IN THE HIGH COURT AT CALCUTTA
Commercial Appellate Jurisdiction
ORIGINAL SIDE

AO-COM/12/2024

WITH

AP-COM/198/2024

UNION OF INDIA THROUGH CHIEF COMMERCIAL MANAGER (FM) AND ANR.

VS

ELECTROSTEEL CASTINGS LTD.

BEFORE:

The Hon'ble JUSTICE ARIJIT BANERJEE

AND

The Hon'ble JUSTICE OM NARAYAN RAI

For the appellant	:	Mr. Siddhartha Lahiri, Adv. Ms. Amrita Pandey, Adv. Mr. Debraj Dutta, Adv. Ms. Sneha Singh, Adv. Ms. Nivedita Mullick, Adv. Ms. Bipasha Jaiswal, Adv. Mr. Ghanshyam Pandey, Adv.
For the respondent	:	Mr. S.N. Mookherjee, Sr. Adv. Mr. Samrat Sen, Sr. Adv. Mr. Paritosh Sinha, Adv. Mr. Amitava Mitra, Adv. Mr. Rajesh Gupta, Adv. Ms. Manali Bose, Adv. Mr. Dhruv Chadha, Adv. Ms. Urmi Sengupta, Adv. Mr. Samriddha Sen, Adv. Mr. Naman Agarwal, Adv.
Judgment on	:	24.10.2025

Arijit Banerjee, J.: -

1. By a judgement and order dated February 29, 2024, a learned Judge of this Court dismissed the appellant's application under Section 34 of the Arbitration and Conciliation Act, 1996, being AP-COM 198 of 2024. Challenging that judgement and order the appellant has come up before us.

Facts of the case

2. The relevant facts of the case briefly stated are that the Ministry of Railways, Government of India, introduced a scheme called Wagon Investment Scheme (WIS) on or about March 30, 2005. The essence of the scheme was that an interested party could procure wagons from approved builders and make over the same to the Railways. Against such investment, that party would enjoy guaranteed allotment of railway rakes for transportation of its goods and would also enjoy freight rebate. This would be for a period of 10 years, after which the ownership of the wagons would vest in the Railways.

3. Pursuant to the Railway Board approving the application of the respondent, an agreement dated January 9, 2008, was entered into by and between the Railways and the respondent under the WIS in respect of two rakes of 122 wagons each, including 4% spares for each rake. Clause 16.0 of the WIS provided that any change in the terms and conditions of the agreement between the parties could be made only by mutual consent of the parties. On September 26, 2008, February 3, 2011, July 27, 2011 and August 1, 2013, Circulars were issued by the Railways which in effect made unilateral changes to the WIS. In the year 2014, the said Circulars were challenged before the Delhi High Court by other similarly placed - WIS investors. By a judgement and order dated June 29, 2015, the Delhi High Court held that the said Circulars amounted to altering the basic structure of the agreements between the parties by modifying the essential terms and conditions. The judgment and order of the learned Single Judge of the Delhi High Court was upheld by the Division Bench by a judgement and order dated November 3, 2015. The Special Leave Petitions preferred by the Railways against the Division Bench judgement were dismissed by the Hon'ble Supreme Court on November 28, 2017.

4. By a notice dated June 17, 2016, the respondent terminated the agreement between it and the Railways. The respondent invoked the Arbitration clause contained in the subject agreement on October 3, 2016.

5. The agreement between the parties contemplated construction of a private siding at Barajamda for convenient operation of the rakes that were to be allotted to the respondent. There was inordinate delay in construction of such siding. According to the respondent, the Railways were entirely responsible for the delay. This caused commercial loss to the respondent. The respondent further contented that by reason of the unilateral modification of the WIS thereby changing the essential terms and conditions of the agreement between the parties, the respondent was unable to enjoy the benefit under the WIS beyond a period of 9 months out of the total period of 10 years.

