



2025:DHC:4892



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* **IN THE HIGH COURT OF DELHI AT NEW DELHI***Reserved on: 23 September 2024**Pronounced on: 30 May 2025*

+ O.M.P. (COMM) 23/2017

NATIONAL HIGHWAY AUTHORITY OF
INDIA

.....Petitioner

Through: Mr. Vikas Goel, Mr. Vivek
Gupta and Ms. Samiksha Goel, Advs.

versus

UNITECH -NCC (JV)

.....Respondent

Through: Ms. Priya Kumar and Mr.
Shivam Goel, Advs.**CORAM:****HON'BLE MR. JUSTICE C. HARI SHANKAR****JUDGMENT**

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30.05.20251. This petition under Section 34¹ of the Arbitration and

¹ 34. **Application for setting aside arbitral award. –**

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

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

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

(i) a party was under some incapacity; or

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

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

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

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

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was



Conciliation Act, 1996² assails an arbitral award dated 16 May 2011, by a three-member Arbitral Tribunal, in an arbitration between the respondent Unitech-NCC JV³ as the claimant and the petitioner-NHAI as the respondent.

2. The dispute arose in the context of a Contract Agreement⁴ executed on 25 May 2001 between NHAI and Unitech. The contract was for widening and upgradation of the existing 2-lane road in the State of Andhra Pradesh between the towns of Visakhapatnam and Ichapuram, a section of NH-5. The date of commencement of the contract was 8 June 2001 and the scheduled date of completion was 7 February 2004. The contract was actually completed on 20 March 2005.

3. The clauses/provisions of the CA/General Conditions of Contract⁵, to the extent they are relevant, may be reproduced thus:

(b) 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 the Court finds that—

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

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

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

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

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

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

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

(2-A) 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 reappraisal of evidence.

² “the 1996 Act” hereinafter

³ “Unitech” hereinafter

⁴ “CA” hereinafter

⁵ “GCC” hereinafter



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“42.2 Failure to Give Possession

If the Contractor suffers delay and/or incurs costs from failure on the part of the Employer to give possession in accordance with the terms of Sub-Clause, the Engineer shall after due consultation with the Employer and the Contractor, determine:

- a) Any extension of time to which the Contractor is entitled under Clause 44, and
- b) The amount of such costs, which shall be added to the Contract Price,
And shall notify the Contractor accordingly, with a copy to the Employer.

44.1 Extension of Time for Completion

In the event of:

- a) The amount or nature of extra or additional work,
- b) Any cause of delay referred to in these Conditions,
- c) Exceptionally adverse climatic conditions,
- d) Any delay, impediment or prevention by the Employer, or
- e) Other special circumstances which may occur, other than through a default of or breach of contract by the Contractor or for which he is responsible.

Being such as fairly to entitle the Contractor to an extension of the Time for Completion of the Works, or any Section or part thereof, the Engineer shall, after due consultation with the Employer and the Contractor, determine the amount of such extension and shall notify the Contractor accordingly, with a copy to the Employer.

44.3 Interim Determination of Extension

Provided also that where an event has a continuing effect such that it is not practicable for the Contractor to submit detailed particulars within the period of 28 days referred to in Sub-Clause 44.2(b), he shall nevertheless be entitled to an extension of time provided that



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he has submitted to the Engineer interim particulars at intervals of not more than 28 days and final particulars within 28 days of the end of the effects resulting from the event. On receipt of such interim particulars, the Engineer shall, without undue delay, make an interim Engineer shall review all the circumstances and shall determine an overall extension of time in regard to the event. In both such cases the Engineer shall make his determination after due consultation with the Employer and the Contractor and shall notify the Contractor of the determination with a copy to the Employer. No final review shall result in a decrease of any extension of time already determined by the Engineer.

47.1 Liquidated Damages for Delay

If the Contractor fails to comply with the Time for Completion in accordance with Clause 48, for the whole of the Works or, if applicable, any Section within the relevant time prescribed by Clause 43, then the Contractor shall pay to the Employer the relevant sum stated in the Appendix to Tender as liquidated damages for such default and not as a penalty (which sum shall be the only monies due from the Contractor for such default) for every day or part of a day which shall elapse between the relevant Time for Completion and the date stated in a Taking-Over Certificate of the whole of the Works or the relevant Section, subject to the applicable limit stated in the Appendix to Tender. The Employer may without prejudice to any other method of recovery, deduct the amount of such damages from any monies due or to become due to the Contractor. The payment or deduction of such damages shall not relieve the Contractor from his obligation to complete the Works, or from any other of his obligations and liabilities under the Contract.

Sub-Clause 47.3 Bonus for Early Completion

“If the Contractor achieves completion of the whole of the works prior to the specified period of completion of 32 calendar months from the date of commencement, the Employer shall pay to the Contractor a sum stated in the Appendix to Tender as bonus for every completed month which shall elapse between the date of completion of all items of works as stipulated in the contract, including variations ordered by the Engineer and the specified period of completion of 32 calendar months. In case of any time extension bonus for early completion considering the extended time shall NOT be payable.



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53.1 Notice of Claims

Notwithstanding any other provision of the Contract, if the Contractor intends to claim any additional payment pursuant to any Clause of these Conditions or otherwise, he shall give notice of his intention to the Engineer, with a copy to the Employer, within 28 days after the event giving rise to the claim has first arisen.

53.4 Failure to Comply

If the Contractor fails to comply with any of the provisions of this Clause in respect of any claim which he seeks to make, his entitlement to payment in respect thereof shall not exceed such amount as the Engineer or any arbitrator or arbitrators appointed pursuant to Sub-Clause 67.3 assessing the claim considers to be verified by contemporary records (whether or not such records were brought to the Engineer's notice as required under Sub-Clause 53.2 and 53.3).

69.4 Contractor's Entitlement to Suspend Work

Without prejudice to the Contractor's entitlement to interest under Sub-Clause 60.10 and to terminate under Sub-Clause 69.1, the Contractor may, if the Employer fails to pay the Contractor the amount due under any certificate of the Engineer within 28 days after the expiry of the time stated in Sub-Clause 60.10 within which payment is to be made, subject to any deduction that the Employer is entitled to make under the Contract, after giving 28 days prior notice to the Employer, with a copy to the Engineer, suspend work or reduce the rate of work. If the Contractor suspends work or reduces the rate of work in accordance with the provisions of this Sub-Clause and thereby suffers delay or incurs costs the Engineer shall, after due consultation with the Employer and the Contractor, determine;

a) any extension of time to which the Contractor is entitled under Clause 44, and

b) the amount of such costs, which shall be added to the Contract Price.

And shall notify the Contractor accordingly, with a copy to the



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Employer.”

4. In exercise of the rights conferred by an arbitration agreement existing in the CA, Unitech raised certain claims against NHAI. On the claims not being considered by NHAI, the matter was referred to a three-member Arbitral Tribunal. The Arbitral Tribunal came to render its award on 16 May 2011. This petition assails the said award.

5. NHAI submits, at the outset, that it is restricting its challenge to the impugned award *vis-a-vis* Claims 3, 4 and 7.

6. I, therefore, propose to deal with the said claims, the award of the learned Arbitral Tribunal thereon, and the rival contentions before this bench in that regard and the sustainability of the said contention, given the parameters of Section 34 of the 1996 Act.

7. Before that, we deem it appropriate to examine the law regarding the power of judicial review under Section 34 of the 1996 Act, with arbitral award.

Scope of judicial interference under Section 34

8. I had, in my judgment in *NDMC v R & T Enterprises*⁶, attempted to analyze the scope of Section 34 of the 1996 Act as it stood on that date, and noted thus:

“55. The decisions on the scope of Section 34 of the 1996 Act are too numerous to justify any paraphrasing, but the position is,

⁶ 2024 SCC OnLine Del 5436



by now, certain. *UHL Power Co. Ltd. v State of H.P.*⁷ and *Dyna Technologies (P) Ltd. v Crompton Greaves Ltd.*⁸ hold that the jurisdiction of the Court under Section 34 cannot be likened to normal appellate jurisdiction. Casual and cavalier interference with arbitral awards, and proscription from interfering on the ground that a better, alternative view was possible, stands clearly foreclosed by *Ssangyong Engineering & Construction Co. Ltd. v N.H.A.I.*⁹ and *Parsa Kente Collieries Ltd. v Rajasthan Rajya Vidyut Utpadan Nigam Ltd.*¹⁰. The autonomy of the Arbitral Tribunal was required to be respected and interference with arbitral awards on factual aspects firmly eschewed. At the same time, if the award was found to be perverse, or that the interpretation of the contractual covenants by the Arbitral Tribunal was one which could not possibly be accepted, the Court was bound to interfere. Instances where the construction of the contractual clauses, by the Arbitral Tribunal, was found to be so unacceptable as to justify interference, are *South East Asia Marine Engineering & Constructions Ltd. v Oil India Ltd.*¹¹ and *Patel Engineering Ltd. v North Eastern Electric Power Corporation Ltd.*¹².

