part of the respondent in completing the work and hence no relief could have been granted in its favour.

20. It was further submitted that mere extension being granted, does not by itself give rise to a claim for escalation and it is the employer's prerogative under Section 63 of the Indian Contract Act, 1872 as to whether or not to accept delayed performance of the contract. It was argued that if the respondent contractor was aggrieved by the rise in prices, he had the option of repudiating the contract or making performance conditional upon increase of its consideration but the contractor had not chosen to do so.

21. It was submitted that there is no general and omnibus prohibition to claim damages by the respondent under the contract, rather it was only under a particular head of escalation and hence the principles of Section 55 of the Contract Act 1872 read with Section 23 and 73 of the Act of 1872 would not apply to the facts of the present case as public policy principles are not applicable to commercial contracts which bars a certain head of claim.

22. The case of **Alopi Parshad & Sons Ltd. v Union of India**¹² was cited for the proposition that parties are bound by the terms of a

¹¹ (2023) 15 SCC 781

¹² 1960 SCC OnLine SC 13; (1960) 2 SCR 793; AIR 1960 SC 588

contract unless it is abandoned or altered by mutual agreement. The Indian Contract Act does not allow a party to ignore express covenants of a contract or claim payment at rates different from those stipulated even if circumstances change unexpectedly. The Court in this case had observed that change in circumstances such as war or economic shifts did not absolve parties from their contractual obligations unless performance became impossible or unlawful under Section 56 of the Contract Act. Additionally claims for compensation based on quantum meruit were also rejected when the contract expressly stipulated the rates of remuneration.

23. The learned counsel for the appellant contends that the costs awarded to the respondent by the Learned Arbitrator was unjustified and arbitrary. It is also argued that the arbitrator has allowed the claim as pleaded in the Statement of Claim and the value was not assessed by the Learned Arbitrator.

Submissions on behalf of the Respondent:

24. Per contra, the learned counsel appearing on behalf of the respondents submits that the award clearly records that the work could not be completed even until closure of work due to appellant's failure to hand over site and thus, the employer was liable for the consequences of delay. The learned Arbitrator had recorded on the basis of evidence adduced by the parties that the respondent contractor was exposed to increased cost of work due to rise in prices of labour and material. Moreover, no penalty was imposed by the appellant against the respondent contractor for extending the period of the original tenure of the contract, owing to laches on the part

of the appellant government, the delay of which was not attributable to the respondent contractor.

25. It was submitted that during the execution of the work the appellant made various changes in the specification governing the contract. On instruction from the appellant, the respondent executed the works under the said contract subject to various changes of specifications. The extra works which the appellant instructed the respondent to do were duly intimated by the respondent to the appellant from time to time and various letters were exchanged between the parties in connection therewith. It is further argued that due to changes of specifications and extra works, the respondent was entitled to, charges and expenses for such extra work and the respondent duly intimated the appellant of the same. The appellants however, neglected to pay the aforesaid amount due and payable to respondent.

26. The learned counsel submitted that Claim no. 4 was granted in favour of the contractor taking into consideration the revised schedule of rates prevailing at that point of time which was duly sanctioned by the department. The contractor referred to the first revised schedule which came into force on 1st October, 1995 and the second revised schedule of rates which was made effective from 1st September, 1996. The adjudication by the learned arbitrator taking into consideration the revised schedule of rates issued by the appellant themselves was well within his jurisdiction and not touching upon any prohibitory clauses. It was strenuously argued that the learned Arbitrator in the award had categorically given description of the difference in the amount in tender schedule and revised schedule after

deducting the tender percentage amounting to Rs 16,77,295/-. The learned Arbitrator had not exceeded his jurisdiction in awarding the sum of Rs 12,50,000/- which was the original claim.

27. It was submitted that Clause 45 and 46 are prohibitory clauses in the contract which are on account of idle labour and escalation in railway freight or market price prohibiting the contractor to claim the same during the tenure of the contract. It is contended that the learned arbitrator had duly considered such prohibitory clauses as well as restrictive clauses in the contract while allowing the claim and hence such claim could be said to be falling within the domain of any restrictive clauses and the arbitrator was correct in allowing such claim. It was argued by the learned counsel that if certain claims fall within the domain of excepted matters, then the appellant should have raised the same objection by filing a section 16 application under the 1996 Act.

28. The learned counsel for the respondent has placed reliance on a judgment of this Hon'ble Court in ***Union of India v Pam Developments Pvt. Ltd.***¹³ for the proposition that in a proceeding under Section 34 the Court cannot interfere with the award merely on the ground that the decision is erroneous if the award is otherwise proper.

29. The judgment of the Hon'ble Supreme Court in ***P. M Paul v Union of India***¹⁴ was also relied upon for the proposition that the arbitrator

¹³ 2003 SCC Online Cal 491

¹⁴ 1989 Supp 1 SCC 368

had the power to grant compensation to the contractor for increase in prices on account of delay attributable solely to the principal employer.

30. It was submitted by the learned counsel that the cost was awarded by the Ld. Arbitrator after taking into consideration section 31(8) of the 1996 Act. He further submitted that a total of 128 hearings had been held for which the claimant had to incur expenses for a sum of Rs.3,20,000/- towards Arbitrator's fees, Rs.32,000/- for stenographer fees and 19,000/- for clerks' fees. Therefore, a sum of Rs 3,71,000/- is payable by the appellant. The respondent contractor was a successful party in the arbitral proceedings and was dragged to arbitration on account of specific breaches and delay in execution of the contract as well as non-payment of admitted dues arising out of the contract. The Learned Arbitrator awarded costs for a sum of Rs 700,000/- which is just and proper.

31. It is further contended that the judgements relied on by the appellants in ***Associate Builders v. DDA***¹⁵, ***PSA Sical Terminals (P) Ltd. v. V.O. Chidambranar Port Trust***,¹⁶ and ***Gopal Chandra Mukherjee v. Food Corporation of India***¹⁷ are judgements rendered by the Hon'ble Supreme Court after taking into consideration the amendment which was incorporated in the year 2015 to the 1996 Act. He further contends that since the award in the instant case was passed prior to the 2015 amendment the ratio of the judgements referred to by the appellants would not be applicable to the instant case where the arbitral award was passed under the old Act.

¹⁵ (2015) 3 SCC 49

¹⁶ (2023) 15 SCC 781

¹⁷ 2017 SCC OnLine Cal 67; AIR 2017 Cal 110

32. It was submitted that the judgments cited by the appellant to impress upon the court that the learned arbitrator is not entitled in law to traverse beyond the scope of the contract are not applicable to the facts of the present case as they are clearly distinguishable.

33. In respect of ***Ramnath International Construction (supra)*** it was argued that it was distinguishable on facts as it dealt with compensation awarded to contractors and was not on the issue of escalation.

34. The decision in ***Associated Engineering Co. (supra)*** was distinguished and it is submitted that the said judgment was passed under Section 30 of the 1940 Act but the present reference was under the 1996 Act. Furthermore, the said judgment clearly stipulated that if the arbitrator has remained inside the parameters of the contract and has given reasons for awarding such claim the same could not be interfered with. In this case, the learned arbitrator had only allowed the claims in respect of the prevailing departmental rates for the overshoot period.

35. It was highlighted that the case of ***Varindera Constructions Limited (supra)*** could not be relied upon at this stage as the same was neither placed before the learned Arbitrator nor the Section 34 court. Even on the facts, the same was distinguishable from the facts of the present case as no award has been granted on account of reimbursement of wages in case of escalation which was the subject matter in the instant case. It was also argued that the case of ***Alopi Parshad & Sons (supra)*** could not be applicable since it had been passed considering the 1940 Act and not under the 1996 Act. Moreover the said judgment was on the issue of reimbursing

agents for undue delay in the execution of work which is in the nature of a claim for idle labour and not in the nature of escalation of prices in materials.

Analysis and Observations:

36. The contentious issue appears to be the Claim nos.4 and 5. Claim No. 4 relates to payment on account of works executed in the over run period at the revised departmental revised schedule of rates. The respondent contractor in its Statement of Claim stated that it was prevented from completing the work in time due owing to various breaches and defaults on the part of the appellant. The original execution of work was delayed by around 28 months instead of the original completion period of 6 working months. In the course of execution of work and particularly the over run period, there was a sharp increase in the prices of labour and materials and the appellants had themselves made two upward revisions in their schedule of rates on 1st October 1995 and 1st September 1996. It was contended in the Statement of Claim that since the appellant had awarded tenders to other agencies at the enhanced schedule of rates, the respondent too was entitled to be paid at the same enhanced prevailing departmental schedule of rates in respect of the works executed by it in the run over period. In essence this Claim relates to escalation of price.

37. Claim No. 5 in the Statement of Claim relates to the respondent contractor having to incur unanticipated additional expenses, on-site and off-site during the over run period of the work of 28 months after 15th February 1996, which would not have been incurred but for the delay attributable to the appellant.

38. The learned District Judge while deciding the merits of the Section 34 application observed with respect to Claim No. 1 that the respondent had raised the claim for works done based on the Measurement Books which were also produced before the learned arbitrator. The learned arbitrator had in view of the several letters written by the Engineer in charge and Executive Engineer held that the work done by the respondent was authorized and accepted by the appellant and on consideration of the Measurement Books observed that the entries made in original in the Books under joint signatures were binding on the parties. Further he had also noted that in view of Clause 12 of West Bengal form no.2911 the respondent contractor was bound to carry out and do the works as required by the Engineer-in-charge including additions, alterations and substitutions and in view of the evidence on record duly corroborated by the entries recorded in the Measurement Book it cannot be said to be unauthorized. In view of the fact that the Books signed by both parties were produced before the learned arbitrator along with several letters authorising the work carried out by the contractor, the learned District Judge found no reason to interfere with the Award on this ground. It was observed that after considering the entries in the Measurement Books, the schedule rates, payment received and deductions allowed, the Claim of the contractor to the tune of Rs. 20 lacs had been allowed. In this regard, the learned judge also noted that any verbal instructions to the respondent contractor to stop work was of no consequence in the absence of any letter indicating as such, once the appellants had put their signature in the Books in respect of works done.