6. Before the Arbitral Tribunal consisting of three Arbitrators, the respondent claimed primarily market value of the wagons in which it had invested, loss of freight rebate and loss of profit. The Tribunal framed the following issues:

> **"**i. Whether termination of the Agreement dated 09.01.2008 by the claimant is legally justified and sustainable?
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> ii. Whether the Railway circulars dated 26.09.2008 and 03.02.2011 unilaterally altered the basic structure of the Agreement (Annexure B) between the parties by modifying the essential terms and conditions of WIS policy (Annexure A) in violation of Clauses 12 & 16 of the Agreement dated 09.01.2008?
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> iii. Whether the part of the claims as formulated by the claimant is barred by law of limitation?

iv. Whether the respondents' counter claim is substantiated by evidence and circumstances on record?

v. Whether the claimant is entitled to the claims for (i) the fair market value of 122 Nos Railway Box "N" HS Wagons and 2 Nos eight wheeled Goods Brake Vans in terms of the Report on Revaluation of Rolling Stock (Annexure DD) (ii) loss of Freight Rebate as per Calculation Sheet (Annexure FF) (iii) loss of profit as per Calculation Sheet (Annexure KK) and also (iv) costs of the arbitration proceeding as accrued?

vi. Whether the claim towards loss in reputation and good will of the Claimant Company is legally tenable?

vii. Whether the Claimant is entitled to interest @ 18% per annum on the four counts of claim namely (i) investment towards procurement of the rakes (ii) loss of Freight Rebate (iii) loss of profit and (iv) present value of the rakes and brake vans?

viii. Whether the Claimant is entitled to an Award as prayed for?**"**

7. The total claim made by the respondent was for Rs 272.47 crore approximately The Arbitrators awarded a sum of approximately Rs. 232.44 crore along with interest at 9% per annum from the date of the Award till payment. The counter claim of the Railways in the sum of Rs 354.76 crore approximately was rejected by the Tribunal.

8. The Award was challenged by the Railways before a learned Judge of this Court by way of an application under Section 34 of the Arbitration and Conciliation Act, 1996 (in short 1996 Act). The application was dismissed by the judgement and order sought to be assailed in this appeal.

Proceedings before the learned Single Judge

9. The appellants/petitioners contended before the learned Single Judge that the notice issued by the respondent herein under Section 21 of the 1996 Act is barred by limitation under Article 113 read with Article 137 of the Schedule to the Limitation Act, 1963, since the challenge to the impugned Circulars was made after three years from the dates of issuance of the Circulars. The learned Judge negated such contention. Referring to Section 22 of the Limitation Act, 1963 and Article 55 of the Schedule to the Limitation Act, 1963, the learned Judge held that the agreement between the parties contemplated the transactions between the parties to be in the nature of running and continuous action with a continuing obligation on the Railways for supply of wagons. The breach of contract on the part of the Railways was of a continuing nature. The respondent's claims crystallised only upon termination of the contract and its right to sue arose only when the contract was terminated. Hence, the notice under Section 21 of the 1996 Act was not - time barred.

On the point of limitation the learned Judge held as follows:

> "**19.** It is also relevant to state that the respondent did not challenge the validity of the Circulars but only the applicability of such Circulars to the respondent in view of Clause 16 of the Agreement which barred the petitioner from incorporating unilateral changes to the terms and conditions of the Agreement. The objection of the petitioner in relation to its claims and the point of limitation were comprehensively dealt with by the arbitral tribunal. The section 34 Court has a limited conspectus before it; and a statutory bar on re-appreciation of evidence. Since limitation is a mixed question of law and facts, the Court is not inclined to interfere with the findings of the Tribunal.
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> **20.** The Court also finds that there is no patent illegality on the part of the arbitral tribunal in deciding the question of limitation. The Supreme Court in ***Ssangyong Engineering & Construction Co. Ltd. vs. National Highways Authority of India (NHAI); (2019) 15 SCC 131***

curtailed the scope of an inquiry under section 34 of the Act even further by declaring that a mere contravention of the substantive law of India by itself will no longer be available as a ground for setting aside an arbitral award. The decisions cited by the petitioner in J.C. Raja vs. Chairman Orissa Mining Corporation; (2008) 2 SCC 444, State of Goa vs. Praveen Enterprises; (2012) 12 SCC 581 dealt with the purpose of section 21 of the Act and are distinguishable on facts. The present case is concerned with the respondent's section 21 notice which the Court finds to be within the period of limitation.**”**