56. “Perversity”, as would justify interference with an arbitral award, connotes a situation in which the finding of fact, by the Arbitral Tribunal, was arrived at by ignoring or excluding relevant material, or by taking into consideration irrelevant material, or where the finding is so outrageously in defiance of logic as to suffer from the vices of irrationality¹³. *Associate Builders v D.D.A.* also placed especial reliance, on the concept of “perversity”, on the following clarification, provided in *Kuldeep Singh v Commissioner of Police*¹⁴:

“10. 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 compendious it may be, the conclusions would not be treated as perverse and the findings would not be interfered with.”

⁷ (2022) 4 SCC 116

⁸ (2019) 20 SCC 1

⁹ (2019) 15 SCC 131

¹⁰ (2019) 7 SCC 236

¹¹ (2020) 5 SCC 164

¹² (2020) 7 SCC 167

¹³ *S.T.O. v Gopi Nath & Sons*, 1992 Supp (2) SCC 312; *Associate Builders v DDA*, (2015) 3 SCC 49

¹⁴ (1999) 2 SCC 10



57. In *Associate Builders and Indian Oil Corporation Ltd. v Shree Ganesh Petroleum*¹⁵, the Supreme Court clearly held that an arbitral award can only be set aside on grounds mentioned under Sections 34(2) and (3) of the said Act and not otherwise. The Court considering an application for setting aside an award, under Section 34 of the 1996 Act, cannot look into the merits of the award except when the award is in conflict with the public policy of India as provided in Section 34(2)(b)(ii) of the 1996 Act. An award could be said to be in conflict with the public policy of India, as per *Associate Builders*, when it is patently violative of a statutory provision, or where the approach of the Arbitral Tribunal has not been judicial, or where the award has been passed in violation of the principles of natural justice, or where the award is patently illegal, which would include a case in which it was in patent contravention of applicable substantive law or in patent breach of the 1996 Act, or where it militated against the interest of the nation, or was shocking to the judicial conscience.

58. An award which ignores the specific terms of the contract, but is not merely a case of erroneous contractual interpretation, is patently illegal. The Supreme Court, in *Indian Oil Corporation Ltd.*, found the case before it to be one such. *Ssangyong Engineering* also demonstrates an interesting example of a case in which the error in interpretation of the contract was so fundamental as to render the award in conflict with the public policy of India:

“76. However, when it comes to the public policy of India, argument based upon “most basic notions of justice”, it is clear that this ground can be attracted only in very exceptional circumstances when the conscience of the Court is shocked by infraction of fundamental notions or principles of justice. It can be seen that the formula that was applied by the agreement continued to be applied till February 2013 - in short, it is not correct to say that the formula under the agreement could not be applied in view of the Ministry's change in the base indices from 1993-1994 to 2004-2005. Further, in order to apply a linking factor, a circular, unilaterally issued by one party, cannot possibly bind the other party to the agreement without that other party's consent. Indeed, the circular itself expressly stipulates that it cannot apply unless the contractors furnish an undertaking/affidavit that the price adjustment under the circular is acceptable to them. We have seen how the appellant gave such undertaking only conditionally and without prejudice to its argument that the Circular does not and cannot apply. This being the case, it is clear that the

¹⁵ (2022) 4 SCC 463



majority award has created a new contract for the parties by applying the said unilateral circular and by substituting a workable formula under the agreement by another formula dehors the agreement. This being the case, a fundamental principle of justice has been breached, namely, that a unilateral addition or alteration of a contract can never be foisted upon an unwilling party, nor can a party to the agreement be liable to perform a bargain not entered into with the other party. Clearly, such a course of conduct would be contrary to fundamental principles of justice as followed in this country, and shocks the conscience of this Court. However, we repeat that this ground is available only in very exceptional circumstances, such as the fact situation in the present case. Under no circumstance can any court interfere with an arbitral award on the ground that justice has not been done in the opinion of the Court. That would be an entry into the merits of the dispute which, as we have seen, is contrary to the ethos of Section 34 of the 1996 Act, as has been noted earlier in this judgment.”

59. Yet another such example was highlighted by the Supreme Court in **PSA Sical Terminals (P) Ltd. v V.O. Chidambranar Port Trust**¹⁶:

“85. As such, as held by this Court in **Ssangyong Engg. & Construction**, the fundamental principle of justice has been breached, namely, that a unilateral addition or alteration of a contract has been foisted upon an unwilling party. This Court has further held that a party to the agreement cannot be made liable to perform something for which it has not entered into a contract. In our view, re-writing a contract for the parties would be breach of fundamental principles of justice entitling a court to interfere since such case would be one which shocks the conscience of the Court and as such, would fall in the exceptional category.”

60. **PSA Sical**, therefore, holds that if the Arbitral Tribunal travels beyond the contract, it acts without jurisdiction, being a creature of the contract, and the award stands vitiated thereby. Following the precedent in **Army Welfare Housing Organisation v Sumangal Services (P) Ltd.**¹⁷, it was held that an Arbitral Tribunal had strictly to act within the boundaries of the contract, and could not proceed *ex debito justitiae*. For example, as observed in **Satyanarayana Construction Co. v U.O.**¹⁸, the Arbitral Tribunal could not award a claim at a rate higher than that

¹⁶ (2021) 18 SCC 716

¹⁷ (2004) 9 SCC 619

¹⁸ (2011) 15 SCC 101



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specified in the contract. Rewriting of the contract is completely proscribed, and fatally imperils the arbitral award, as held in *N.H.A.I. v Bumihiway DDB (JV)*¹⁹, *Union Territory of Pondicherry v P.V. Suresh*²⁰, *Shree Ambica Medical Stores v Surat People's Co-operative Bank Ltd.*²¹, *IFFCO Tokio General Insurance Co. v Pearl Beverages Ltd.*²², *Tata Consultancy Services v Cyrus Investments (P) Ltd.*²³, and *Maharashtra State Electricity Distribution Co. v Maharashtra Electricity Regulatory Commission*²⁴.

61. Comprehensively examining and analysing the entire gamut of existing case laws and reiterating the above principles, the Supreme Court, in *S.V. Samudram v State of Karnataka*²⁵, further clarified that an arbitral award could not be modified by the Court, as held in *N.H.A.I. v M. Hakeem*²⁶ and *Dakshin Haryana Bijli Vitran Nigam Ltd. v Navigant Technologies (P) Ltd.*²⁷. The latter decision, it was noted, further held that, where the Court set aside the award of the Arbitral Tribunal, the underlying dispute would be required to be decided afresh in an appropriate proceeding. In the event of the Court finding the arbitral award to justify evisceration, the Court, it was held in *McDermott International and Larsen Air Conditioning & Refrigeration Co. v U.O.I*²⁸, could only quash the award leaving the parties to reinstitute arbitration should they so choose, but could not itself rewrite or modify the award.

63. These principles also stand exhaustively delineated in *Reliance Infrastructure Ltd. v State of Goa*²⁹.

9. The extent to which a Section 34 Court could interfere with the manner in which an Arbitral Tribunal interpreted the terms of the contract with which it was concerned has, since, been revisited by a three Judge Bench of the Supreme Court in *DMRC Ltd v Delhi*

¹⁹ (2006) 10 SCC 763

²⁰ (1994) 2 SCC 70

²¹ (2020) 13 SCC 564

²² (2021) 7 SCC 704

²³ (2021) 9 SCC 449

²⁴ (2022) 4 SCC 657

²⁵ (2024) 3 SCC 623

²⁶ (2021) 9 SCC 1

²⁷ (2021) 7 SCC 657

²⁸ (2023) 15 SCC 472

²⁹ (2024) 1 SCC 479



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Airport Metro Express Pvt Ltd³⁰, which held thus:

“34. The contours of the power of the competent court to set aside an award under Section 34 has been explored in several decisions of this Court. In addition to the grounds on which an arbitral award can be assailed laid down in Section 34(2), there is another ground for challenge against domestic awards, such as the award in the present case. Under Section 34(2-A) of the Arbitration Act, a domestic award may be set aside if the Court finds that it is vitiated by “patent illegality” appearing on the face of the award.