39. In respect of Claim No. 4, the learned Judge noted the observations of the learned arbitrator that as per evidence adduced during the arbitral proceedings the appellant was unable to provide the land required by the contractor to complete the outfall channel, the estimated quantity of work also increased and there was no allegation by the appellant that the contractor had delayed the work. It was undisputable that the Government had revised the schedule of rates. However, relying on the decision of ***P.M Paul v Union of India***¹⁸ wherein it has been observed that when there is a delay in execution of the work due to conduct of the employer/respondent, the employer becomes liable for the consequences of delay namely increase in price, the learned Arbitrator had notwithstanding the restrictive clauses in the agreement on escalation of price, allowed the claim of the contractor since it was proved that the delay in work was due to conduct of the appellant. The learned District Judge found no reason to interfere with such finding.

40. In respect of Claim No. 5, the learned arbitrator had observed that the work was kept suspended at times by the appellant and the contractor had to incur expenses even during the period after completion of the work, awaiting his release and closure of work and even after the work was completed, contractor incurred on-site and off-site expenses since it was not released for quite some time, and the idle period exceeded 10 months. In light of the observations of the Apex Court in ***P.M. Paul (supra)*** and in view of categorical findings of the arbitrator that such expenses have incurred due to suspension of work at times by

¹⁸ AIR 1989 SC 1034

the respondent and also of not releasing the contractor even after completion of the work, the learned District Judge found that the claim awarded in this regard was proper.

41. The learned Judge also held that although the respondent contractor had claimed for an interest @ 18% p.a, taking into account the fluctuating interest rates the arbitrator rejected such claim of interest and awarded reasonable interest at the rate of 12% p.a.

42. It is pertinent at this juncture to refer to the case of ***P.M. Paul (supra)*** since Claim Nos 4 and 5 have been allowed primarily based on the observations of the Hon'ble Supreme Court in that case. In the facts of that case, the respondent entered into a contract with the appellant for construction of a building. Under the contract if the work was not completed within the stipulated time the contractor had a right to get extension of time. On failure to grant the extension, the contractor could claim difference in prices. The contract also contained a provision for settlement of disputes by arbitration. The building could not be completed within time. By an order of the Supreme Court dispute between the parties was referred to a retired Judge of the Court. The reference was as to who was responsible for delay in completion of the building, what were the repercussions of the delay and how to apportion the consequences of the responsibility. The respondent inter alia contended that in the absence of any escalation clause it was not permissible to the arbitrator to grant any escalation price sought by the contractor. The arbitrator noted that the claim related to the losses caused due to increase in prices of materials and cost of labour and transport during the extended period of contract. After discussing the evidence and

the submissions the arbitrator found that it was evident that there was escalation and, therefore, he allowed 20 per cent of the compensation.

43. The Hon'ble Supreme Court when faced with the issue of whether the arbitrator travelled beyond his jurisdiction in awarding escalation costs and charges, observed that escalation was a normal incident in this inflationary age in performing any contract and after noting from the evidence and submissions that there was delay resulting in losses caused to the claimant due to increase in prices of materials and cost of labour, found that there was escalation and accordingly allowed 20% compensation under this head of claim of escalation. The Apex Court noted that this was a matter within the jurisdiction of the arbitrator and there was no misconduct in awarding the same. The Court held that "*once it was found that the arbitrator had no jurisdiction to find that there was delay in execution of the contract due to the conduct of the respondent, the respondent was liable for the consequences of the delay, namely increase in prices.*"

44. In ***K.N. Sathyapalan Vs. State of Kerala & Anr.***¹⁹, the Court was called upon to answer whether in the absence of any price escalation clause in the original agreement and a specific prohibition to the contrary in the supplemental agreement, the appellant could have made any claim on account of escalation of costs and whether the arbitrator exceeded his jurisdiction in allowing such claims as had been found by the High Court. The Hon'ble Supreme Court referring to its earlier decision in ***P.M. Paul (supra)*** held as follows:

¹⁹ (2007) 13 SCC 43

“32. Ordinarily, the parties would be bound by the terms agreed upon in the contract, but in the event one of the parties to the contract is unable to fulfil its obligations under the contract which has a direct bearing on the work to be executed by the other party, the arbitrator is vested with the authority to compensate the second party for the extra costs incurred by him as a result of the failure of the first party to live up to its obligations. That is the distinguishing feature of cases of this nature and Alopi Parshad case [Alopi Parshad & Sons Ltd. v. Union of India, (1960) 2 SCR 793 : AIR 1960 SC 588] and also Patel Engg. case [State of U.P. v. Patel Engg. Co. Ltd., (2004) 10 SCC 566] . As was pointed out by Mr Dave, the said principle was recognised by this Court in P.M. Paul [P.M. Paul v. Union of India, 1989 Supp (1) SCC 368] where a reference was made to a retired Judge of this Court to fix responsibility for the delay in construction of the building and the repercussions of such delay. Based on the findings of the learned Judge, this Court gave its approval to the excess amount awarded by the arbitrator on account of increase in price of materials and costs of labour and transport during the extended period of the contract, even in the absence of any escalation clause. The said principle was reiterated by this Court in T.P. George case [T.P. George v. State of Kerala, (2001) 2 SCC 758] .” (emphasis supplied)

45. A Division Bench judgment of this Court in **State of West Bengal & Anr. Vs. M/S. N. Bhakat & Co. & Anr.** being **A.P.O. No.241 of 2012 with A.P. No.435 of 2008** reported at **MANU/WB/0894/2012**, relying upon **P.M. Paul** (supra) considered escalation clauses which are:-

“(I) No claim for idle labour will be entertained under any circumstances.

42. *No escalation of rate within the period of execution of the work is admissible”.*

Clause -7.

“.....It should be clearly understood that no claim whatsoever shall be entertained by the Government on account of delay in supplying materials”.

46. The Division Bench relying upon ***P.M. Paul (supra)*** and ***General Manager, Northern Railways (supra)*** held that those clauses would not absolve the State from their liability to pay damage due to their fault in delaying the process of work. In the former case the Hon’ble Division Bench observed that escalation is a normal incident arising out of gap of time in this inflationary age in performing any contract. The Arbitrator has held that there was delay. The Arbitrator found that it was evident that there was escalation and, therefore, he came to the conclusion that it was reasonable to allow the claim on account of price escalation. This was a matter, which was within the jurisdiction of the Arbitrator. Hence, the Arbitrator had not mis-conducted in awarding the said amount as he has done.

47. In the case of ***Assam State Electricity Board vs Buildworth Pvt. Ltd²⁰***, the Hon’ble Supreme Court held that in the event one of the parties to the contract is unable to fulfil its obligations under the contract which has a direct bearing on the work to be executed by the other party, the arbitrator is vested with the authority to compensate the second party for the extra costs incurred by him as a result of the failure of the first party to live up to its obligations relying on the decision in ***P.M. Paul (supra)***. Taking note of the fact that there was no formal extension of time and the claimant was allowed to carry on the work beyond the extended date without

²⁰ (2017) 8 SCC 146

any objection, without any penalty being invoked, it was held that the claimant was entitled to escalation price for the period that he had not worked. It was observed as follows:

“10. *The first submission is based on the provisions of Clause 2.3(a)(i) of the purchase order which is extracted below:*

“PRICES: 2.3.

(a) Escalation

1. The increase in price of steel labour valve, expansion joints, electrodes, etc. shall be to Boards accounts, with the overall ceiling of Rs 9,16,825 on submission of documentary evidence.”

11. *The contention of the claimant was that Clause 2.3(a)(i) applied only for the specific period mentioned in the purchase order and not for the extended period of the contract. According to the Board, a cap of Rs 9.16 lakhs was imposed under the above provision and no price escalation was permissible beyond it. The arbitrator entered the following finding:*

“... The contract is silent as to what will happen if the work agreed to be completed by 6-9-1983 cannot be completed within 6-9-1983. It has not been disputed by the respondent that the project work was completed much beyond the extended date i.e. by 6-9-1983. It is pertinent to point out here that the extension of time up to 6-9-1983 was formally granted by the respondent by a letter dated 27-3-1985. There is no formal extension of time beyond 6-9-1983 by the purchaser, but the claimant was allowed to carry out the work beyond 6-9-1983. From the records it is found that during the period from 6-9-1983 to 27-3-1985, there is no objection as to delay nor any formal extension. Nor was the penalty clause (2.6.7) invoked. As a matter of fact, the work was carried out by the claimant with active cooperation of the respondent till 31-1-1986 when the work

on TG-IV was completed and necessary payment was made to the claimant. It appears, therefore, that though there is no formal extension of time beyond 6-9-1983, the claimant was given informal extension of time up to 21-1-1986 when the work was finally completed.

12. *Besides this, the arbitrator noted that by a letter dated 5-6-1983 the claimant had specifically intimated to the Board that the escalation provision contained in Clause 2.3(a)(i) would not be applicable for the extended period. No objection was raised on behalf of the Board to the above letter and, on the contrary, the claimant was allowed to carry on the work beyond 6-9-1983 which was the extended date, without any objection up to 31-8-1986. The ultimate conclusion which was arrived at by the arbitrator was as follows:*

“As discussed above, the clause of price being firm cannot be extended to cover the period beyond the formal extended date i.e. 6-9-1983. Price escalation is a process which does not naturally confine itself between the date of purchase order and the extended date i.e. 6-9-1983. On the contrary, generally market tendency is that it goes on increasing with every passing day. Therefore, it would be naïve to presume that there was no price escalation between the period 6-9-1983 to 31-1-1986.

In view of the above, the respondent Board cannot deny the claimant the charge on account of price escalation taking shelter under Clause 2.3(a) of the purchase order and Clause 31 of the specification. Provision of both the clauses is applicable only up to the formal extension date 6-9-1983 and not beyond. Having allowed the claimant to carry out the work much beyond the formal extended date i.e. from 6-9-1983 up to 31-1-1986, the respondent cannot now take the stand that the claimant is not entitled to escalation price for the period he worked even though there is no formal extension of

time but for intents and purposes there was an extension of time up to 31-1-1986.”