10. The second point that was urged before the learned Judge by the appellants was that the market value of the rakes arrived at by the Tribunal was by following a procedure contrary to the mode of assessment contemplated in the agreement between the parties. It was argued by the appellants that the Arbitral Award disregards the method of valuation stated in Clause 11.2 of the agreement in arriving at the market value of the rakes. The learned Judge noticed that Clause 11 of the agreement is concerned with wagons involved in accidents, where the wagons are condemned and the Railways pay a nominal value at the time of condemnation. Clause 11 did not apply to the facts of the case. Rather, it was Clause 12 of the agreement which was relevant as it provided for a scenario where the agreement is terminated by the investor due to alteration in the scheme. The learned Judge noted that the Railways did not suggest any alternative method of valuation before the Tribunal for arriving at the market value of the wagons. The learned Judge observed that the Arbitral Tribunal has the final say on the quality and quantity of the evidence placed before it and the Court in a Section 34 application cannot interfere if the Tribunal's view is a possible one. The learned Judge also observed by referring to Section 34 (2A) of the 1996 Act that an Award shall not be set aside merely on the ground of an erroneous application of the law or by reappreciation of evidence.

11. The appellants also argued before the learned Judge that the Award on account of loss of freight rebate was in disregard of the evidence available before the Tribunal. The respondent argued that of the total span of 7 years and 6 months from the date of commissioning of the rakes till the termination of the agreement, the respondent was allowed to avail the WIS facility only for 9 months. Hence it was constrained to place indents for regular rakes to fulfil its iron ore consumption need and register at different railway sidings which led to loss of freight rebate of 10% . The learned Judge held that the respondent's loss of freight rebate under the WIS is factually correct. Further, the Award-debtor did not put any meaningful question or suggestion on the respondent's claim for freight rebate at the time of cross-examination of the respondent's witnesses. There was no cross-examination on the respondent's entitlement to the claim of freight rebate or the claimed amount. Hence the respondent's evidence on the claim and quantum remained unchallenged. The contention of the appellants was rejected by the learned Judge in the following words:

> **"31.** Therefore, the petitioner's argument that the respondent did not place any rakes is factually without basis. The Arbitral Tribunal also found that the award-holder was terminated from loading WIS Rakes by the petitioner on the ground of non-mentioning of designated loading station due to lapses on the part of the petitioner itself and that the respondent could not benefit from the WIS after April, 2012 due to the unilateral changes made by the petitioner. This Court does not find any infirmity in the Tribunal's finding of the respondent being entitled to the claim for freight rebate also in view of there being no cross-examination

in respect of the respondent's claim or the quantification thereof by the petitioner / award-debtor.**"**

12. It was then argued by the appellants that the Award on account of loss of profit was in disregard of the WIS policy. It was argued that the goods which were to be transported by the WIS rakes were solely for self-consumption of the respondent. The Arbitral Tribunal should not have relied on agreements between the respondent and SESA Goa Ltd for allowing the claim on account of loss of profits. The learned Judge rejected this contention in the following words:

> **"34.** It is undisputed from the evidence on record that there was no cross examination by the petitioner of the respondent's witnesses on the claim for loss of profit. In the absence of such, the evidence of CW 1 and CW2 (respondent's witnesses) remained unchallenged and has to be taken into consideration. The Arbitral Tribunal's decision in respect of the claim for loss of profit is clearly discussed in the impugned Award with reliance on annexures and invoices raised on Sesa Goa. The impugned Award is based on evidence which is uncontroverted and the Court is not inclined or even statutorily authorised to interfere with the Tribunal's findings on the evidence. Although, the petitioner has relied on Associate Builders vs. Delhi Development Authority; (2015) 3 SCC 49 and PSA Sical Terminals Pvt. Ltd. vs. Board of Trustees of V.O. Chidambaram Port Trust Tuticorin; 2021 SCC OnLine SC 508 on the point of perversity where the Award is not based on evidence or takes into account extraneous facts or ignores vital evidence, the impugned Award in the present case is replete with findings on oral and documentary evidence which was before the Arbitral Tribunal.**"**

13. The next point argued by the appellants was that the impugned Award deals with a dispute which falls outside the terms of submission to Arbitration. It was urged that the issue with regard to delay in construction of the private siding at Barajamda was not part of the notice issued by the respondent invoking the Arbitration clause. The Arbitral Tribunal went beyond the scope of the reference and returned a finding in that regard. This contention was also rejected by the learned Single Judge by observing as follows:

> **"37.** The impugned Award shows that the respondent successfully demonstrated before the Arbitral Tribunal that the petitioner's breach and defaults of the Agreement resulted in the non-commissioning of the private siding at Barajamda and further that the respondent was directed to utilise an alternative siding for 9 months out of the contractual period of 10 years. It would further be evident that the petitioner cited delay in commissioning of the respondent's / claimant's private siding at Barajamda as one of the primary reasons for the petitioner's refusal to grant the claimant's entitlements under the WIS. Therefore, the reason for the private siding at Barajamda not being commissioned on time was a crucial dispute which went to the root of the differences between the parties and was wholly within the scope of the Arbitration Agreement. Hence, there is no basis in the petitioner's stand that the Arbitral Tribunal acted beyond the contemplation of the reference or arrived at a finding which was beyond the scope of submission to arbitration.**"**

14. It was finally argued by the appellants before the learned Single Judge that rejection of the counter claim of the Railways by the Arbitral Tribunal was perverse. The learned Judge rejected this contention by holding that the counter claim of the Railways was not based on any evidence and was not proved. The learned Judge dismissed the Section 34 application with the following final observations:

> "**39.** The Court will not interfere with a plausible or even a possible view as long as the view taken is not perverse. The Court will only substitute its view if the Award contains findings which are ex facie perverse or impossible on the face of the record or the evidence which was before the Tribunal.
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> **40.** The petitioner has not produced any evidence of the Arbitral Tribunal ignoring vital facts or taking into account irrelevant facts or pronouncing on a issue without any evidence. None of the grounds available to an aggrieved party to seek recourse under section 34 of the 1996 Act has successfully been raised before this Court. The ground of perversity can only be accepted where the Arbitral Tribunal has arrived at findings or conclusions which are not supported by evidence or were entirely beyond the contemplation of the reference."

Arguments of appellants before us

15. Essentially the same arguments were advanced before us by the Railways as was done by them before the learned Single Judge. In other words, the following points were argued before us:

> (i) The respondent's notice under Section 21 of the 1996 Act was barred by Limitation.
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> (ii) The Arbitral Award is perverse because it ignores vital evidence and takes into account irrelevant things.
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> (iii) The Award deals with issues not falling within the scope of submission to Arbitration i.e. the issue of delay in construction of private siding at Barajamda. Hence, the Award is violative of Section 34 (2) (a) (iv) of the 1996 Act.
>
> (iv) The Award is unfair and unreasonable. It shocks the conscience of the Court.

(v) Rejection of the counter claim of the Railways is perverse.

16. The scope of an appeal under Section 37 of the 1996 Act in which a judgement and order passed under Section 34 of the Act is under challenge, is very limited. The Appeal Court's duty is to see whether or not the learned Single Judge has operated within the parameters of Section 34 of the 1996 Act. The grounds on which an Arbitral Award may be set aside are those enumerated in Section 34 of the Act. Unless one or more of such grounds is/are made out, the Award should not be touched. The object of the 1996 Act is to give finality to an Arbitral Award unless it falls foul of one or more of the grounds stated in Section 34 of the Act. The policy is of minimal interference by the Court. A Court in seisin of a Section 34 application is not to act as an Appellate Court so as to decide the disputes between the parties afresh on reappreciation of the evidence on record. The Court is only to see if there is any blatant illegality on the face of the Award or if the Award is contrary to the public policy of India. Unless the view of the Arbitral Tribunal is an impossible one or is otherwise perverse or is so unreasonable that no reasonably informed person would take such view (*Wednesbury Unreasonableness*), the referral Court should not interfere with the Award in exercise of power under Section 34 of the 1996 Act.

17. In an appeal under Section 37 of the 1996 Act, the Appeal Court is required to only consider whether the view of the learned Single Judge is perverse or an impossible one. Hence, we are required to see whether the learned Single Judge erred in not interfering with the Arbitral Award in question. This would necessarily require us to peruse the Arbitral Award to see whether the same is hit by any of the grounds for setting aside enumerated in Section 34 of the 1996 Act. Only if we find that the Award is clearly hit by one or more of the grounds, we shall be justified in interfering with the impugned order. In conducting this exercise, due deference must be given to the view of the learned Single Judge. If such view is plausible one, we will not be justified in interfering with the impugned judgement only because we may have a different view. This principle of law is well-established.