35. In *Associate Builders v DDA*, a two-Judge Bench of this Court held that although the interpretation of a contract is exclusively within the domain of the arbitrator, construction of a contract in a manner that no fair-minded or reasonable person would take, is impermissible. A patent illegality arises where the arbitrator adopts a view which is not a possible view. A view can be regarded as not even a possible view where no reasonable body of persons could possibly have taken it. This Court held with reference to Sections 28(1)(a) and 28(3), that the arbitrator must take into account the terms of the contract and the usages of trade applicable to the transaction. The decision or award should not be perverse or irrational. An award is rendered perverse or irrational where the findings are:

- (i) based on no evidence;
- (ii) based on irrelevant material; or
- (iii) ignores vital evidence.

36. Patent illegality may also arise where the award is in breach of the provisions of the arbitration statute, as when for instance the award contains no reasons at all, so as to be described as unreasoned.

38. In *Ssangyong Engg. & Construction Co. Ltd. v NHAI*, a two-Judge Bench of this Court endorsed the position in *Associate Builders v DDA*, on the scope for interference with domestic awards, even after the 2015 Amendment:

“40. The change made in Section 28(3) by the

³⁰ (2024) 6 SCC 357



Amendment Act really follows what is stated in paras 42.3 to 45 in *Associate Builders v DDA* (*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).*

41. ... Thus, a finding based on no evidence at all or an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside on the ground of patent illegality. Additionally, a finding based on documents taken behind the back of the parties by the arbitrator would also qualify as a decision based on no evidence inasmuch as such decision is not based on evidence led by the parties, and therefore, would also have to be characterised as perverse.”

(emphasis supplied)

39. In essence, the ground of patent illegality is available for setting aside a domestic award, if the decision of the arbitrator is found to be perverse, or so irrational that no reasonable person would have arrived at it; or the construction of the contract is such that no fair or reasonable person would take; or, that the view of the arbitrator is not even a possible view [*Patel Engg. Ltd. v North Eastern Electric Power Corpn. Ltd.*]. A “finding” based on no evidence at all or an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside under the head of “patent illegality”. An award without reasons would suffer from patent illegality. The arbitrator commits a patent illegality by deciding a matter not within his jurisdiction or violating a fundamental principle of natural justice.”

10. The entire law relating to Section 34 has once again been revisited by the Supreme Court in *OPG Power Generation Pvt Ltd v Enxio Power Cooling Solutions India Pvt Ltd*³¹. The judgment has captured the essence of nearly every decision of note prior thereto. The passages, from the decision in *OPG Power Generation*, which set

³¹ (2025) 2 SCC 417



out the law as declared therein, may be reproduced thus:

“Relevant legal principles governing a challenge to an arbitral award

30. Before we delve into the issue/sub-issues culled out above, it would be useful to have a look at the relevant legal principles governing a challenge to an arbitral award. Recourse to a court against an arbitral award may be made through an application for setting aside such award in accordance with sub-sections (2), (2-A) and (3) of Section 34 of the 1996 Act. Sub-section (2) of Section 34 has two clauses, (a) and (b). Clause (a) has five sub-clauses which are not relevant to the issues raised before us. Insofar as clause (b) is concerned, it has two sub-clauses, namely, (i) and (ii). Sub-clause (i) of clause (b) is not relevant to the controversy in hand. Sub-clause (ii) of clause (b) provides that if the Court finds that the arbitral award is in conflict with the public policy of India, it may set aside the award.

Public policy

31. “Public policy” is a concept not statutorily defined, though it has been used in statutes, rules, notification, etc. since long, and is also a part of common law. Section 23 of the Contract Act, 1872 uses the expression by stating that the consideration or object of an agreement is lawful, unless, inter alia, opposed to public policy. That is, a contract which is opposed to public policy is void.

37. What is clear from above is that for an award to be against public policy of India a mere infraction of the municipal laws of India is not enough. There must be, inter alia, infraction of fundamental policy of Indian law including a law meant to serve public interest or public good.

The 2015 Amendment in Sections 34 and 48

42. The aforementioned judicial pronouncements were all prior to the 2015 Amendment. Notably, prior to the 2015 Amendment the expression “in contravention with the fundamental policy of Indian law” was not used by the legislature in either Section 34(2)(b)(ii) or Section 48(2)(b). The pre-amended Section 34(2)(b)(ii) and its Explanation read:



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“34. Application for setting aside arbitral award.—

(1) * * *

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

(b) the court finds that—

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

Explanation.—Without prejudice to the generality of sub-clause (ii), it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption or was in violation of Section 75 or Section 81.”

44. By the 2015 Amendment, in place of the old Explanation to Section 34(2)(b)(ii), Explanations 1 and 2 were added to remove any doubt as to when an arbitral award is in conflict with the public policy of India.

46. The 2015 Amendment adds two Explanations to each of the two sections, namely, Section 34(2)(b)(ii) and Section 48(2)(b), in place of the earlier Explanation. The significance of the newly inserted Explanation 1 in both the sections is two-fold. First, it does away with the use of words : (a) “without prejudice to the generality of sub-clause (ii)” in the opening part of the pre-amended Explanation to Section 34(2)(b)(ii); and (b) “without prejudice to the generality of clause (b) of this section” in the opening part of the pre-amended Explanation to Section 48(2)(b); secondly, it limits the expanse of public policy of India to the three specified categories by using the words “only if”. Whereas, Explanation 2 lays down the standard for adjudging



whether there is a contravention with the fundamental policy of Indian law by providing that a review on merits of the dispute shall not be done. This limits the scope of the enquiry on an application under either Section 34(2)(b)(ii) or Section 48(2)(b) of the 1996 Act.

47. The 2015 Amendment by inserting sub-section (2-A) in Section 34, carves out an additional ground for annulment of an arbitral award arising out of arbitrations other than international commercial arbitrations. Sub-section (2-A) provides that the Court may also set aside an award if that is vitiated by patent illegality appearing on the face of the award. This power of the Court is, however, circumscribed by the proviso, which states that an award shall not be set aside merely on the ground of an erroneous application of the law or by reappraisal of evidence.

48. Explanation 1 to Section 34(2)(b)(ii), specifies that an arbitral award is in conflict with the public policy of India, only if:

- (i) the making of the award was induced or affected by fraud or corruption or was in violation of Section 75 or Section 81; or
- (ii) it is in contravention with the fundamental policy of Indian law; or
- (iii) it is in conflict with the most basic notions of morality or justice.

In contravention with the fundamental policy of Indian law

51. As discussed above, till the 2015 Amendment the expression “in contravention with the fundamental policy of Indian law” was not found in the 1996 Act. Yet, in ***Renusagar Power Co. Ltd. v General Electric Co.***³², in the context of enforcement of a foreign award, while construing the phrase “contrary to the public policy”, this Court held that for a foreign award to be contrary to public policy mere contravention of law would not be enough rather it should be contrary to:

- (a) the fundamental policy of Indian law; and/or
- (b) the interest of India; and/or

³² 1994 Supp (1) SCC 644



(c) justice or morality.

55. The legal position which emerges from the aforesaid discussion is that after “the 2015 Amendments” in Section 34(2)(b)(ii) and Section 48(2)(b) of the 1996 Act, the phrase “in conflict with the public policy of India” must be accorded a restricted meaning in terms of Explanation 1. The expression “in contravention with the fundamental policy of Indian law” by use of the word “fundamental” before the phrase “policy of Indian law” makes the expression narrower in its application than the phrase “in contravention with the policy of Indian law”, which means mere contravention of law is not enough to make an award vulnerable. To bring the contravention within the fold of fundamental policy of Indian law, the award must contravene all or any of such fundamental principles that provide a basis for administration of justice and enforcement of law in this country.

56. Without intending to exhaustively enumerate instances of such contravention, by way of illustration, it could be said that:

- (a) violation of the principles of natural justice;
- (b) disregarding orders of superior courts in India or the binding effect of the judgment of a superior court; and
- (c) violating law of India linked to public good or public interest, are considered contravention of the fundamental policy of Indian law.

However, while assessing whether there has been a contravention of the fundamental policy of Indian law, the extent of judicial scrutiny must not exceed the limit as set out in Explanation 2 to Section 34(2)(b)(ii).

Most basic notions of morality and justice

57. In *Renusagar* this Court held that an arbitral award is in conflict with the public policy of India if it is, inter alia, contrary to “justice and morality”. Explanation 1, inserted by the 2015 Amendment, makes it clear that an award is in conflict with the public policy of India, inter alia, if it conflicts with the “most basic notions of morality or justice”.