13. *The arbitrator has taken the view that the provision for price escalation would not bind the claimant beyond the scheduled date of completion. This view of the arbitrator is based on a construction of the provisions of the contract, the correspondence between the parties and the conduct of the Board in allowing the completion of the contract even beyond the formal extended date of 6-9-1983 up to 31-1-1986. Matters relating to the construction of a contract lie within the province of the Arbitral Tribunal. Moreover, in the present case, the view which has been adopted by the arbitrator is based on evidentiary material which was relevant to the decision. There is no error apparent on the face of the record which could have warranted the interference of the court within the parameters available under the Arbitration Act, 1940. The arbitrator has neither misconducted himself in the proceedings nor is the award otherwise invalid.*

15. *A similar principle finds expression in another judgment of two learned Judges of this Court in Food Corporation of India v. A.M. Ahmed & Co. [Food Corporation of India v. A.M. Ahmed & Co., (2006) 13 SCC 779] : (SCC pp. 794-95, para 32)*

“32. Escalation, in our view, is normal and routine incident arising out of gap of time in this inflationary age in performing any contract of any type. In this case, the arbitrator has found that there was escalation by way of statutory wage revision and, therefore, he came to the conclusion that it was reasonable to allow escalation under the claim. Once it was found that the arbitrator had jurisdiction to find that there was delay in execution of the contract due to the conduct of FCI, the Corporation was liable for the consequences of the delay, namely, increase in statutory wages. Therefore, the arbitrator, in our opinion, had jurisdiction to go into this question. He has gone into that question and has awarded as

he did. The arbitrator by awarding wage revision has not misconducted himself. The award was, therefore, made rule of the High Court, rightly so in our opinion.” (emphasis supplied)

48. The Delhi High Court in the case of **MBL Infrastructures Limited v Delhi Metro Rail Corporation**²¹ the Court was deciding a Section 34 application. The claimant before the arbitrator had suffered damages on account of idling of machinery and loss of overheads due to default on the part of the respondent in fulfilling obligations under the contract. Certain clauses of the contract namely Clause 2.1 of GCC, Clause 2.2 of GCC as well as Clause 8.3 of GCC were referred to by the Arbitral Tribunal, wherein it was explicitly mentioned that the claimant would be entitled only to reasonable extension of time and there could be no monetary claims payable in this regard. Clause 8.3 of the enunciated that any delay on account of the respondent shall entitle the contractor to a remedy of extension of time which the Engineer deemed reasonable. The delay included in its ambit the handing over of site necessary for execution of work, giving of necessary notice for the purpose of commencement of work, providing necessary drawing or instructions or clarification or clarification or to supply any material, plant or machinery, which as per the terms and conditions of the Contract was the obligation of the employer. The Tribunal attributed the delay pertaining to the completion project on the respondent. The Court observed as under:

“42. *Upon perusal of the abovesaid paras pertaining to the award of Claim no. 1, it is crystal clear that the learned Tribunal has held that the*

²¹ 2023: DHC: 9067: 2023 SCC OnLine Del 8044

delay in completion of the project is attributable to the respondent. It has further categorically held that as per notice dated 2nd August 2013, under clause 13.2 of the GCC regarding failure to meet contractor's obligations as per the contract has been given wrongly. Since as per the material on record the tribunal held that the delays were beyond the control of the petitioner and the same cannot be construed as its fault.

43. Furthermore, the Tribunal highlighted the fact that there were surplus workers deployed in the key categories of Carpenter and fitters as per the data provided by the respondent. Therefore, the Tribunal held that the termination of the contract and forfeiture of performance security by the respondent is not in accordance with the contract.

44. This Court is of the opinion that the clauses which restricts the right of the party in claiming damages is a restrictive clause. Such a clause will defeat the purpose of the Indian Contract Act, 1872. Under section 55 and 73 of the said Act, the aggrieved party is entitled to claim damages, and there cannot be any restriction or prohibition exercised by the other party. It is the right of the aggrieved party to claim such damages.

45. Under section 23 of the Indian Contract Act, 1872, states that such clause is opposed to public policy since it aims at restraining the aggrieved party from claiming its rightful dues.” (emphasis supplied)

The Court placed reliance on the cases of **Simplex Concrete Piles (India) Ltd. v. Union of India**²², **Ircon International Ltd. v. GPT-Rahee JV**²³, **Ircon International Ltd. v. DMRC**²⁴, **Delhi Metro Rail Corporation Ltd. v. J. Kumar-Crtg JV**²⁵, for the proposition that similar clauses of the GCC of the respondent has been considered by the tribunal which had given

²² 2010 SCC OnLine Del 821

²³ 2022 SCC OnLine Del 839

²⁴ 2023 SCC OnLine Del 6368

²⁵ 2022 SCC OnLine Del 1210

finding that apart from Extension of time the contractor can also claim damages due to the delay on the part of the employer.

The conclusions of the Court as reproduced hereinunder are relevant for the present case:

“54. *In view of the aforesaid judgment, it is settled law that the learned Arbitral Tribunal can award damages when the clause of the contract contemplates that only extension of time can be given as remedy when there is a delay on the part of the employer. Hence, the act of awarding the damages to the aggrieved party does not amount to transgression from the terms of the contract.*

55. *Furthermore, as per Section 23 of the Indian Contract Act when there is a Contract which contains clauses that are against the public policy then such consideration or object of an agreement is considered unlawful and void.*

56. *In the instant facts, the impugned award merits interference since the award has shocked the conscience of the court due to the fact that despite holding that there is a delay on the part of the respondent and there has been wrongful termination of the contract by the respondent, the learned Tribunal has not awarded any damages to the petitioner. Learned Arbitral Tribunal has wrongly not awarded any damages to the petitioner.*

57. *The learned Tribunal failed to appreciate the fact that such a clause which restricts the right of the party to claim damages is a prohibitory clause and is wrongly disentitles the aggrieved party to claim damages. Such clause is against the public policy since it is contrary to the fundamental policy of Indian law.*” (emphasis supplied)

49. In **Atlanta Limited vs. Union of India**²⁶, the Hon'ble Supreme Court held that it is beyond the jurisdiction of the Appellate Court to assign to itself, the task of construing the terms and conditions of the contract and its provisions and take a view on certain amounts awarded in favour of a party.

"23. The second argument concerns the amount that was awarded in favour of the Appellant-claimant on account of idle hire charges and the value of its machinery and equipment lying at the site, that has been set aside in the impugned judgment. This point was covered in Issue No. 17 framed by the learned Sole Arbitrator, as below:

17. Is the claimant entitled to Rs. 25,45,88,460.00 for the loss of his overhead and profit, loss of idle hire charges of machinery and equipment, loss on account of missing parts, loss suffered due to wrongful and illegal encashment of Bank Guarantee and for compensation of extra expenditure incurred due to price rise during the extended period as claimed in his claim No. 3 ?

xxxx

26. The Appellate Court has set aside the aforesaid claim by taking a view that the learned Sole Arbitrator lost sight of the fact that once the High Court had passed an order granting permission to the Appellant-claimant to remove the equipment and machineries from the site in the proceedings initiated by it and still they were not removed, then it has none else to blame but itself for the situation. Holding that the learned Sole Arbitrator had misconducted himself by observing that the claimant "may be correct" in not taking the machineries without an inventory when they were available at the site, the Appellate Court held that the Appellant-claimant was not entitled to any amount towards the value of the tools and machineries, having been awarded idle hire charges for the very same equipments.

27. The aforesaid conclusion drawn by the Appellate Court is manifestly erroneous and flies in the face of the settled legal position that the Arbitrator is the final arbiter of the disputes between the parties and it is not open to a party to challenge the Award on the ground that he has drawn his own conclusions or has failed to appreciate certain facts. It is beyond the jurisdiction

²⁶ (2022) 3 SCC 739

of the Appellate Court to assign to itself, the task of construing the terms and conditions of the contract and its provisions and take a view on certain amounts awarded in favour of a party. It is reiterated that the learned Sole Arbitrator had given certain cogent reasons for awarding the amount in favour of the Appellant-claimant towards idle hire charges of the parts of the machineries and equipments and loss of machinery. It was beyond the domain of the Appellate Court to have examined the reasonableness of the said reasons by reappreciating the evidence to arrive at a different conclusion. Having regard to the fact that amounts have been awarded in favour of the Appellant-claimant on the above heads, based on the Report submitted to the Court by the Court Commissioner for valuing the tools and machinery and premised on the formula offered by the Appellant-claimant for arriving at the idle hire charges, both being undisputed, we see no good reason for the Appellate Court to have interfered in the manner it did.

28. The submission made on behalf of the Respondent-Union of India that the learned Sole Arbitrator had misconducted himself, is also unmerited. On the contrary, the conclusions are consistent with his findings and the records reveal that material documents were thoroughly examined by the learned Sole Arbitrator in the correct perspective. Nor are we persuaded by the plea that the learned Sole Arbitrator acted in excess of his jurisdiction by taking upon himself, the task to decide some of the disputes raised, when purportedly, they were specifically barred in the contract, described as "excepted matters".

29. Having carefully perused the Award, we find that the terms and conditions of the contract referred to by learned ASG appearing for the Respondent-Union of India, namely, Clauses 7, 11, 54 and 70 have been duly noted, discussed and declared as inapplicable to the fact situation by the learned Sole Arbitrator, by relying on the facts of the case, the conduct of the parties and some other material terms and conditions of the contract, which in his view disentitled the Respondent-Union of India from claiming that it was justified in refusing to extend the time as prayed for by the Appellant-claimant, to complete the project. We therefore reject the submission made on behalf of the Respondent-Union of India that the learned Sole Arbitrator had misconducted himself. Having held so, none of the decisions cited on the aspect of "excepted matters" would be of any assistance to the Respondent-Union of India. Nor will the reliance placed by learned ASG on Para 44(g) of the decision in Rajasthan State

Mines and Minerals Ltd. (supra) be of any benefit to the Respondent-Union of India.” (emphasis supplied)

50. In **NTPC Ltd. vs. Deconar Services Pvt. Ltd.**²⁷, the a three judge bench of the Hon’ble Supreme Court has, in line with the settled principle of minimum interference in arbitral awards, *inter alia* reiterated that in order to succeed in a challenge against an arbitral award, the party challenging the award must show that the arbitrator’s award suffered from perversity; or an error of law; or that the arbitrator had otherwise misconducted himself. The Court held that the grant or refusal of escalation cost, akin to other claims is based on the construction of the contract in that case, the evidence placed before the arbitrator and other facts and circumstances of the case. Undoubtedly, the grant of escalation cost in utter negation of an explicit contractual prohibition to the said effect, contradicts the fundamental and core principles of arbitration and the jurisdiction of an arbitrator. However, in contrast, failure of an arbitrator to exercise its authority to grant such costs/in appropriate cases/instances, where no contractual prohibitions exist, would certainly negate the principles of justice, equity and fairness. It was observed thus:

“18. The second issue pertains to the grant of escalation charges for work done by the Respondent beyond the scheduled period of the contract. It is significant to note herein that the Arbitrator only allowed a part of the claim made by the Respondent under this head. In Civil Appeal No. 6483 of 2014, the Arbitrator awarded a sum of Rs. 17,86,212/- against a claim of Rs. 66,98,773/-. while in Civil Appeal No. 6484 of 2014, the Arbitrator awarded a sum of Rs. 3,03,419/- as against a claim of Rs. 42,20,261/-. The Arbitrator took a view on the construction of the clauses of the contract that the firm price Clause

²⁷ (2021) 19 SCC 694

operated only with respect to the period for which the contract subsisted, and would not subsist beyond the scheduled period of the contract. The Arbitrator also noted that the Appellant accepted the work undertaken by the Respondent beyond the period of the contract without objections. The Arbitrator also carefully assessed the period of delay attributable to the Appellant and awarded escalation to the Respondent only for the same.