18. We have gone through the Arbitral Award meticulously. Issues nos. i and ii were taken up together for discussion by the learned Tribunal (the issues have been set out towards the beginning of this judgement). After a detailed analysis of the pleadings on record and assimilation of the evidence adduced before it, the Tribunal decided the first two issues as follows:

> **"75.** To sum up, the entire issue in controversy is that after December 08, 2009 the claimant has not been allowed to use the rakes in question and, therefore, the claimant has been able to use the rakes for nine months only within the span of ten years. Since the date of Agreement till April, 2012 the claimant was prevented from loading the WIS rakes on the ground of non-commission of designated loading station, even though it happened so due to lapses from the side of the Railway Respondents at different point of time. We are convinced to opine from the sequence of events that despite best endeavor by the claimant to ensure timeline direct for its private siding project, the time frame of the timeline as per exigencies of contractual obligations was not followed strictly out of sheer lack of sincere efforts from the side of the Railway respondents. It has also been admitted by Mr. Biswas, RW-1 in response to Q.no.222 during his cross-examination that sometimes-actual commissioning suffers within timeline due to many ancillary factors. It has been established and firmly established from the evidence both oral and documentary and surrounding circumstances on record that the claimant could not obtain any benefit under WIS' Agreement due to unilateral changes made thereto by the respondents.

76. As discussed earlier, the dispute regarding the validity of termination of Agreement in an identical case pertaining to the same WIS policy appears to have been settled once for all on the strength of judicial pronouncements of Delhi High Court and the Hon'ble Apex Court. Fortified with the rulings of Delhi High Court and subsequent order of the Hon'ble Supreme Court as quoted suitably and discussed in details in preceding paragraphs 46 to 50, the tribunal have meticulously evaluated the entire corroborative evidence on record both oral and documentary and in the final analysis It can reasonably be asserted that validity of termination of the Agreement rests entirely upon a true and correct reading of Clauses 6.1,12.0,15.0 and 16.0 of bilateral Agreement with reference to salient features of WIS policy. A careful scrutiny of two impugned circulars dated 26.09.2008 and 03.02.2011 in terms of clause 12.0 & 16.0 of the Agreement reveals that there was a change/alteration in terms and conditions of WIS policy and consequent bi-lateral Agreement dated 09.01.2008. It is also significantly important to note that such change/alteration has been effected irrationally and unilaterally by the respondent railways without the consent of the claimant as required under clause 16.0 of the Agreement. It is also made contextually clear that the plea of rationalization of the Scheme, or procedural guidelines to streamline the working of WIS system or public policy etc as per clauses 6.1 (a) to (d) & 15.0 of the Agreement does not hold good for lack of convincing evidence to that effect. It can, therefore, unhesitatingly be held that fundamental changes have been brought about in WIS itself by the respondent railways by issuing impugned circular dated 26.09.2008 & 03.02.2011. It is further held that consequent thereupon preferential right of the claimant dwindled, monitoring pattern contravening Clause 7:1 of the Agreement was changed substantially and further making the Scheme more onerous for the claimant and thus affecting the rights of the Claimant prejudicially. Such alteration/modification carried out by the respondent railways through issuance of circulars in question changed the nature of WIS policy (Annexure A) and also consequently altered the terms and conditions of bilateral Agreement (Annexure B). In such view of the matter, it can safely be held that the Claimant Company has rightly exercised its option in terms of clause 12 of the Agreement (Annexure B). Such being the position, it can, therefore, be conclusively held that termination of Agreement vide letter dated 17.06.2016 (Annexure P) is within the right of the Claimant Company and it is absolutely justified in the facts and circumstances of the instant proceeding and further that such termination is legally valid and sustainable.**”**