Justice

58. Justice is the virtue by which the society/court/Tribunal



gives a man his due, opposed to injury or wrong. Justice is an act of rendering what is right and equitable towards one who has suffered a wrong. Therefore, while tempering justice with mercy, the court must be very conscious, that it has to do justice in exact conformity with some obligatory law, for the reason that human actions are found to be just or unjust on the basis of whether the same are in conformity with, or in opposition to, the law [*Union of India v Ajeet Singh*³³, para 26] . Therefore, in “judicial sense”, justice is nothing more nor less than exact conformity to some obligatory law; and all human actions are either just or unjust as they are in conformity with, or in opposition to, the law [P. Ramanatha Aiyar's Advanced Law Lexicon, 6th Edn., Vol. III, p. 2621.].

59. But, importantly, the term “legal justice” is not used in Explanation 1, therefore simple conformity or non-conformity with the law is not the test to determine whether an award is in conflict with the public policy of India in terms of *Explanation 1*. The test is that it must conflict with the most basic notions of justice. For lack of any objective criteria, it is difficult to enumerate the “most basic notions of justice”. More so, justice to one may be injustice to another. This difficulty has been acknowledged by many renowned jurists, as is reflected in the observations of this Court in *State (NCT of Delhi) v Gurdip Singh Uban*³⁴], extracted below:

“23. The words “justice” and “injustice”, in our view, are sometimes loosely used and have different meanings to different persons particularly to those arrayed on opposite sides. “*One man's justice is another's injustice*” [Ralph Waldo Emerson : Essays (1803-82), First Series, 1841, “Circles”]. Justice Cardozo said: ‘The web is entangled and obscure, shot through with a multitude of shades and colors, the skeins irregular and broken. Many hues that seem to be simple, are found, when analysed, to be a complex and uncertain blend. *Justice* itself, which we are wont to appeal to as a test as well as an ideal, *may mean different things to different minds* and at different times. Attempts to objectify its standards or even to describe them have never wholly succeeded.’ (Selected Writings of Cardozo, pp. 223-224, Falcon Publications, 1947).”

(emphasis in original)

62. In the light of the discussion above, in our view, when we

³³ (2013) 4 SCC 186

³⁴ (2000) 7 SCC 296



talk about justice being done, it is about rendering, in accord with law, what is right and equitable to one who has suffered a wrong. Justice is the virtue by which the society/court/Tribunal gives a man his due, opposed to injury or wrong. Dispensation of justice in its quality may vary, dependent on person who dispenses it. A trained judicial mind may dispense justice in a manner different from what a person of ordinary prudence would do. This is so, because a trained judicial mind is likely to figure out even minor infractions of law/norms which may escape the attention of a person with ordinary prudence. Therefore, the placement of words “most basic notions” before “of justice” in Explanation 1 has its significance. Notably, at the time when the 2015 Amendment was brought, the existing law with regard to grounds for setting aside an arbitral award, as interpreted by this Court, was that an arbitral award would be in conflict with public policy of India, if it is contrary to:

- (a) the fundamental policy of Indian law;
- (b) the interest of India;
- (c) justice or morality; and/or is
- (d) patently illegal.

Morality

64. The other ground is of morality. On the question of morality, in *Associate Builders*, this Court, after referring to the provisions of Section 23 of the Contract Act, 1872; earlier decision of this Court in *Gherulal Parakh v Mahadeodas Maiya*³⁵ and *Indian Contract Act* by Pollock and Mulla, held that judicial precedents have confined morality to sexual morality. And if “morality” were to go beyond sexual morality, it would cover such agreements as are not illegal but would not be enforced given the prevailing mores of the day. The Court also clarified that interference on this ground would be only if something shocks the Court's conscience [See *Associate Builders*, para 39].

Patent illegality

65. Sub-section (2-A) of Section 34 of the 1996 Act, which was inserted by the 2015 Amendment, provides that an arbitral award not arising out of international commercial arbitrations, may

³⁵ AIR 1959 SC 781



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also be set aside by the Court, if the Court finds that the award is visited by patent illegality appearing on the face of the award. The proviso to sub-section (2-A) states that an award shall not be set aside merely on the ground of an erroneous application of the law or by reappreciation of evidence.

Perversity as a ground of challenge

69. Perversity as a ground for setting aside an arbitral award was recognised in ***ONGC Ltd. v Western Geco International Ltd.***³⁶. Therein it was observed that an arbitral decision must not be perverse or so irrational that no reasonable person would have arrived at the same. It was observed that if an award is perverse, it would be against the public policy of India.

Scope of interference with an arbitral award

74. The aforesaid judicial precedents make it clear that while exercising power under Section 34 of the 1996 Act the Court does not sit in appeal over the arbitral award. Interference with an arbitral award is only on limited grounds as set out in Section 34 of the 1996 Act. A possible view by the arbitrator on facts is to be respected as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon. It is only when an arbitral award could be categorised as perverse, that on an error of fact an arbitral award may be set aside. Further, a mere erroneous application of the law or wrong appreciation of evidence by itself is not a ground to set aside an award as is clear from the provisions of sub-section (2-A) of Section 34 of the 1996 Act.

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

84. An Arbitral Tribunal must decide in accordance with the terms of the contract. In a case where an Arbitral Tribunal passes an award against the terms of the contract, the award would be patently illegal. However, an Arbitral Tribunal has jurisdiction to interpret a contract having regard to terms and conditions of the contract, conduct of the parties including correspondences exchanged, circumstances of the case and pleadings of the parties.

³⁶ (2014) 9 SCC 263



If the conclusion of the arbitrator is based on a possible view of the matter, the Court should not interfere [See : *SAIL v Gupta Brother Steel Tubes Ltd.*³⁷; *Pure Helium India (P) Ltd. v ONGC*³⁸; *McDermott International Inc. v Burn Standard Co. Ltd.*³⁹; *MMTC Ltd. v Vedanta Ltd.*⁴⁰]. But where, on a full reading of the contract, the view of the Arbitral Tribunal on the terms of a contract is not a possible view, the award would be considered perverse and as such amenable to interference [*South East Asia Marine Engg. & Constructions Ltd. v Oil India Ltd.*⁴¹]

Whether unexpressed term can be read into a contract as an implied condition

85. Ordinarily, terms of the contract are to be understood in the way the parties wanted and intended them to be. In agreements of arbitration, where party autonomy is the *grund norm*, how the parties worked out the agreement, is one of the indicators to decipher the intention, apart from the plain or grammatical meaning of the expressions used [*Balco v. Kaiser Aluminium Technical Services Inc.*⁴²].

86. However, reading an unexpressed term in an agreement would be justified on the basis that such a term was always and obviously intended by the parties thereto. An unexpressed term can be implied if, and only if, the court finds that the parties must have intended that term to form part of their contract. It is not enough for the court to find that such a term would have been adopted by the parties as reasonable men if it had been suggested to them. Rather, it must have been a term that went without saying, a term necessary to give business efficacy to the contract, a term which, although tacit, forms part of the contract [*Adani Power (Mundra) Ltd. v Gujarat ERC*⁴³].

87. But before an implied condition, not expressly found in the contract, is read into a contract, by invoking the business efficacy doctrine, it must satisfy the following five conditions:

- (a) it must be reasonable and equitable;
- (b) it must be necessary to give business efficacy to the contract, that is, a term will not be implied if the contract is effective without it;

³⁷ (2009) 10 SCC 63

³⁸ (2003) 8 SCC 593

³⁹ (2006) 11 SCC 181

⁴⁰ (2019) 4 SCC 163

⁴¹ (2020) 5 SCC 164

⁴² (2016) 4 SCC 126

⁴³ (2019) 19 SCC 9



- (c) it must be obvious that “it goes without saying”;
- (d) it must be capable of clear expression;
- (e) it must not contradict any terms of the contract [*Nabha Power Ltd. v. Punjab SPCL*⁴⁴, followed in *Adani Power*].”