19. With respect to the question of law as to whether the Arbitrator could order such an escalation, this Court has, in a catena of judgments, upheld the same. A three-Judge Bench of this Court in *Assam State Electricity Board v. Buildworth Private Limited*, MANU/SC/0765/2017 : (2017) 8 SCC 146 : (AIR 2017 SC 3336), was faced with almost identical circumstances. In that case, the Arbitrator granted escalation charges beyond what was permissible under the contract between the parties, which prescribed a cap on the same. Upholding such an award, the Court in that case held as follows:

13. The arbitrator has taken the view that the provision for price escalation would not bind the claimant beyond the scheduled date of completion. This view of the arbitrator is based on a construction of the provisions of the contract, the correspondence between the parties and the conduct of the Board in allowing the completion of the contract even beyond the formal extended date of 6-9-1983 up to 31-1-1986. Matters relating to the construction of a contract lie within the province of the Arbitral Tribunal. Moreover, in the present case, the view which has been adopted by the arbitrator is based on evidentiary material which was relevant to the decision. There is no error apparent on the face of the record which could have warranted the interference of the court within the parameters available under the Arbitration Act, 1940. The arbitrator has neither misconducted himself in the proceedings nor is the award otherwise invalid.

20. We are of the opinion that the above holding of this Court is directly applicable to the present case. The Arbitrator in the present case has constructed the present contract, and the fixed price clause, in the same manner. This construction was on the basis of the evidence on record and the submissions of the counsel before him. The Arbitrator has carefully delineated the period of delay attributable to the Appellant, and has granted the claim of the Respondent only to that limited extent.

21. The counsel for the Appellant has placed on record certain judgments of this Court, which according to him mandate a different view. As such, it would be necessary to analyze the same.

22. In New India Civil Erectors (P) Ltd. v. Oil and Natural Gas Corporation, MANU/SC/0221/1997 : (1997) 11 SCC 75 : (AIR 1997 SC 980), this Court rejected the claim for escalation of prices during the period of delay on the basis of the specific stipulation in the contract therein, which specifically excluded price escalation "till the completion of work". On the other hand, in the present case, the contractual Clause stipulates only that the price would be firm during the "period of execution of the contract", which the Arbitrator took to refer only to the 12 month period originally stipulated for the execution of the contract. This may appear to be a technical distinction, but it must be remembered that construction of a contract is in the domain of the Arbitrator, and as long as the interpretation given is a possible view, the Court may not interfere with the same. In the New India Civil Erectors case (supra), this Court was of the opinion that, in view of the specific Clause of the contract in that case, the granting of escalation prices was not a possible view. This is not the case in the present matter. As we have already held above, we are of the opinion that in the facts and circumstances of the present case, the view taken by the Arbitrator was a possible one, and cannot therefore be interfered with by the Courts.

24. In General Manager, Northern Railway v. Sarvesh Chopra, MANU/SC/0145/2002 : (2002) 4 SCC 45 : (AIR 2002 SC 1272), the Court was seized of a matter pertaining to a reference to arbitration. The considerations of a Court in such a matter are distinct from those of a Court in appeal over the final award of an Arbitrator. Be that as it may, in that case, a contractual Clause between the parties specifically excluded any claims of the contractor arising out of delays attributable to the opposite party, which is not the case in the present matter.

25. It is clear from the above analysis that any decision regarding the issue of whether an arbitrator can award a particular claim or not, will revolve on the construction of the contract in that case, the evidence placed before the arbitrator and other facts and circumstances of the case. No general principle can be evolved as to whether some claim can be granted or not. The judgments placed on record by the Appellant, wherein claim for escalation was denied, have to therefore be read in the context of their facts, and cannot be read in isolation. It is clear that all the judgments cited by the Appellant can be distinguished on facts.

26. In these circumstances, we are of the opinion that the Appellant has neither been able to point out any error apparent on the face of the record, nor otherwise made out a case for interference with the award by the Arbitrator with respect to this issue._(emphasis supplied)

51. The facts and circumstances are also distinguishable from the cases cited by the appellant. In ***State of Rajasthan v Nav Bharat Construction (supra)*** the appellants had invited tenders for construction of Bhim Sagar Dam and the tender of the respondent was accepted. Under the contract, the work was to be commenced on 16th November 1978 and completed by 15th May 1981. The work was not completed within time and not even within the extended time. The appellants had terminated the contract and got the balance work completed by some other contractor. In contrast, in this case, the work could not be completed by the respondent contractor due to delay attributable solely to the appellant employer. Similarly, even in the case of ***New India Civil Erectors (supra)***, the appellant had undertaken to construct housing units by entering into a contract with ONGC. Although the appellant had commenced the construction, it had not been completed even within the extended period and the respondent had after termination of contract gotten the work done through another agency. This was not a case of delay attributable to the employer due to which the work could not be completed by the contractor.

52. In the instant case, Claim no. 1 was a claim for work done including additional work done. The appellant contended that the respondent was verbally asked to stop further work but he continued with the work and hence, cannot claim for the additional work done by him. The

Learned Arbitrator while allowing claim no. 1 has made categorical findings with respect to the fact that the entries as original made in the Measurement Book under joint signatures as reflected in the Measurement Book are binding and the respondent is entitled to payment on that basis. Any verbal instruction from the appellants is of no significance as they have put their signatures in the Measurement Book in respect of the work done. Thus, the Learned arbitrator has allowed the claim no. 1 and the appellants were directed to pay a sum of Rs. 20 lakhs along with simple interest at the rate of 12% p.a. from 1st December, 1997 till payment to the respondents and the Learned District Judge was justified in upholding the same as there was no written instruction from the appellants that they had terminated the contracted and no further work should be carried on.

53. In the instant case, with regard to Claim no. 4, the Learned Arbitrator by placing reliance on the decision of the Hon'ble Supreme Court in the case of **P.M. Paul (supra)** on the proposition that the arbitrator has the power to grant compensation to the contractor for increase in prices on account of delay attributable solely to the principal employer, awarded damages and simple interest on such amount from the date of reference to arbitration, i.e., 11th December 1998 onwards when the request for reference to arbitration and for appointment of arbitrator was made by the respondent till payment at the rate of 12% p.a. as simple interest and/or interest by way of damages. The respondent had also relied on the revised schedule of rates as revised by the State Government from time to time. The revisions were in 1st October, 1995 and on 15th September, 1996. The said revised schedule of rates had been proved and exhibited in the arbitral proceedings. There was

no contrary evidence on part of the respondent in this regard. With regard to Claim no. 5, the respondent has given evidence and claimed damages for additional off site and on site expenses amounting to Rs. 9,87,344.

54. With regard to the claim No.5, as rightly argued on behalf of the appellant it is a duplication of Claim No.4 which the learned Arbitrator has clearly overlooked. The Arbitrator while deciding the Claim No.4 has already recorded that it was a claim on account of expenses incurred towards labour and materials during the overrun period. Having arrived at such a finding the Arbitrator could not have allowed Claim No.5 which is in essence a duplication of Claim No.4. On this limited ground the award in respect of Claim No.5 is set aside.

55. The ratio of the ***P.M. Paul (supra)*** judgment and the decisions discussed above which have relied on it, is that escalation is a routine incident of inflation during the performance of any commercial contract and claims based on escalation of prices can be allowed by the arbitrator in cases where it is proved that the delay is attributable to the employer and not due to any fault of the contractor.

56. The cases cited by the appellants is distinguishable on facts and not for the proposition that despite delay by the employer, claims on escalation or idle labour cannot be granted by the arbitrator in view of express restrictive provisions of the contract between the party.

57. Admittedly there was no formal extension of time beyond 16th February 1996. However, the respondent contractor was allowed to carry out the work beyond 16th February 1996 and there were no objections as to delay nor any formal extension. Neither was penalty imposed by the

appellants indicating that that an informal extension of time was given. Instead, the work carried out by the contractor as recorded in the Measurement Books was signed by both parties proving that the work carried out by the contractor was authorized. The contractor had come to a finding of fact that the delay in completion of the contractual obligations was solely attributable to the appellant employer. Furthermore, it is also a fact that during the period of the execution of the contract, there were two revisions in the departmental schedule of rates introduced by the appellants themselves. Hence, it is not an unreasonable and absurd demand on the part of the contractor to claim compensation at the prevalent increased schedule of rates having carried out the job work in the extended period of time.

58. The view which has been adopted by the arbitrator is based on evidentiary material which was relevant to the decision. It is trite law that the arbitrator is a creature of the contract and is bound by the stipulations of the contract agreed upon by and between the parties. However, the argument of the appellant that in view of express prohibitory clauses in the contract stating that no amount could be claimed on account of idle labour or escalation charges, the learned arbitrator could not have awarded the same is not acceptable. The delay being attributable to the appellant, and the appellant allowing the contractor to continue the work beyond the stipulated period and accepting performance of the contract could not at this stage be reluctant to pay the dues owed to the respondent contractor for the work carried out by investing time, labour and equipment.