19. The third issue i.e. the issue of limitation was decided by the Tribunal as follows:

> **“77.** Issue No. III: On the question of limitation we have taken into consideration rival submission of the learned Counsel for the parties with reference to the relevant provisions of Limitation Act, 1963 and Arbitration Act together with the surrounding materials and circumstances on record. It appears that the Agreement between the parties was terminated on 17.06.2016 and on 03.10.2016 a notice u/s 21 of Arbitration Act (Annexure Q) requesting for the disputes to be referred to arbitration in terms of the arbitration clause of Agreement dated 09th January, 2008 was served upon the respondents. The Claimant, therefore, made reference for arbitration on 03.10.2016. As per Article 137 of Limitation Act, 1963 three year period of limitation

begins when the right to apply accrues. According to Mr Ghosh, since reference for arbitration was made on 03.10.2016, the claims of the claimant should relate to the period from 04.10.2013 to 03. 10. 2016 and rest of the claims prior to 04.10.2013 are simply barred by the law of limitation. It is further argued by him that even after 04.10.2013 there was no cause of action to raise because the Claimant failed to show that either prior to or after 04.10.2013 the Railways did not supply the Rakes to the Claimant despite its placement of indents. We, however, find much substance in Mr Sen's contention that the claim has crystalized on termination and commencement of arbitration in terms of section 21 of Arbitration Act was made within the period of limitation of the date when the right to sue-accrued. That apart, it has been specified in Article 55 of the Schedule Part II to the Limitation Act that in a case where the breach is continuing the period of limitation to institute Claims for compensation begins to run when it ceases and the period of limitation is three years. As discussed earlier, the instant case is, undoubtedly, a case of continuing breach and in such circumstances, the right to sue arose only when the contract is terminated. In such view of the matter, Railway Respondents' plea regarding no cause of action for the claimant is of no consequence and Mr Ghosh's argument on that score is also not acceptable.

Considering all these in its proper perspective, it is held by the Tribunal that no part of the Claims of the claimant Company is barred by limitation.

Issue No III is answered in the negative accordingly.**”**

20. The fourth issue was whether or not the counter claim of the Railways is substantiated by evidence and circumstances on record. The counter claim was rejected in the following words:

> **"79.** As regards to the merit of Counter claim filed by the respondents we have taken into consideration the entire materials and circumstances on record on the touchstone of the rulings cited on behalf of the claimant. In ***State of Rajasthan VS Ferro Concrete Construction Private Limited reported in (2009) 12 SCC 1*** it is held inter alia by the Hon'ble Apex Court that award cannot be made solely on the basis of claim Statement considering itself as proof without looking for or insisting on proof. In another ruling of Delhi High Court reported in 2009 [113] DRJ 779 [Prominent Electric Works vs. Delhi Development Authority & Ors.] It has been clearly laid down that a claim cannot succeed on the basis of mere statement contained in the statement of facts or pleadings without being supported by evidence in Arbitral proceeding. It is further held therein that basic and fundamental principles of Evidence Act, 1872 are applicable even to arbitration proceeding.
>
> **80.** It is also quite evident from foregoing discussions that the claimant's detailed objections assailing counter claim have also not at all been rebutted on behalf of the respondents. Considering all these, the Tribunal is to hold that there is no evidence available to establish Counter Claim and as such the respondents have miserably failed to discharge the onus cast upon them, in order to succeed in substantiating counter claim. In such a situation, Counter claim filed on behalf of the respondent Railways is clearly liable to be dismissed and the same stands dismissed accordingly.**"**

21. The other issues as regards entitlement of the respondent/claimant to receive fair market value of the concerned wagons and its entitlement to be compensated for loss of freight rebate and loss of profit have also been decided by the Tribunal on the basis of cogent evidence on record. The Tribunal has quoted the relevant portions of the depositions of witnesses to buttress its findings. The claim on account of loss of goodwill has been rejected.

22. Having carefully read the Arbitral Award, we do not find that the same is hit by of the grounds for setting aside mentioned in Section 34 of the 1996 Act. In this connection, it may be helpful to set out sub-sections 2 and 2A under Section 34 of the 1996 Act:

> **"34. Application for setting aside arbitral award .—**
>
> **(2)** An arbitral award may be set aside by the Court only if—
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> (a) the party making the application[1] [establishes on the basis of the record of the arbitral tribunal that]—
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> (i) a party was under some incapacity, or
>
> (ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or
>
> (iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
>
> (iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:
>
> Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the

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

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

(b) the Court finds that—

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

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

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

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

23. In an appeal under Section 37 of the Arbitration and Conciliation Act, 1996, what falls for consideration of the Division Bench is whether or not the learned Trial Judge acted within the parameters of Section 34 of the 1996 Act. It is established law that while exercising jurisdiction under Section 34 of the 1996 Act, the Court does not act as an Appellate Court. The learned Single Judge does not sit in appeal over the arbitral award. The learned Judge has to see only if the petitioner assailing the award has been able to make out at least one of the grounds for setting aside an arbitral award as mentioned in Section 34 of the 1996 Act.