11. The statutory position

11.1 The grounds on which an arbitral award can be challenged stand statutorily delineated in Section 34. They are

- (i) incapacity of a party [Section 34(2)(a)(i)],
- (ii) invalidity of the arbitration agreement [Section 34(2)(a)(ii)].
- (iii) lack of proper notice regarding appointment of the arbitrator [Section 34(2)(a)(iii)],
- (iv) inability of the party to present his case before the arbitrator [Section 34(2)(a)(iii)],
- (v) if the arbitral award deals with a dispute not falling within the terms of reference [Section 34(2)(a)(iv)],
- (vi) if the arbitral award contains decisions on matters beyond the scope of the reference [Section 34(2)(a)(iv)],
- (vii) if the composition of the arbitral tribunal was not in accordance with the arbitration agreement, unless the agreement itself was in conflict with a non-derogable provision in Part I of the 1996 Act [Section 34(2)(a)(v)], or
- (viii) the subject matter of the dispute is non-arbitrable [Section 34(2)(b)(i)], or

⁴⁴ (2018) 11 SCC 508



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- (ix) the arbitral award is in conflict with the public policy of India [Section 34(2)(b)(ii)], meaning
- (a) the award is induced or affected by fraud or corruption [Section 34(2)(b)(ii) read with Explanation 1(i) thereto], or
 - (b) the award violates Section 75⁴⁵ [Section 34(2)(b)(ii) read with Explanation 1(i) thereto], or
 - (c) the award violates Section 81⁴⁶ [Section 34(2)(b)(ii) read with Explanation 1(i) thereto], or
 - (d) the award is in conflict with the fundamental policy of Indian law, which would not entail a review on the merits of the dispute [Section 34(2)(b)(ii) read with Explanation 1(ii) and Explanation 2 thereto], or
 - (e) the award is in conflict with the most basic notions or morality or justice [Section 34(2)(b)(ii) read with Explanation 1(iii) thereto], or
- (x) the award is vitiated by patent illegality appearing on the face of the award, which would not include an erroneous appreciation of the law or reappreciation of evidence [Section 34 (2-A)].

⁴⁵ **75. Confidentiality.** – Notwithstanding anything contained in any other law for the time being in force, the conciliator and the parties shall keep confidential all matters relating to the conciliation proceedings. Confidentiality shall extend also to the settlement agreement, except where its disclosure is necessary for purposes of implementation and enforcement.

⁴⁶ **81. Admissibility of evidence in other proceedings.** – The parties shall not rely on or introduce as evidence in arbitral or judicial proceedings, whether or not such proceedings relate to the dispute that is the subject of the conciliation proceedings,—

- (a) views expressed or suggestions made by the other party in respect of a possible settlement of the dispute;
- (b) admissions made by the other party in the course of the conciliation proceedings;
- (c) proposals made by the conciliator;
- (d) the fact that the other party had indicated his willingness to accept a proposal for settlement made by the conciliator.



11.2 The Section contains several expressions which make for fascinating reading, such as “under some incapacity”, “fundamental policy of Indian law”, “most basic notions of morality or justice” and, last but never the least, “patent illegality”. These expressions are, to my mind, deliberately left ambiguous, with an apparent intent at providing some play in the joints. What “incapacity” does Section 34(2)(a)(i) allude to? “Incapacity” could mean, etymologically, anything. What is the “fundamental policy” of Indian law? Does, for that matter, Indian law have anything concrete which can be identified as its “fundamental policy”? What is the scope of the expressions “morality” and “justice”? What are their “most basic notions”? Why has the legislature used the expression “most basic”? Does it imply that there are some breaches of morality or justice which, even if they exist, would not vitiate an arbitral award?⁴⁷ What is the difference between “illegality” and “patent illegality”? Why has the legislature qualified the word “illegality” with the adjective “patent”?

11.3 An interpretative excursion into these expressions, and their true scope, meaning and intent, can provide material for an exhaustive thesis. Needless to say, this judgment is not intended to be one.

11.4 Ever since Section 34, in its present *avatar*, incarnated in the statute on 30 August 2019, Courts have been grappling with these issues. They have led to a fascinating body of case law, of which this decision, earlier, has only skims the surface. In our legal system – as in the case of many other legal systems in the world, the statute has to

⁴⁷ Such an interpretation, were it to be permissible at all, would be fraught with extremely dangerous consequences, which might well be imagined.



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conform to the interpretation accorded to it by the Courts.⁴⁸ The Supreme Court has, through its judgments, lent colour and complexion to these somewhat befuddling expressions in Section 34, and we, in the spirit of Articles 141 and 144 of the Constitution of India, are bound to be guided thereby.

12. I proceed, therefore, to distil some of the relevant principles that emerge from the decisions cited *supra*.

13. The principles that emerge

From the decisions cited earlier, the following principles emerge:

- (i) An arbitral award cannot be interfered with on grounds not envisaged by Section 34(2) or (3) of the 1996 Act.
- (ii) Section 34 jurisdiction is not appellate. Interference with arbitral awards is generally proscribed, and is to be limited to rare and exceptional cases.
- (iii) Interference on the ground that another, more appropriate and perhaps better, view, different from that adopted by the arbitrator, is possible, is impermissible.
- (iv) There can be no interference with factual findings of an

⁴⁸ The Full Bench of 9 learned Judges of the Supreme Court of the United States noted this truism when, in its decision in **Port Authority Trans-Hudson Corporation v Patrick Feeney**, 495 US 299 (1990): 109 L. Ed. 2d 264, it noted, apropos the Eleventh Amendment to the US Constitution, that “actions for prospective relief against an interstate agency would not be barred by the Eleventh Amendment, *as the Court interprets it*, whatever the agency's relationship to the States' treasuries”.



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arbitral tribunal, unless they are perverse. A possible view by the arbitrator, on the facts, has to be respected. The arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon.

- (v) “Perversity” exists where
- (a) the arbitral tribunal ignores or excludes relevant material, or
 - (b) the arbitral tribunal takes into consideration irrelevant material, or
 - (c) the finding is so outrageously in defiance of logic as to suffer from the vice of irrationality.

(vi) If there is no evidence, or the evidence is thoroughly unreliable in the sense that no reasonable person would act on it, there is perversity. Where there is some acceptable evidence on record, on which the arbitral tribunal relies, the conclusion would not be perverse.

(vii) The Section 34 Court cannot look into the merits of the dispute.

(viii) An award is in conflict with the public policy of India if it

- (a) is patently violative of a statutory provision, or
- (b) reflects an approach by the arbitral tribunal which is not judicial, or



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(c) has been passed in violation of the principles of natural justice, or

(d) is patently illegal, which would include a case in which

(i) the award is in patent contravention of applicable substantive law, or

(ii) the award patently breaches the 1996 Act, or

(iii) the award militates against the interests of the nation, or

(iv) the award is shocking to the judicial conscience, or

(v) the award ignores the specific terms of the contract, which would *not include* a case of mere erroneous contractual interpretation, unless the error of interpretation was fundamental, as in ***Ssangyong Engineering***, which resulted in the award being contrary to the “most basic notions of justice”, which shocked the judicial conscience, in which the arbitral tribunal substituted a clause in the contract with another.

(ix) The Court cannot interfere with an arbitral award on the ground that it does not do justice, in the opinion of the Court, as that would require examination of the merits of the dispute, which is proscribed.

(x) Infraction of fundamental policy of Indian law includes a law meant to serve public interest or public good. Mere



infraction of the municipal laws of India does not render the award violative of the fundamental policy of Indian law.

(xi) An arbitral award infracts the fundamental policy of Indian law if it contravenes all or any of the fundamental principles which provide a basis for administration of justice and enforcement of law in the country. This would include, for example,

- (a) violation of the principles of natural justice,
- (b) disregarding orders of precedentially superior Courts, or their binding effect, or
- (c) violating laws linked to public good or public interest.

(xii) “Justice” is nothing more or less than exact conformity to some obligatory law.

(xiii) “Morality” includes agreements which cannot be enforced given the prevailing mores of the day. That said, an arbitral award can be set aside on the ground that it is contrary to the most basic concepts of morality only if it shocks the judicial conscience of the Court.

(xiv) An unreasoned award is patently illegal.

(xv) In the matter of interpretation of contractual covenants by the arbitral tribunal, the following principles apply:



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(a) An interpretation which is completely unacceptable, in that it is one which no fair-minded or reasonable person would take, merits interference. If the arbitrator adopts a view which is not a *possible* view, it merits interference. An impossible view is one which no reasonable body of persons could possibly have taken.

(b) The arbitral tribunal, being a creature of the contract, cannot travel beyond it.

(c) An arbitral tribunal cannot rewrite the contract, or substitute one clause with another.

(d) An arbitral tribunal cannot foist, on a party, a covenant which is not to be found in the contract and is not binding on it.

(e) An arbitral tribunal cannot proceed *ex debito justitiae, de hors* the contract.

(f) The arbitral tribunal must also take into account the usages of trade applicable to the transaction, while interpreting the contract.