59. **Konkan Railway Corporation Ltd v Chenab Bridge Project**

Undertaking²⁸ a three-judge bench in paragraph 18 stated thus:

“Scope of interference by a court in an appeal under Section 37 of the Act in examining an order, setting aside or refusing to set aside an award, is restricted and subject to the same grounds as the challenge under Section 34 of the Act.” (emphasis supplied)

60. The aforesaid view has been reiterated in paragraph 26 in **Bombay Slum Redevelopment Corporation Pvt. Ltd. v. Samir Narain Bhojwani**²⁹. It was held thus:

“26. The jurisdiction of the appellate court dealing with an appeal under Section 37 against the judgment in a petition under Section 34 is more constrained than the jurisdiction of the Court dealing with a petition under Section 34. It is the duty of the appellate court to consider whether Section 34 Court has remained confined to the grounds of challenge that are available in a petition under Section 34. The ultimate function of the appellate court under Section 37 is to decide whether the jurisdiction under Section 34 has been exercised rightly or wrongly. While doing so, the appellate court can exercise the same power and jurisdiction that Section 34 Court possesses with the same constraints.” (emphasis supplied)

61. In the case of **Punjab State Civil Supplies Corporation Limited and Another v. Sanman Rice Mills and Others**³⁰, it has been held by the Hon’ble Supreme Court that Section 37 of the Act provides for a forum of appeal *inter-alia* against the order setting aside or refusing to set

²⁸ (2023) 9 SCC 85

²⁹ 2024 (7) SCC 218

³⁰ 2024 SCC OnLine SC 2632

aside an arbitral award under Section 34 of the Act. The scope of appeal is naturally akin to and limited to the grounds enumerated under Section 34 of the Act. It is equally well settled that the appellate power under Section 37 of the Act is not akin to the normal appellate jurisdiction vested in the civil courts for the reason that the scope of interference of the courts with arbitral proceedings or award is very limited, confined to the ambit of Section 34 of the Act only and even that power cannot be exercised in a casual and a cavalier manner.

62. The findings of the learned Arbitral Tribunal show that after due consideration of the materials placed before it, the evidence adduced before it and arguments advanced by the parties, the learned arbitrator has passed the Award dated 12th July 2007. He has considered each of the seven heads of claim and recorded appropriate reasons for coming to a finding therein. He has clearly stated the reason for allowing the Claim nos. 4 and 5 in favour of the respondent contractor noting that the delay was attributable to the employer State.

63. The award can be interfered only on the limited grounds as envisaged under the Act. Moreover, when the view taken by the arbitrator is a possible view the court in deciding an application for setting aside the award shall not interfere with such a view or substitute such view with its own view. Once the interpretation given by the arbitrators are backed by logic and are reasonable the same is required to be upheld as held in **MMTC**

Ltd. v. Vedanta Ltd.³¹ and **UHL Power Company Ltd. v. State of Himachal Pradesh**³².

64. In **Somdatt Builders-NCC- CEC(JV) vs. National Highways Authority of India & Ors.**³³ the Hon'ble Supreme Court in referring to **M/s. Larsen Air Conditioning and Refrigeration Company v. Union of India**³⁴ and **Reliance Infrastructure Ltd. v. State of Goa**³⁵ has observed that:

“It is necessary to remind the courts that a great deal of restraint is required to be shown while examining the validity of an arbitral award when such an award has been upheld, wholly or substantially, under Section 34 of the 1996 Act. Section 37 of the 1996 Act grants narrower scope to the appellate court to review the findings in an arbitral award if it has been upheld or substantially upheld under Section 34. Frequent interference with arbitral awards would defeat the very purpose of the 1996 Act.” (emphasis supplied)

The aforesaid view has been reiterated in decision in **C & C Construction Ltd. v. Ircon International Ltd.**³⁶.

65. The issue of cost awarded by the arbitrator in favour of the respondent does not require interference because the same was awarded after taking into consideration section 31(8) of the 1996 Act. A generic clause in the agreement stating that the cost shall be shared by the parties equally will not inhibit the tribunal from passing the decision as to costs

³¹ 2019(4) SCC 163

³² 2022(4) SCC 116

³³ 2025 SCC OnLine SC 170

³⁴ 2023 INSC 708

³⁵ 2024 (2) SCC 613

³⁶ 2025 SCC OnLine SC 218

and making one of the parties to the proceeding to bear whole or as a part of such cost, as may be decided by the tribunal.

66. In view thereof, the appeal is allowed in part and the award dated 12th July, 2007 stands modified to the extent as indicated above.

67. There shall be no order as to costs.

68. Urgent photostat certified copy of this judgment, if applied for, be supplied to the parties upon compliance of all requisite formalities.

(Soumen Sen, J.)

Biswaroop Chowdhury, J:

I have read the judgment authored by my esteemed brother Justice Soumen Sen and I fully agree with the conclusion arrived at by Justice Sen. However, I wish to give my own reasoning for arriving at the same conclusion.

The Appellant before this Court is an Award Debtor and is aggrieved by an Order dated 28-01-2019 passed by Learned District Judge Uttar Dinajpur in an application under Section 34 of the Arbitration and Conciliation Act 1996 being Misc case 115 of 2024.

The case of the Appellant in the application under Section 34 of the Arbitration and conciliation Act 1996 may be summed up thus;

An application under Section 34 of the Arbitration and Conciliation Act 1996 for setting aside the arbitral award dated 12-12-2007 passed by Learned Sole Arbitrator Justice Babu Lall Jain was filed. The application

was dismissed by Order dated 27-02-2018 on the ground of not being maintainable due to defect in nomenclature of the case. The Appellant State of West Bengal being aggrieved by the Order dated 27-02-2018 passed by the Learned District Judge preferred an appeal before this Court being FMA No-1872 of 2018. The Hon'ble Division Bench was pleased to set aside the order dated 27-02-2018 and remit the matter for re-consideration in accordance with law with the following directions:

It is made clear that the first aspect that the District Judge will consider is whether the petition under Section 34 of the Act was filed within three months of the date of the receipt of the award by the appellant herein; if not whether such petition was filed within further period of thirty days. If the answer to both is against the appellant herein, the District Judge will be under no obligation to consider the merits of the challenge.

If the petition under Section 34 of the Act is found to have been filed within period of three months from the date of receipt of the award by the appellant, or within the extended period of 30 days thereafter the District Judge will enter into the merits of the matter as permitted in assessing an award on a challenge thereto under Section 34 of the Act of 1996.

Considering that the matter pertains to an arbitral award of the year 2007, the District Judge Uttar Dinajpur is requested to ensure that challenge to the award is disposed of within three months of the receipt of a copy of this order.'

The Learned District Judge upon considering the Order dated 27-02-2018 passed by the Hon'ble Division Bench in FMA-no 1872 of 2018 and upon hearing Learned Advocates for both parties and on being satisfied that the application under Section 34 of the Arbitration and conciliation Act 1996 is filed within the prescribed period of Limitation, proceeded to decide the said application under Section 34 of the Arbitration and Conciliation Act 1996 on merits.

The appellant in the instant case invited sealed tender for construction of cross-drainage structure at 28.15 km of D.N.M.C. in P.S. Islampur District-Uttar Dinajpur and the participating tenderers were required to submit their tender on the basis of departmental schedule of rates attached to tender papers on 'at par' or 'percentage above' or 'percentage below' basis. The price schedule of items contained the required items of works, together with the quantities and/or estimated quantities of different items and departmental rates for each item was also attached to the tender document. The tender was described as 'item rate tender and contract of works'. In pursuance to the said tender the opposite party – claimant submitted his tender on 19th January 1995 and the appellant issued work order to the respondent/claimant by letter dated 10th April 1995 for a sum of Rs. 77,13,696/-which is 18.25 % less than the estimated departmental value of different items amounting to Rs. 94,35,714/-. The stipulated date of commencement was 17th April 1995, and the stipulated date of completion of the work was six working months therefrom.

A formal agreement was also executed and signed by and between the parties bearing no. 10 of S.E/MBO of 1994-95. In the agreement it was mentioned that the time allowed for carrying out the work would be six working months from the date of issuance of work order by the Department, that the entire site of work together with drawing and decision should be made available to opposite party – claimant on the date of commencement of work and that there should not be any hindrance on account of the appellant. The appellant took the responsibility of supplying cement/steel at the rates specified in the tender. All necessary drawings was to be supplied by the appellant and on account payments was required to be made monthly as far as possible within 10th day from the date of presentation of bill.

The date of commencement of work was from 17th April 1995, ie seven days after issuance of work order and the time allowed for performance was six working months and the period for completion of work would be 16th of February 1996 meaning thereby that the rainy season will not be considered as working months.

In relation to the aforesaid work dispute cropped up between the parties with regard to execution of work and its due payments. The respondent filed an application before this Court and by order dated 26-04-2001 the Hon'ble Chief Justice was pleased to appoint a retired judge of this Court as sole arbitrator in AP no-18 of 2000 (M/S M.R. Builders VS State of West Bengal and others).

The respondent/claimant filed statement of claim before the Learned Arbitrator and the Appellant contested the same by filing objection and counter claim. Evidence was adduced by the parties, and upon considering the evidence and upon hearing the parties Learned Arbitrator was pleased to pass the following order;

In respect of the claims of the respondent/claimant M/S. M.R. Builders claim No-1 "I hereby award in favour of the claimant and I direct the respondents to pay a sum of Rs. 20 Lakhs on account of claim no. 1 for works done in terms of the contract with simple interest thereon @ 12 % p.a. calculated from 1st December 1997 till payment. The interest awarded in this award is as and by way of damages suffered or to be suffered by the claimant for wrongful detention of monies, due to the claimant as aforesaid and whenever and wherever such interest is awarded in this award."

Claim no-2"- since provision has been made in the bills at the rate specified in the contract and in the facts and circumstances of this case, I am unable to accept the claim of the claimant on this account and the claim made by the claimant in item no-2 is not allowed and is rejected."

Claim no-3-" There is no dispute that the security deposit has not yet been refunded and the respondents are still withholding the said security deposit. In that view of the matter, I direct the respondents to refund and pay to the claimant the said sum of Rs. 1 lac alongwith simple interest thereon as and by way of damages at the rate of 12% p.a calculated from 5th March 1998 until payment."