24. In the case of ***M/S. B.B.M. Enterprise Vs. State of West Bengal in FMA 1409 of 2022 With FMA 1419 of 2022***, a Coordinate Bench of this Court, in the context of Section 34 of the 1996 Act, observed, *inter alia*, as follows: -

> **"15.** On a perusal of the aforesaid section it would be clear that the grounds of challenging an arbitral award have been restricted by the legislature. Under the Arbitration Act, 1940, an award could be challenged on various grounds. This resulted in prolongation of the process of resolution of disputes between the parties by resorting to arbitration as an alternative dispute resolution mechanism since in a large number of cases the arbitral award was challenged before the competent Court. Thereafter the legal process continued up to the Hon'ble Apex Court. The intention of the legislature of making arbitration an expeditious procedure for dispute resolution was often defeated. This was one of the reasons for promulgation of the 1996 Act. The grounds of challenging an arbitral award are now limited. As would appear from the opening words of sub-section (2) of Section 34 of the 1996 Act, the grounds of challenge mentioned under Section 2 are exhaustive. An arbitral award may be set aside "only if" one or more of the grounds enumerated in sub section (2) is/are made out by the petitioner. Subsequently sub-section (2A) was introduced which provided an additional ground for setting aside an award.
>
> 16. One of the grounds for setting aside an award is, if the award is in conflict with the public policy of India. Explanation 1 under sub-section (2) clarifies when an award can said to be in conflict with the public policy of India. One such situation is when the award is in contravention of the fundamental policy of Indian law. Explanation 2 under Sub-Section 2 clarifies that in order to ascertain whether there is a

contravention of the fundamental policy of Indian law, the Court shall not review the merits of the dispute.

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

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

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

a) On a cumulative reading of Section 5 and Section 34 of the Act, it is now well settled that an award passed by an Arbitrator can be set aside on the limited grounds and the supervisory role of a Court is reduced to a minimum level.

b) It is not permissible for a Court to examine the correctness of the findings of the Arbitrator as if it were sitting in appeal overj an award. As such, a Court while considering the objections under Section 34 of the Act is not expected to re- appreciate the entire findings and reassess the whole case of the parties.

c) If the conclusion or the final decision of the Arbitrator is based on a possible view of the matter, a Court should not interfere with an award. Generally, the conclusion of the Arbitrator with regard to the construction of a contract is not to be interfered with, if there is a plausible view of the matter, and even an error relatable to interpretation of the contract by an Arbitrator is regarded as an error within its jurisdiction and as such it is an error which is not amenable to correction by Courts.

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

25. At paragraph 33 of the reported decision in the case of ***Associate Builders v. Delhi Development Authority reported at (2015) 3 SCC 49***, the Hon'ble Supreme Court observed as follows: -

> **"33.** It must clearly be understood that when a court is applying the "public policy" test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. Thus an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score [Very often an arbitrator is a lay person not necessarily trained in law. Lord Mansfield, a famous English Judge, once advised a high military officer in Jamaica who needed to act as a Judge as follows: "General, you have a sound head, and a good heart; take courage and you will do very well, in your occupation, in a court of equity. My advice is, to make your decrees as your head and your heart dictate, to hear both sides patiently, to decide with firmness in the best manner you can; but be careful not to assign your reasons, since your determination may be substantially right, although your reasons may be very bad, or essentially wrong". It is very important to bear this in mind when awards of lay arbitrators are challenged.]. Once it is found that the arbitrator's approach is not arbitrary or capricious, then he is the last word on facts. In P.R. Shah, Shares & Stock Brokers (P) Ltd. v. B.H.H. Securities (P) Ltd. reported at (2012) 1 SCC 594:
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> 21. A court does not sit in appeal over the award of an Arbitral Tribunal by reassessing or reappreciating the evidence. An award can be

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

26. In the recent decision in the case of ***Punjab State Civil Supplies Corpn. Ltd. v. Sanman Rice Mills, reported at 2024 SCC OnLine SC 2632***, the Hon'ble Supreme Court, dilating on the scope of Section 37 of the 1996 Act, observed, *inter alia*, as follows:-