(g) An arbitrator has the jurisdiction to interpret a contract having regards to its terms and conditions, conduct of the parties including correspondences exchanged, circumstances of the case, the manner in which the parties worked out the contract, and pleadings



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of the parties. Thus viewed, if the interpretation accorded by the arbitrator to the contract is based on a possible view, the Court would not interfere.

(h) An unexpressed term can also be read into an agreement if such a term was always and obviously intended by the parties thereto. It must be a term which goes without saying, which is necessary to give business efficacy to the contract and which, although tacit, forms part of the contract. It must, however,

- (a) be just and equitable,
- (b) be necessary to give business efficacy to the contract, in that, if the contract is effective without it, the term will not be implied,
- (c) be obvious, in that it “goes without saying”,
- (d) be capable of clear expression, and
- (e) not contradict any term of the contract.

14. With this background, I proceed to examine whether the grounds on which the petitioner challenges the impugned award can sustain as valid grounds, within the meaning of Section 34 of the 1996 Act.

15. To facilitate this, a tabular depiction of the grounds on which the learned Arbitral Tribunal has allowed the claims of the respondent, the grounds of challenge by the petitioner thereto, and the response of the respondent thereto is separately provided as an Annexure-A to this judgment.



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Analysis

16. A prismatic precedential view of the grounds of challenge, as urged by NHAI, do not make out a case that suffices to set aside the impugned award.

17. Re. Claim 3

17.1 Claim 3 was for losses suffered by Unitech owing to additional mobilisation which it had to do, because of breach, by NHAI, with the covenants of the CA with respect to the manner in which the project site was to be handed over. From a reading of the grounds on which NHAI has sought to challenge the award of the learned Arbitral Tribunal on this Claim, it becomes apparent that there is no serious dispute, by NHAI, with respect to the fact that delay was occasioned, and that the project site had not been handed over by NHAI to Unitech in the manner stipulated in the CA. NHAI has also not been able to dent the finding of the learned Arbitral Tribunal, supported by letter dated 5 December 2003 of the PE, that the site was handed over in bits and pieces, and that Unitech had to work on whatever fragment of the site was made available to it at a particular point of time. The PE clarified that, while the CA envisaged handing over of the project site to Unitech in 5 instalments, the site was handed over in 36 bits.

17.2 Once, on this factual aspect of the matter, NHAI has not been able to put up any serious contest, the challenge by NHAI to the award of the learned Arbitral Tribunal, qua Claim 3, loses much of its



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momentum.

17.3 It is not necessary to reiterate, here, the specific considerations which prevailed on the Arbitral Tribunal to award Claim 3 to Unitech, albeit in part, as they stand exhaustively set out in the tabular statement annexed to this judgment. Suffice it to note that the Arbitral Tribunal placed reliance on the letter dated 5 December 2003 of the PE, while recommending grant of Extension of time⁴⁹ till 20 April 2005, in which it was specifically noted that the project plan was not provided by NHAI to Unitech in the manner envisaged by the CA and that, as a result of having to work on the bits and pieces of the land which was made available from time to time, massive time and financial implications resulted to Unitech. It was also noted, in the said letter, that the bits provided were not in kilometre sequence, with the longest bits having been provided more than 13 months after the commencement date. The Arbitral Tribunal also noted that, by granting EOT without levying any liquidated damages as permissible under Clause 47.1 of the GCC, NHAI had effectively acknowledged the fact that no delay was attributable to Unitech. The very grant of EOT was acknowledgement of the said fact, in Clause 44.1 of the CA.

17.4 NHAI's contention that Annexure I to the CA was only an indicative list of the plant and equipment, and not the requirement that Unitech was required to mobilise, is contrary to the very wordings of Annexure I itself, which clearly stated that it was the "minimum plant and equipment to be deployed by the contractor" and, further, that it was the "Employers estimate of the minimum essential basic holding

⁴⁹ "EOT" hereinafter



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of plant and mechanical equipment which the Contractor will require *in order to meet all of his performance obligations under the Contract*". The Arbitral Tribunal was, therefore, corrected its view that Annexure I to the CA represented the plant and equipment which was contractually required to be mobilised by Unitech in order to be able to complete all its obligations under the CA. In any event, this is a plausible interpretation of Annexure I to the CA and cannot, therefore, merit interference under Section 34 of the 1996 Act.

17.5 NHAI's contention that, in para 17(ii) of the impugned award, the Arbitral Tribunal had acknowledged the fact that Annexure I was merely an indicative list of plant and equipment, and not the only equipment or plant required to be mobilised by Unitech in order to be able to complete the project, is incorrect on facts. There is no such acknowledgement or acceptance in para 17(ii) of the award. In fact, the Arbitral Tribunal has clearly noted, in the said paragraph, that, while the machinery and equipment enlisted in Annexure I to the CA did represent the minimum machinery required to complete the work in the stipulated period, it was necessary to supplement the said machinery with a number of other machines/equipments to make them productive and that the details of such additional machinery and equipment which Unitech had to deploy and employ were reflected in the Monthly Project Reports, under the signature of the Team Leader. These Monthly Project Reports were found, by the Arbitral Tribunal to constitute "contemporaneous record", within the meaning of Clause 53.4 of the CA. This, again, is a purely subjective view of the Arbitral Tribunal, based on its interpretation and understanding of the expression "contemporaneous record" as employed in the CA, and



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cannot warrant judicial interference.

17.6 As has been correctly pointed out by Unitech, NHAI did not lead any evidence to discredit, on facts, the assertion of Unitech regarding deployment of additional plant and machinery, or the findings of the Arbitral Tribunal in that regard. Inasmuch as Arbitral Tribunal had relied on the working provided by NHAI itself with its written submissions, after discarding the worksheet provided by Unitech and substantially reducing the claim, from the amount of ₹ 17,23,41,950/- claimed by Unitech to ₹ 3,59,78,180/-, actually awarded by the Arbitral Tribunal, it cannot be said that NHAI has succeeded in putting up any substantial opposition to the arbitral award, qua Claim 3.

17.7 The reference, by NHAI, to the CA certificate provided by Unitech was also, as Unitech correctly points out, misguided. NHAI seeks to contend that the amount of ₹ 23,11,07,825/-, certified as having been spent by Unitech between 8 June 2001 to 8 February 2004, as per the CA certificate, was discovered with the rate at which Unitech was racing its claim for additional deployment of plant and machinery. If the said rate were applied, NHAI's contention is that, during the period of 32 months, even for the minimum plant and machinery deployed by Unitech as per Annexure I to the CA, it should have spent ₹ 30,72,57,600/-. As Unitech correctly points out, the certificate of the CA is with respect to the claims as originally raised, which included expenses towards POL⁵⁰ and inherent idling. These amounts had to be reduced from the figure of ₹ 30,72,57,600/-

⁵⁰ Petroleum Oil and Lubricants



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certified by the CA, which would result in a net scheduled expenditure of ₹ 8,17,61,247 which amount, from the actual expenditure of ₹ 31,48,33,060/- reflected in the CA certificate, would result in additional expenditure incurred by Unitech of ₹ 23,30,71,813/-. The CA certificate, therefore, did not indicate that Unitech had not incurred any additional expenditure, as NHAI sought to contend.

17.8 Insofar as NHAI's contention that the Arbitral Tribunal erred in deducting, from the amount found to be payable to Unitech against Claimed 3, the bonus of ₹ 3,87,01,242/-, is concerned, this aspect stands correctly answered by Unitech both in its response with respect to Claim 3 and with respect to Claim 7. Owing to the preachers on the part of NHAI, Unitech was prevented from claiming bonus on account of early completion of the work. It was for this reason that the Arbitral Tribunal decided to uphold Unitech's claim to bonus under Claim 7 but failed twice not to duplicate the claim by also awarding an equivalent amount towards additional mobilisation of plant and machinery. Otherwise, Unitech could have been awarded ₹ 7,46,79,422/- against Claim 3, as was correctly worked out by the Arbitral Tribunal.

17.9 None of the submissions advanced by NHAI, to challenge the impugned award, insofar as it awards Claim 3 to Unitech, albeit to the extent of ₹ 3,59,78,180/-, therefore, impress.