Claim No-4-“ I hereby bacon award in favour of the claimant and direct the respondents to pay a sum of Rs. 12, 30, 000/- only in respect of claim no-4. The respondents will also pay simple interest on the said sum of Rs. 12,30,000/- from the date of reference to arbitration ie. 11.12.98 onwards when the request for reference to arbitration and appointment of arbitrator was made by the claimant till payment at the rate of 12% p.a. as simple interest and/or as interest by way of damages.”

Claim No-5- “As such a sum of Rs. 1, 50,000/- only is allowed on account of the said claim which is in respect of the expenses incurred during idle periods only, and the respondents are directed to pay the said sum on account of claim no.5 and there will accordingly be an award for the said further sum of Rs. 1,50,000/- in favour of the claimant and the respondents are directed to pay the same with simple interest at the rate of 12% p.a. on and from the aforesaid date of commencement of reference ie. 11.12.98 till payment.”

Claim-6 “I am not inclined to allow claim no. 6 and the said claim of the claimant is disallowed.”

Claim No-7. “so far as claim no-7 is concerned I have already awarded interest with regard to different claims herein above which has been awarded as and by way of damages. Therefore further consideration of this account is not required in view of the award already made for the interest on different heads.”

The appellant being aggrieved by the award passed by the Learned Arbitrator moved an application under Section 34 of the Arbitration and Conciliation Act 1996, before the Learned District Judge Uttar Dinajpur Raiganj.,

Learned District Judge Uttar Dinajpur by Order dated 28/01/2019 was pleased to dismiss the application under Section 34 of the Arbitration and Conciliation Act 1996 by observing and directing as follows”

In view of the above discussion as I find that the decision arrived at by the arbitrator is reasonable, speaking and not erroneous hence there is no ground to interfere with the award which is otherwise proper. Further I am in consonance with the argument advanced on behalf of the opposite party-claimant relying on the decision of Hon’ble High Court, at Calcutta passed in Union of India versus Pam Development Pvt. Ltd reported in AIR. 2004 NOC 353 (Cal) that the arbitration Court cannot interfere with the award that the decision is erroneous if the award is otherwise proper and the award of the arbitrator is ordinarily final and conclusive.

It has been submitted on behalf of the petitioner-respondent that the arbitrator without any basis rejected the counter claim of the petitioner-respondent. However at page no. 11 of the award it has been categorically observed by the arbitrator that nobody has come to give oral evidence on behalf of the respondent to prove the counterclaim. Further at page no. 14 of the award it has been observed by the arbitrator that no attempt was made by the respondent to prove its said counterclaim. Thus I find that the petitioner-respondent has not made any endeavour to establish its

counterclaim before the arbitrator and as such the dismissal of counter claim cannot be interfered with.

Considering the rival submissions seriously pressed into service and in view of the above discussion I am of the opinion that the instant petition is liable to be dismissed.”

The appellant being aggrieved by the Order dated 28-01-2019 passed by the Learned District Judge Uttar Dinajpur in Misc Case 115 of 2014 has come up with the instant appeal.

Heard Learned Advocate for the appellant and Learned Advocate for the respondent, perused the memo of appeal and materials on record.

Learned Advocate for the appellant submits that clauses of the agreement which are essential for deciding a dispute should have been taken into consideration by Learned Arbitrator but the same is not considered by the Learned Arbitrator. Learned Advocate further submits that there are certain prohibitory clauses in the agreement which are as follows:

- a) Clause-7-No claim shall be entertained for any increase of railway freight and market price.
- b) Clause-51- No escalation of rate will be allowed for execution of work for any increase of cost of materials fuel and lubricant, labour and minimum wages which may occur during the period of execution.

- c) Clause-5-mentions that contractor will get reasonable extension of time if applied under clause-5 of Form. 2911(ii) of the contract as the case may be if the work is non-commenced or stopped as delayed.
- d) Clause-12-Alteration in the works if any would be required to be done at the same rates and conditions, and the contractor would be entitled to only increase in time period for additional works if any.
- e) Clause-45-The department shall not entertain any claim whatsoever from the contractor for payment of compensation on account of idle Labour.
- f) Clause-46-No claim whatsoever from the contractor shall be entertained for any increase in railway freight/or marked price under any circumstances.

Learned Advocate submits that it is a settled principle of law that an award cannot be passed disregarding the prohibitory clauses contained in the agreement. An Arbitrator is a creature of this agreement and in view thereof if the agreement contains a prohibitory clause with regard to idle labour and escalation the same could not have been awarded.

Learned Advocate further submits that the Learned Arbitrator allowed claim no-4 for rise in price of labour and materials during the extended period without any discussion as to why despite the same prohibitory clauses being there.

Learned advocate also submits that claim no-5 on account of additional on site and off site expenses is allowed by Arbitrator without any reason as to why the said claim has been allowed despite prohibitory clause.

Learned advocate relies upon the following Judicial decision.

1. State of Rajasthan vs Nav Bharat Construction CO.

Reported in 2006(1) SCC.86.

2. New India Civil Erectors Pvt. Ltd VS Oil and Natural Gas Corporation.

Reported in (1997) 11 SCC.75

3. Chairman Board of Trustes for Shyamaprasad Mukherjee port VS Universal Sea Port Pvt. Ltd.

(2022) SCC Online Cal-4477.

4. State of Orissa VS Sudhakar Das.

(2000) 3 SCC. 27.

5. Bharat Coking Coal Limited VS Annapurna Construction.

(2003) 8 SCC. 154

6. Gopal Chandra Mukherjee VS Food Corporation of India.

AIR-2017. Cal 110.

7. Ramnath International Construction (p) Ltd VS Union of India.

Reported in (2007) 2 SCC-P453.

Learned Advocate for the respondent submits that the Learned Trial Court while adjudicating application under Section 34 of the Arbitration and Conciliation Act 1990 has considered the ground of challenge in respect of each claim. None of the grounds mentioned in the application contemplated any scope of interference with the award dated 12-12-2007.

Learned Advocate further submits that the award has been passed by the Learned Arbitrator taking into consideration all the necessary evidence adduced by the parties and upon giving due weightage to the same and considering the terms of the contract between the parties. Learned Advocate also submits that the claimant had filed its statement of claim on account of braches committed by the Appellant Irrigation Department.

With regard to claim no-4 allowed by the Learned Arbitrator Learned Advocate submits that while allowing the claim it was observed that 'the work could not be completed even until closure of work due to respondents failure to hand over site' thereby also recording that the employer becomes liable for the consequences of delay. It is further submitted that it is also recorded on basis of evidence adduced by the parties that the claimant was exposed to increased cost of work due to rise in prices of labour and material. Furthermore the said claim was granted in favour of claimant respondent taking into consideration the revised schedule of rates prevailing at that point of time which was duly sanctioned by the department. Learned Advocate also submits that the Learned Arbitrator in internal page 40 of the award has categorically given description of the difference in the amount in tender schedule and revised schedule after deducting the tender percentage

amounting to Rs. 16, 77, 295/-. But since the original claim was Rs. 12, 50,000/- the Learned Arbitrator did not exceed his jurisdiction and as such only awarded the sum of Rs. 12, 50, 000/-. With regard to the clause 45, and 46 which are prohibitory clauses in the contract prepared on account of idle labour and escalation of railway freight or market price prohibiting the contractor to claim the same during the tenure of the contract, the Learned Arbitrator has duly considered such prohibitory clauses as well as other restrictive clauses in the contract in the award while elaborately discussing claim-4.

Learned Advocate further submits that the court cannot interfere with the award on the ground that the decision is erroneous if the award is otherwise proper. Learned Advocate also submits that the Hon'ble Supreme Court in PM. Paul VS Union of India reported in 1989 Supp. 1 SCC 368 where it was held that the arbitrator has power to grant compensation to the contractor for increase in price on account of delay attributable solely to the principal employer.

With regard to the cost awarded by the arbitrator in favour of the claimant Learned Advocate submits that a total of 128 hearings were held for which the claimant had to incur expenses for a sum of Rs. 3,20,0000/- as Arbitrator fees, Rs. 32,000/- for stenographers fees and Rs. 19, 000/- for clerks fees. Therefore admittedly a sum of Rs. 3, 71, 000/- is documented from the records of the Tribunal. Furthermore since the claimant was a successful party in the arbitral proceedings and was dragged to commensurate with arbitration on account of specific breaches and delay in

execution of the contract as well as non payment of admitted dues arising out of the contract, the Learned arbitrator was just fair to award costs for a sum of Rs. 700, 000/-.

Learned Advocate further submits that the decision of the Hon'ble Calcutta High Court in Gopal Chandra Mukherjee, (supra) is not applicable to this case as the same was arrived at by considering the amended provisions brought in Arbitration and Conciliation Act by the Amending Act 2015, but the same cannot be made applicable to the present case as the reference was under the 1996 Act and the award was passed by the Learned Arbitrator taking into consideration the providing laws of the land and the provisions of the 1996 Act.

The following decisions are relied upon by Learned Advocate for the respondent.

Union of India VS Pam Developments Pvt. Ltd.

Reported in 2003. SCC online Cal-491.

Union of India VS Pam Development Private Limited

Reported in (2014) 11 SCC-366.

P.M. Paul VS Union of India.

Reported in 1989 Supp (1) SCC-368.

Before proceeding to consider the material in issue it is necessary to consider the provisions contained in Section 34 of the Arbitration and

Conciliation Act 1996. Section 34 of the Arbitration and Conciliation Act 1996 provides as follows:

S.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 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 arbitral award

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

v) the composition of the arbitral tribunal as the arbitral procedure was not in accordance with the agreements 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 isolation 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 and justice;

Explanation-2. For the avoidance of doubt the test as to whether there is 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 arbitration 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 erroneous application of the law or by re-appreciation 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 the application had received that 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 with 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.

With regard to the argument of the Appellant that the Arbitrator cannot grant enhanced rate as the same is prohibited under the contract it is necessary to consider the following judicial decisions.