> **"20.** In view of the above position in law on the subject, the scope of the intervention of the court in arbitral matters is virtually prohibited, if not absolutely barred and that the interference is confined only to the extent envisaged under Section 34 of the Act. The appellate power of Section 37 of the Act is limited within the domain of Section 34 of the Act. It is exercisable only to find out if the court, exercising power under Section 34 of the Act, has acted within its limits as prescribed thereunder or has exceeded or failed to exercise the power so conferred. The Appellate Court has no authority of law to consider the matter in dispute before

the arbitral tribunal on merits so as to find out as to whether the decision of the arbitral tribunal is right or wrong upon reappraisal of evidence as if it is sitting in an ordinary court of appeal. It is only where the court exercising power under Section 34 has failed to exercise its jurisdiction vested in it by Section 34 or has travelled beyond its jurisdiction that the appellate court can step in and set aside the order passed under Section 34 of the Act. Its power is more akin to that superintendence as is vested in civil courts while exercising revisionary powers. The arbitral award is not liable to be interfered unless a case for interference as set out in the earlier part of the decision, is made out. It cannot be disturbed only for the reason that instead of the view taken by the arbitral tribunal, the other view which is also a possible view is a better view according to the appellate court.

21. It must also be remembered that proceedings under Section 34 of the Act are summary in nature and are not like a full-fledged regular civil suit. Therefore, the scope of Section 37 of the Act is much more summary in nature and not like an ordinary civil appeal. The award as such cannot be touched unless it is contrary to the substantive provision of law; any provision of the Act or the terms of the agreement.**”**

27. Keeping the above principles of law in mind and in the light of the discussion hereinabove, we do not find any perversity in the Award. The conclusion reached by the Tribunal on each count is fully supported by reasons and material on record. The point of limitation has been rightly rejected by the Tribunal. We do not see that the Tribunal has ignored any vital evidence or has taken into account irrelevant factors. We do not find the Award to be unfair or unreasonable to any extent. There is nothing in the Arbitral Award which shocks our conscience. The issue of delay in construction of the private siding at Barajamda is inextricably intertwined and interlinked with the main disputes between the parties. Hence the Tribunal cannot be said to have transgressed its jurisdiction in returning its finding on that issue. The rejection of the counter claim of the Railways is also well founded. The Railways do not appear to have made any effort to establish their counter claim by cogent acceptable evidence.

28. In view of the aforesaid, we are of the opinion that the learned Single Judge rightly refused to interfere with the Award. The learned Judge applied the correct principles of law in dismissing the application for setting aside the Award. The judgment and order impugned is a well-reasoned one. Not only the view of the learned Judge is a plausible one, in our opinion, that is the only view one can reasonably take in the facts and circumstances of the case.

29. We have consciously refrained from specifically dealing with the decisions cited by the parties. The principles of law laid down by those decisions are well established and are amply reflected in the Award as also in the judgment and order sought to be assailed before us. The judgment and order of the learned Single Judge is not in contravention of any of the principles of law propagated in those decisions.

30. In fine, we see no reason to interfere with the judgement and order sought to be assailed before us. AO-COM/12/2024 is dismissed. There will be no order as to costs.

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

I agree.

(ARIJIT BANERJEE, J.) **(OM NARAYAN RAI, J.)**

Later:-

After judgment is delivered in open Court, learned Advocate for the appellants prays for stay of operation of the judgment and order. Such prayer is considered and refused.

At this point, learned Senior Counsel for the respondent draws our attention to an order dated May 1, 2024, passed by a Co-ordinate Bench at the time of admission of the appeal. He says that in terms of that order, the monies deposited by the appellants before the Registrar, Original Side of this Court, were withdrawn by the respondent upon furnishing two bank guarantees for Rs.2,50,32,41,670.49/- and Rs. 60 crore. Since the present appeal stands dismissed, the bank guarantees should be returned to the respondent.

Learned Advocate for the appellants opposes such prayer.

Since we have dismissed the appeal as being meritless, we see no reason to retain the bank guarantees. The learned Registrar, Original Side, is directed to return the bank guarantees bearing numbers OGT 0515230082741 and OGT 0515240003505 to the respondent at the earliest and definitely within three weeks from the date of communication of this order to the learned Registrar.

(ARIJIT BANERJEE, J.) **(OM NARAYAN RAI, J.)**