18. Re. Claim 4

18.1 The awarding of Claim 4 of Unitech was but a sequitur the



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findings by the Arbitral Tribunal while awarding Claim 3. While awarding Claim 3, the Arbitral Tribunal had specifically held the MPRs for the period August 2001 to January 2005 to constitute “contemporary record” within the meaning of Clause 53.4 of the GCC, of the number of machinery, plant and equipments actually deployed by Unitech. While awarding Claim 3, the Arbitral Tribunal had also found the delay in completion of the project, beyond the scheduled contract period, to be attributable to NHAI. Inasmuch as the total value of the contract was ₹146,96,67,435/–, to be executed within 32 months, the average work to be executed by Unitech per month works out to ₹ 4,59,27,107/–. The total was executed by Unitech was to the tune of ₹ 156,22,44,345/–. At the rate of rupees for pro ₹ 59,27,107/– per month, it would take 34 months to execute work valued at ₹ 156,22,44,345/–. This would imply 10 months additional period of work, for which period Unitech would naturally have to keep its plant, machinery and equipment mobilise, entitling it to mobilisation charges as claimed. The amount awarded was worked out on the basis of the Hire Charges from the Date at Book of the MORTH⁵¹, on the basis of which the idling cost of equipment for 10 months worked out to ₹ 3,29,95,870/–, which was, therefore, awarded.

18.2 NHAI’s contention that the claim was allowed without evidence is, therefore, incorrect, as the Arbitral Tribunal relied on the MPRs of constituting contemporary record. Inasmuch as this was an exercise of appreciation of evidence, and cannot be said to be initiated by perversity, no case for interference therewith is made out. Notice it possible to fault the Arbitral Tribunal for holding that Unitech was

⁵¹ Ministry of Road Transport and Highways



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entitled to additional payment for mobilisation of machinery, labour, materials, overheads and site establishment during the period which the contract was performed on account of NHAI's breaches. This constituted a distinct claim, upon from Claim 3, which was for additional plant and machinery, over and above the scheduled plant and machinery enumerated in Annexure I to the CA.

18.3 It cannot be said, therefore, that, in awarding Claim 4, the Arbitral Tribunal committed any such as would invite interference under Section 34 of the 1996 Act. The reliance, by the Arbitral Tribunal, on Section 73 of the Contract Act is also, in my view, justify, as the charges which had to be spent by Unitech towards mobilisation of plant, machinery, infrastructure, overheads, etc, during the period performance of the contract was delayed owing to NHAI's breaches, entitled Unitech for compensation under Section 73.

18.4 In working out the amount awardable to Unitech against this Claim, the Arbitral Tribunal applied Hire Charges from the Data Book of the MORTH, as was done in the case of Claim 3. As in the case of Claim 3, once NHAI was found not to have any effective defence against the findings of breaches of the CA in the matter of handing over of the project planned for performance of the contract by Unitech, and the consequent loss suffered by Unitech on that score, no substantial defence to the awarding of Claim 4, by the Arbitral Tribunal, can be said to exist. The claim has been awarded by the Arbitral Tribunal for the period during which the minimum plant and machinery, as envisaged by Annexure I to the CA could not be operated to optimum capacity owing to the erratic manner in which



the project land was made available to Unitech, and yet had to remain mobilised at Unitech's expense. This was an additional expenditure incurred by Unitech, over and above the expenditure in deploying additional plant, machinery and equipment which formed subject matter of Claim 3, and the decision of the Arbitral Tribunal to allow the claim of Unitech, in that regard, even if only in part, cannot be said to suffer from any patent legality or any of the other inhibiting factors envisaged by Section 34 of the 1996 Act.

18.5 The submissions of Unitech, as contained in the tabular statement and to this judgment, by way of response to NHAI's objections to the awarding of Claim 4 are, therefore, convincing, and merit acceptance.

18.6 NHAI's objections to the awarding of Claim 4 to Unitech are, therefore, devoid of substance.

19. Re. Claim 7

19.1 The entitlement of Unitech to Claim 7, as awarded by the Arbitral Tribunal, is self-evident, once the award in respect of Claim 3 is found to be sustainable. In fact, Claims 3, 4 and 7 merely represent 3 consequences which had necessarily to visit NHAI as a result of the breach, by, of the covenants of the CA in the manner of handing over of the project site and providing of the land in bits and pieces. NHAI has not even attempted to dispute these facts and, therefore, the entire challenge raised by it to the impugned award is fundamentally without a foundation.



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19.2 NHAI's primary ground of challenge, to the awarding of Claim 7 by the Arbitral Tribunal, is that the award is contrary to Clause 47.3 of the Conditions of Particular Application⁵², which forbade grant of bonus in cases where EOT was granted.

19.3 The argument, superficially seen, is undoubtedly attractive at first blush. It may also be possible to argue that the Arbitral Tribunal, as a creature of the CA, could not have declared Clause 47.3 to be illegal or in conflict with Section 73 of the Contract Act.

19.4 However, in my opinion, the impugned award has to be read holistically. It is clear that Unitech could not have been awarded bonus, as bonus is payable, under Clause 47.3, only in the case of early completion of the project. Inasmuch as the completion of the project was delayed, no bonus, strictly speaking, could have been awarded to Unitech.

19.5 The Arbitral Tribunal has, while adjudicating Claim 7, not returned any finding that Unitech had completed the project work early, or before time – as, indeed, it very well could not have. The amount awarded under Claim 7 cannot, therefore, be regarded as award of bonus as envisaged by Clause 47.3.

19.6 What the Arbitral Tribunal has in effect held is that Unitech was handicapped from claiming bonus, or completing the work before time, because of the delays on the part of NHAI. It has been

⁵² "COPA" hereinafter



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specifically observed, by the Arbitral Tribunal, that, though the PE had, vide letter dated 5 May 2004, determined that Unitech was entitled to EOT till 20 April 2005, and Unitech had also accepted EOT date 20 April 2005, NHAI approved grant of EOT till 20 March 2005 only at a highly belated stage on 11 April 2005, nearly 2 months after taking over certificate had been issued on 20 February 2005. Having itself, thereby, delayed in granting EOT and hinder the progress of the work, the Arbitral Tribunal has held Unitech entitled to be recompensed therefor, even on principles akin to Section 73 of the Contract Act.

19.7 As Unitech has correctly contended, the amount awarded under Claim 7 and under Claim 3 are essentially 2 elements of 1 awarded amount, related to the accumulated effect, on Unitech, of NHAI's default on handing over the site in the manner envisaged by the CA, providing land in bits and pieces, thereby hindering the progress of the work and, even after EOT had been approved by the PE, sitting on the approval for nearly a year before sanctioning the EOT. That this is what the Arbitral Tribunal also intended a sapper and from the fact that the amount awarded under Claim 7 has been deducted while awarding Claim 3.

19.8 Viewed holistically, therefore, it cannot be said that, in awarding Claim 7, the Arbitral Tribunal has awarded anything to Unitech in excess than was its due.

20. Re. interest and costs



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20.1 NHAI has also, in its written submissions, questioned the award, by the Arbitral Tribunal, of pre-reference and *pendente lite* interest and costs.

20.2 At the very commencement of arguments, it was clearly stated, by learned Counsel for NHAI, that it was restricting its challenge only to the award in respect of Claims 3, 4 and 7.

20.3 It is not required for me, therefore, to return any findings with respect to the challenge, in the written submissions, on the aspect of interest and costs. Nonetheless, the award of interest, *pendente lite* and pre-reference, is within the scope of authority of the Arbitral Tribunal has conferred by Section 31(7)(a)⁵³ of the 1996 Act, unless otherwise agreed upon between the parties. NHAI has not drawn my attention to any covenant in the CA or elsewhere, proscribing award of interest, to Unitech, from the date when the amount became due to it.

20.4 Similarly, the power to grant costs vests in the Arbitral Tribunal by Section 31(8)⁵⁴ of the 1996 Act.

Conclusion

21. In the result, therefore, NHAI has not been able to make out any case for interference with the impugned arbitral award, within the parameters of Section 34 of the 1996 Act.

⁵³ (7)(a) Unless otherwise agreed by the parties, where and in so far as an arbitral award is for the payment of money, the arbitral tribunal may include in the sum for which the award is made interest, at such rate as it deems reasonable, on the whole or any part of the money, for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made.

⁵⁴ (8) The costs of an arbitration shall be fixed by the arbitral tribunal in accordance with Section 31-A.



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22. The petition is dismissed.