In the case of State of Rajasthan V Nav Bharat Construction Co. (supra) the Hon'ble Supreme Court observed as follows:

27. "There can be no dispute to the well established principle set out in these cases. However these cases do not detract from the law laid down in Bharat Coking Coal Ltd's case or Continental Construction Co. Ltd's case (supra). An arbitrator cannot go beyond the terms of the contract between the parties. In the guise of doing justice he cannot award contrary to the terms of the contract. If he does so he will have misconducted himself. Of course if an interpretation of a term of the contract is involved than the interpretation of the arbitrator must be accepted unless it is one which could not be reasonably possible. However where the term of the contract is clear and unambiguous the arbitrator cannot ignore it."

In the case of Bharat Coking Cool Ltd (supra) the Hon'ble Supreme Court observed as follows:

“22. There lies a clear distinction between an error within the jurisdiction and error in excess of jurisdiction. Thus, the role of the arbitrator is to arbitrate within the terms of the contract. He has no power apart from what the parties have given him under the contract. If he has travelled beyond the contract, he would be acting without jurisdiction, whereas if he has remained inside the parameter of the contract, his award cannot be questioned on the ground that it contains an error apparent on the face of the records.

23. In paragraph 577 of Halsbury's laws of England 4th Edition Vol 2, the law has been stated in the following terms:

"As an arbitrator (and subsequently any umpire) obtains his jurisdiction solely from the agreement for his appointment it is never open to him to reject any part of that agreement, or to disregard any limitations placed on his authority, as, for example, a limitation on his right to appoint an umpire. Nor can he confer jurisdiction upon himself by deciding in his own favour some preliminary point upon which his jurisdiction depends. Nevertheless he is entitled to consider the question whether or not he has jurisdiction to act in order to satisfy himself that it is worth while to proceed, and an award which

expressly or impliedly refers to such a finding is not thereby invalidated."

24. In '*Commercial Arbitration*' by Mustill and Boyd at page 598 it is stated :

"In the first place, it could be argued that an arbitrator who is appointed in respect of a dispute arising under a contract expressly or impliedly governed by English law is authorized by the parties to pronounce upon the issues in accordance with that law, and in no other way. Any decision which proceeds, on a different basis lies outside the scope of the arbitrator's mandate to bind the parties. The award is accordingly void for want of jurisdiction, since the arbitrator has done something which the parties never authorized him to do. Secondly, it would be possible to draw support from a line of authority culminating in three important decisions during the past decade which approach the question whether a tribunal can effectively decide contrary to law by using the word 'jurisdiction' in the first of the three senses indicated above. Whilst a reconciliation of this decision is a matter for a treatise on administrative law, there is no doubt that in relation to certain kinds of tribunal the law has recognized a distinction between errors of law which go to jurisdiction and those which do not, and that there is a difference between tribunal which has arrived at a decision by asking itself the wrong question,

and one which has correctly identified the question, but has supplied the wrong answer in terms of law. Following up this line of authority, it could be said that an arbitrator empowered to decide the rights of the parties under a contract governed by English law, who asks himself not what England law has to say about those right, but what the rights ought to be if assessed in accordance with his own ideas of an extra-legal concept of justice, is either asking himself the wrong question, or not really asking a question at all."

25. In *Alopi Parshad & Sons Ltd. v. Union of India* [(1960) 2 SCR 793], this Court clearly held that if damages are awarded ignoring the expressed terms of the contract, the arbitrator would commit misconduct of the proceedings. Reference in this connection may also be made to *Naihati Jute Mills Ltd. Vs. Khyaliram Jagannath*.

In the case of *New India Civil Erectors (P) Ltd (supra)* the Hon'ble Supreme Court observed as follows:

10. "Claim No.9: The appellant claimed an amount of Rs.32,21,099.89p under this head, against which the arbitrators have awarded a sum of Rs.16,31,425/-. The above claim was made on account of escalation in the cost of construction during the period subsequent to the expiry of the original contract period. The appellant's claim on this account was resisted by the respondent-corporation with reference to

and on the basis of the stipulation in the corporations' acceptance letters dated 10th January, 1985 which stated clearly that "*the above price is firm and is not subject to any escalation under whatsoever ground till the completion of the work*". The Division Bench held, and in our opinion rightly, that in the face of the said express stipulation between the parties, the appellant could not have claimed any amount on account of escalation in the cost of construction carried on by him after the expiry of the original contract period. The aforesaid stipulation provides clearly that there shall be no escalation on any ground whatsoever and the said prohibition is effective till the completion of the work. The learned arbitrators, could not therefore have awarded any amount on the ground that the appellant must have incurred extra expense in carrying out the construction after the expiry of the original contract period. The aforesaid stipulation between the parties is binding upon them both and the arbitrators. We are of the opinion that the learned single Judge was not right in holding that the said prohibition is confined to the original contract period and does not operate thereafter. Merely, because the time was made the essence of the contract and the work was completed within 15 months, it does not follow that the aforesaid stipulation was confirmed to the original contract period this is not a case of the arbitrators construing the agreement. It is a clear case of the arbitrators acting contrary to the stipulation/condition contained in the

agreement between the parties. We therefore, affirm the decision of the Division Bench on this Count as well [claim No.9].

11. So far as the position of the law on the subject is concerned, there is hardly any dispute between the parties. It is sufficient to refer to the well considered decision of this Court in *Sudarshan Trading Company V. Government of Kerala* [A.I.R.[1989] S.C. 890], within it has been held | "..... if the parties set limits to action by the arbitrator, then the arbitrator had to follow the limits set for him and the court can find that he exceeded his jurisdiction on proof of such excess..... Therefore it appears to us that there are two different and distinct grounds involved in many of the cases. One is the error apparent on the face of the award, and the other is that arbitrator exceeded his jurisdiction. In the latter case, the courts can look into the arbitration agreement but in the former, it cannot, unless the agreement was incorporated or recited in the award".

In the case of *State of Orissa VS Sudhakar Das* (supra) the Hon'ble Court observed as follows:

‘2 It is not disputed that the arbitration agreement contained no escalation clause. In the absence of any escalation clause, an Arbitrator cannot assume any jurisdiction to award any amount towards escalation. That part of the Award which grants escalation charges is clearly not sustainable and suffers from a patent error. The decree, insofar as the award of escalation charges is concerned, cannot, therefore, be sustained.’

In the case of Ramnath International Construction (P) Ltd. (supra) the Hon'ble Supreme Court observed as follows:

"18. In spite of having held that both were responsible for the delay and having noticed the arguments based on clause 11(C) of the General Conditions of contract, the Arbitrator proceeded to award damages on the ground of delay on the reasoning that the contractor is entitled to compensation, unless the employer establishes that the contractor has consented to accept the extension of time alone in satisfaction of his claim for delay. As rightly held by the High Court, which decision we have affirmed while considering questions no. (i), clause 11 (C) of the General Conditions of Contract is a clear bar to any claim for compensation for delays, in respect of which extensions have been sought and obtained. Clause 11(C) amounts to a specific consent by the contractor to accept extension of time alone in satisfaction of his claims for delay and not claim any compensation. In view of the clear bar against award of damages on account of delay, the arbitrator clearly exceeded his jurisdiction, in awarding damages, ignoring clause 11(C). In Associated Engineering Co. (supra) this Court held :

"24. The arbitrator cannot act arbitrarily, irrationally, capriciously or independently of the contract. His sole function is to arbitrate in terms of the contract. He has no power apart from what the parties have given him under the contract. If he has travelled outside the bounds of the contract, he has acted without jurisdiction..."

26. A dispute as to the jurisdiction of the arbitrator is not a dispute within the award, but one which has to be decided outside the award. An umpire or arbitrator cannot widen his jurisdiction by deciding a question not referred to him by the parties or by deciding a question otherwise than in accordance with the contract. He cannot say that he does not care what the contract says. He is bound by it. It must bear his decision. He cannot travel outside its bounds. If he exceeded his jurisdiction by so doing, his award would be liable to be set aside...

28. In the instant case, the umpire decided matters strikingly outside his jurisdiction. He outstepped the confines of the contract. He wandered far outside the designated area. He digressed far away from the allotted task. His error arose not by misreading or misconstruing or misunderstanding the contract, but by acting in excess of what was agreed. It was an error going to the root of his jurisdiction because he asked himself the wrong question, disregarded the contract and awarded in excess of his authority. In many respects, the award flew in the face of the provisions of the contract to the contrary.”

In the case of Union of India VS Pam Developments Pvt. Ltd. (supra) the Hon’ble Supreme Court observed as follows:

18. In our opinion, the High Court has correctly come to the conclusion that the appellant having failed to raise the plea of jurisdiction before the Arbitral Tribunal cannot be permitted to raise

for the first time in the Court. Earlier also, this Court had occasion to consider a similar objection in Bharat Sanchar Nigam Limited and another versus Motorola India Private Limited [(2009) 2 SCC 337]. Upon consideration of the provisions contained in Section 4 of the Arbitration Act, 1996, it has been held as follows

(SCC p.349, para 39)

“39. Pursuant to section 4 of the Arbitration and Conciliation Act, 1996, a party which knows that a requirement under the arbitration agreement has not been complied with and still proceeds with the arbitration without raising an objection, as soon as possible, waives their right to object. The High Court had appointed an arbitrator in response to the petition filed by the appellants (sic respondent). At this point, the matter was closed unless further objections were to be raised. If further objections were to be made after this order, they should have been made prior to the first arbitration hearing. But the appellants had not raised any such objections. The appellants therefore had clearly failed to meet the stated requirement to object to arbitration without delay. As such their right to object is deemed to be waived.”

Thus upon perusal of the Judicial decisions it is clear that Arbitrator is a creature of contract and cannot go beyond the stipulations made in the contract.

With regard to claim no-1 upon considering the analysis made by the Learned Arbitrator and the reasons given by the Learned Arbitrator. Learned Trial Court was pleased to hold that on account of works done as indicated in 1st to 5th supplementary tenders amounting to Rs. 20 lacs, it appears from the award at page no-31 that the opposite party-claimant relying on the Measurement Book has raised the claim in respect of works done and entered under joint signatures and also admitted works which were entered in the 5th RA, 6th RA and final Bill. Thus the factual findings arrived by the Learned Arbitrator and considered by the Learned Trial Court by affirming the same should not be disturbed.

With regard to claim no-3 it is the observation of the Learned Trial Court that the refund of security deposit was not challenged before the Learned Arbitrator and has not been disputed thus there is no scope to dissent from the findings of the Learned Arbitrator. Hence upon considering the observation of the Learned Trial Judge in deciding application under Section 34, of the Arbitration and Conciliation Act we are of the view that findings with regard to claim-3 should not be disturbed.

As arguments is advanced by Learned Advocate for the Appellant with regard to paragraph 16 of General terms and conditions, Clause 46 of the Additional Terms and Conditions and Clause 12 of the West Bengal Form No. 2911 of the Contract agreement, it would be reasonable to discuss the provisions of the Terms and Conditions. Paragraph 16 of General terms and Conditions provides as follows:

16. The Contractor will have to apply as per Clause 5 of BF 2911(ii) or 2911(ii) as the case may be for extension of time, if the work is not commenced or stopped or delayed due to non-receipt of Departmental materials land acquisition or public interference etc. No compensation for idle labour establishment charges or other matters will be entertained on these accounts.

Clause 46- of the Additional terms and conditions provide that no claim whatsoever from the contractor shall be entertained for any increase in Railway freight/or market price under any circumstance.

As all conditions of W.B.F. No. 2908/2911 i)/2911 (ii) will be obligatory and binding, the same is quoted as follows:

As per Clause 4 of WBF 2908 or clause 5 of WBF 2911 (i) or 2911 (ii) as the case may be (when on extension of time for completion of work is authorized by the Engineer in charge) it shall be taken for granted that the validity of the contract is extended automatically upto the extended period with all terms and conditions rates etc. remaining unaltered ie. the tender is revalidated upto the extended period.

Learned Arbitrator came to a findings that work was suspended due to fault of the employer and work could not be complete within the stipulated period. Whether the findings of the Arbitrator should be disturbed.

In the case of MMTC. VS Vedante Ltd. Reported in AIR-2019. S.C. 1168 the Hon'ble Supreme Court observed as follows:

‘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 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.

12. It is only if one of these conditions is met that the Court may interfere with an arbitral award in terms of Section 34(2)(b)(ii), but such interference does not entail a review of the merits of the dispute, and is limited to situations where the findings of the arbitrator are arbitrary, capricious or perverse, or when the conscience of the Court is shocked, or when the illegality is not trivial but goes to the root of the matter. An arbitral award may not be interfered with if the view taken by the arbitrator is a possible view

based on facts. (See Associate Builders v. DDA, (2015) 3 SCC 49). Also see ONGC Ltd. v. Saw Pipes Ltd., (2003) 5 SCC 705; Hindustan Zinc Ltd. v. Friends Coal Carbonisation, (2006) 4 SCC 445; and McDermott International v. Burn Standard Co. Ltd., (2006) 11 SCC 181).

13. It is relevant to note that after the 2015 amendments to Section 34, the above position stands somewhat modified. Pursuant to the insertion of Explanation 1 to Section 34(2), the scope of contravention of Indian public policy has been modified to the extent that it now means fraud or corruption in the making of the award, violation of Section 75 or Section 81 of the Act, contravention of the fundamental policy of Indian law, and conflict with the most basic notions of justice or morality. Additionally, sub-section (2A) has been inserted in Section 34, which provides that in case of domestic arbitrations, violation of Indian public policy also includes patent illegality appearing on the face of the award. The proviso to the same states that an award shall not be set aside merely on the ground of an erroneous application of the law or by re-appreciation of evidence.

14. As far as interference with an order made under Section 34, as per Section 37, is concerned, it cannot be disputed that such interference under Section 37 cannot travel beyond the restrictions laid down under Section 34. In other words, the Court cannot undertake an independent assessment of the merits of the award, and must only ascertain that the exercise of power by the Court under Section 34 has not exceeded the scope of the provision. Thus, it is

evident that in case an arbitral award has been confirmed by the Court under Section 34 and by the Court in an appeal under Section 37, this Court must be extremely cautious and slow to disturb such concurrent findings.

In the case of Ssongyong Engg. And construction Co.Ltd V NHAI. Reported in AIR 2019. S.C. the Hon'ble Supreme Court observed as follows:

27. In Ssangyong Engg and Construction Co Ltd v NHAI (2019) 15 SCC 131 : (AIR 2019 SC 5041) (supra), this court has set out the scope of challenge under Section 44 of the 1996 Act in further details in the following words :

‘37. Insofar as domestic awards made in India are concerned, an additional ground is now available under sub-section (2A), added by the Amendment Act, 2015, to Section 34. Here, there must be patent illegality appearing on the face of the award, which refers to such illegality as goes to the root of the matter but which does not amount to mere erroneous application of the law. In short, what is not subsumed within “the fundamental policy of Indian law”, namely, the contravention of a statute not linked to public policy or public interest, cannot be brought in by the backdoor when it comes to setting aside an award on the ground of patent illegality.

38. Secondly, it is also made clear that re-appreciation of evidence, which is what an appellate court is permitted to do,

cannot be permitted under the ground of patent illegality appearing on the face of the award.

39. To elucidate, paragraph 42.1 of Associate Builders (supra), namely, a mere contravention of the substantive law of India, by itself, is no longer a ground available to set aside an arbitral award. Paragraph 42.2 of Associate Builders (supra), however, would remain, for if an arbitrator gives no reasons for an award and contravenes Section 31(3) of the 1996 Act, that would certainly amount to a patent illegality on the face of the award.

40. The change made in Section 28(3) by the Amendment Act really follows what is stated in paragraphs 42.3 to 45 in Associate Builders (supra), namely, that the construction of the terms of a contract is primarily for an arbitrator to decide, unless the arbitrator construes the contract in a manner that no fair-minded or reasonable person would; in short, that the arbitrator's view is not even a possible view to take. Also, if the arbitrator wanders outside the contract and deals with matters not allotted to him, he commits an error of jurisdiction. This ground of challenge will now fall within the new ground added under Section 34(2-A)."

Thus from the observation made in the case of Ssangyong Engg and Construction Co. Ltd it is clear that the construction of the terms of a contract is primarily for an arbitrator to decide unless the arbitrator construes the contract in a manner that no fair minded or reasonable person would; in short that the arbitrators view is not even a possible view

to take. It will further appear that in an application for setting aside award re-appreciation of evidence is not permissible.

Upon perusal of paragraph 16 of General terms and conditions, clause 46 of the Additional Terms and Conditions, Clause 46 of the Additional Terms and Conditions and Clause 4 of WBF 2908 it is clear that no claim can be made on the ground of idle labour, or overhead expenses due to delay in handing over Departmental materials, or land acquisition when an extension of time is made. Thus in this matter it is necessary to consider the findings of the Learned Arbitrator to decide whether compensation is awarded for idle labour and overhead expenses for delay in execution of work.

The Learned Arbitrator while deciding Claim no-4 of the claimant observed as follows:

“According to the claimant the work could not be completed within the contracted period ie. 16.2.1996 because of various defaults laches or breaches of obligations on the part of the respondent According to the claimant’s witness additional expenses had to be incurred on account of labour and materials during the period after the contract period came to an end. The claimant has submitted that the claimant is entitled to be compensated in respect of the said damages in the form of increased cost of labour and materials that had to be paid and borne by the claimant.

In support of this the claimant has relied on the revised schedule of rates as revised by the State Government from time to time. The said

revisions were in October 1995 and also on 15th September 1996. The said copies of the revised schedule of rates have also been proceeded and exhibited in this proceedings. The claimant has given evidence that he had to pay and bear the additional expenses due to rise in price of labour and materials in respect of tender items excluding items of supplementary tenders.

There was no contradictory evidence on the part of the respondent in this regard. I am therefore inclined to award a sum of Rs. 12,30,000/- as and by way of damages arising due to rise in price of labour and materials during the extended period in respect of tender items for which in my opinion the respondent was responsible.

I hereby make an award in favour of the claimant and direct the respondents to pay sum of Rs. 12,30,000/- only in respect of claim no. 4. The respondents will also pay simple interest on the said sum of Rs. 12,30,000/- from the date of reference to arbitration ie. 11.12.98 onwards when the request for reference to arbitration and for appointment of arbitrator was made by the claimant till payment at the rate of 12% p.a. as simple interest and/or as interest by way of damages.”

Thus upon observation made by the Learned Arbitrator it will appear that the claim no-4 is not awarded merely due to idle labour or enhancement of railway freight or overhead expenses due to delay in work caused due to the act of the Appellant, but it was awarded as the schedule of rates were revised by the State Government. The claimant/respondent has also supported the case by filing documents showing schedule of revised

rates before Learned Arbitrator. Thus when rates are revised by Government Authority such rates are to be honoured with regard to all.

A contractor who could not complete work for no fault of his own and the period is extended cannot be deprived of revised rates, as that would amount to unjust deprivation. The award is in accordance with the Public Policy. Thus we do not find any error in awarding claim 4.

Now with regard to Claim no-5 it appears that the Learned Arbitrator made the following observation:

“I am of the view that the damages awarded in respect of claim no. 4 includes the on site and off site expenses so far as items covered by tender and supplementary tenders are concerned, the damages already awarded hereinabove in respect of claim no-4 above on the basis of revised schedule rates as sanctioned by the State of West Bengal, in claim item no. 4, above takes care of the onsite and off site expenses and therefore the claimant is entitled to further consideration of damages for idle periods only and expenses incurred during that period which were suffered by the claimant due to untimely and delayed decisions and/or laches of the respondent. As such a sum of Rs. 1,50,000/- only is allowed on account of the said claim which is in respect of the expenses incurred during idle periods only and the respondents are directed to pay the said sum on account of claim no. 5 and there will accordingly be an award for the said further sum of Rs. 1,50,000/- in favour of the claimant and the respondents are directed to pay the same with simple interest at the rate of 12% p.a. on and from the aforesaid date of commencement of reference ie. 11.12.98 till payment.”

Upon perusal of the observation made by the Learned Arbitrator it will appear that on one hand Learned Arbitrator came to a finding that the damages awarded in respect of claim no. 4, includes on site and off site expenses, whereas for the self-same claim, a separate claim was made with a different nomenclature. The learned arbitrator overlooked this fact and allowed such claim in part. This appears to be allowing a claim twice over. Accordingly the award in respect of Claim No.5 is disallowed.

The appeal is allowed in part.

The award stands modified.

(Biswaroop Chowdhury, J)