C. HARI SHANKAR, J.

MAY 30, 2025

dsm

Click here to check corrigendum, if any



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**Annexure-A**

Claim No. and nature of claim	Amount claimed and awarded	Reasoning of Arbitral Tribunal		Grounds of challenge by petitioner		Response by Respondent
<u>Claim 3</u> For loss suffered because of additional mobilization made to overcome lapses of NHAI, on site handing over aspect	<u>Claimed</u> ₹ 172341950/- <u>Awarded</u> ₹ 35978180/-	(i)	Part 1/4 of the CA at page 122 set out the lengths of the project site which were to be handed over by NHAI to Unitech at the commencement of the project and at 3, 6, 9 and 12 months thence. Entire stretch was to be handed over by 7 June 2002.	(i)	Actual delay attributable to NHAI was not determined. For damages to sustain, there must not only be breach, but actual loss being suffered by the opposite party as a result thereof. As such, for not having establish the causal relationship between the alleged breach of contract by NHAI and loss suffered by Unitech as a result, the award was bad as violative of public policy of India.	
		(ii)	According to the CA, (a) 22.845 km was to be completed by 21 months, (b) 9.565 km was to be completed by 27 months and (c) 12.420 km was to be completed by 32 months.	(ii)	There was no evidence of the time from which Unitech deployed the additional mobilization.	
		(iii)	As per Clause 48.2 of the GCC, substantial completion of the contract had taken place by 31 January 2005.	(iii)	The additional deployment had not been bifurcated between that required for claiming bonus and that required to complete	



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				the work.	
		(iv)	The PE granted extension upto 20 April 2005 <i>vide</i> letter dated 5 May 2004 and NHAI granted extension upto 20 March 2005 <i>vide</i> letter dated 11 April 2005.		
		(v)	The PE, in his letter dated 5 December 2003 observed/confirmed that (a) non-provision of land as per the contract rendered the contract inoperable and redundant, (b) working in bits and pieces over the full length of the contract, instead of defined economical sections as per the CA, had massive time and financial implications, (c) land was given in 36 bits instead of 5 bits as per CA, and Unitech had to work on any length/piece of land which became available, (d) the bits were not in km sequence either, thereby making problems worse, as many more teams were required at any one time to work on all available sections,		



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			(e) the longest bits of land of 4.8 km and 6.77 km were given more than 13 months after the commencement date, and (f) the land bits availability for work had to be recorded in more than 92 separate sections, which involved complex analysis which would take more time to resolve.		
		(vi)	It was after the letters issued by NHAI alleging lack in performance by Unitech and casting blame on it for delayed completion of the contract that EOT was given by NHAI. The grievances must have been considered before granting EOT.		
		(vii)	The issue was, therefore, to determine who was responsible for the delay which necessitated EOT.		
		(viii)	No Liquidated Damages ⁵⁵ had been levied by NHAI though it was permissible under Clause 47.1 of the GCC in the event of delay or default by Unitech. This also indicated that Unitech was not liable for the		

⁵⁵ “LD” hereinafter



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			delay.		
		(ix)	Clause 44.1 stipulated that Unitech would not be entitled to EOT if delay was attributable to it. The fact that EOT was granted by NHAI therefore indicated that Unitech was not responsible for the delay.		
		(x)	Having granted EOT, NHAI was estopped from contending that Unitech was responsible for the delay.		
		(xi)	From the details of Plant and Machinery recorded in monthly meetings with the team leader for the period August 2001 to January 2005, it was clear that, soon after the start, Unitech had deployed sufficiently more machinery than the minimum specified in page 124 Annexure I of the CA. These constituted “contemporary record” for the purpose of Clause 53.4 of the GCC, of the different types of machinery employed at the site. When, from this figure, the minimum machinery envisaged at Page 124 of Annexure I of the CA was deducted, the additional machinery employed was	(iv)	Annexure 1 to the CA only contained in the indicative list of the plant and equipment, and was not the only requirement that Unitech was required to mobilize. This position had been accepted by the Arbitral Tribunal in para 17(ii) of the impugned Award.
				(v)	Failure, on Unitech’s part, to issue a notice under Clause 53.1 of the GCC within 28 days of arising of the claim was a fatal defect. As it commenced with a <i>non obstante</i> clause, Clause 53.1 would override Clause 53.4, on which the Arbitral Tribunal relied.
				(i)	Annexure I to the CA clearly stated that it was the “minimum plant and equipment to be deployed by the contractor”. It clearly stated that it was “the Employer’s estimate of the minimum essential basic holding of plant and mechanical equipment which the Contractor will require in order to meet all of his performance obligations under the Contract”.
				(ii)	It was based on this that Unitech assessed the equipment required to carry out the work, which had additional plant and machinery over and above that envisaged in Annexure I.
				(iii)	NHAI had not produced any evidence to indicate that Unitech’s assessment was



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			easily worked out.				inaccurate.
		(xii)	Unitech's claim was therefore admissible under Clauses 42.2, 53 and 69.4 of the GCC.	(vi)	Clause 42.2 was wrongly invoked as no effort was made by the Arbitral Tribunal to verify the actual cost incurred by Unitech. Instead, the Arbitral Tribunal relied on Annexure B to NHAI's written submission which was submitted without prejudice.		
				(vii)	Clause 69.4 was irrelevant, as it dealt with the right of Unitech in the event of delay in payment by NHAI. It entitled Unitech to suspend or reduce the work or progress of work and would therefore militate against any claim for additional mobilization.		
		(xiii)	Unitech's claim was also admissible under Clause 73, as it had suffered by the breach on the part of NHAI in handing over the site in the manner envisaged in the CA.				
		(xiv)	However, NHAI's contention that Unitech's quantification of the additional machinery deployed on the basis of averages was exaggerated, was	(viii)	The claim was allowed on the basis of computer generated sheets with made up calculations, which could not be regarded as evidence at all.	(iv)	The AT had relied on the Monthly Progress Reports ⁵⁶ maintained by the PE which constituted "contemporaneous record". The actual deployment

⁵⁶ "MPRs" hereinafter



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			found to be acceptable. As such, the absolute numbers contained in the last column of the Table provided by NHAI in Annexure A/Column 4 of Annexure B of its written synopsis was adopted.				of plant and machinery was vouchsafed by these records, which were independent and admitted.
				(ix)	Annexure A filed with NHAI's written synopsis demonstrated how the actual machinery deployed by Unitech was less than the average deployment claimed by it. If credit was given for this, the claim would be reduced by ₹ 132538400/-.	(v)	The working out by Unitech, based on averages, lost significance as the Arbitral Tribunal itself rejected it and allowed the claim on the basis of the working provided by NHAI.
				(x)	Annexure A to the written synopsis of NHAI was not an admission on its part but its submission to demonstrate how the claim was excessive.		
				(xi)	Applying the rate employed by Unitech, it should have spent ₹ 307257600/- during the scheduled contract period of 32 months on the minimum plant and machinery which was contractually required to be maintained by it. If it was deploying additional resources, this figure should have been more. However, the Chartered Accountant's certificate	(vi)	The Arbitral Tribunal had applied the Hire Charges provided in the Data Book of the MORTH, which was a standard text relied upon by Arbitral Tribunals and which had also passed judicial muster. Even from this, the Arbitral Tribunal deducted Petroleum Oil and Lubricants ⁵⁷ expenses and inherent idling expenses, over the amounts claimed by Unitech.

⁵⁷ "POL" hereinafter



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					produced by Unitech make it clear that Unitech suffered no loss and that it had expended only ₹ 231107825/- between 8 June 2001 and 8 February 2004. This was pointed out in Annexure C to NHAI's written submissions but negated by the Arbitral Tribunal on the ground that the CA's certificate mentioned another figure of ₹ 83725235/- for the period February 2004 to January 2005, which was not relevant.	(vii)	NHAI was misconstruing the CA certificate. The CA certificate specifically stated that it was being submitted in support of Unitech's claims. The claimed amounts did not include POL and inherent idling. As such, the net cost of plant and machinery reflected in the CA certificate also did not include POV and idling charges. This was also how the Arbitral Tribunal understood the working. To arrive at the net cost of plant and machinery, therefore, the amount of ₹ 307257600/- had to be reduced by 73.39% as held by the Arbitral Tribunal. The net scheduled expenditure therefore worked out to ₹ 81761247/-. If this amount was deducted from the actual expenditure of ₹ 314833060/- reflected in the CA certificate, the net additional expenditure incurred by Unitech worked out to ₹ 233071813/-. Thus, NHAI's contention, based on the CA certificate, that Unitech did not incur any additional expenditure, was incorrect.
				(xii)	The AT did not examine how a claim of ₹ 95550000/- presented		



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					to the DRB and covering the period till April 2004 swelled up to ₹ 172391450/- before the Arbitral Tribunal till December 2004/	
		(xv)	Applying (a) hire charges as per the rates contained in the Data Book of the Ministry of Road Transport & Highways ⁵⁸ , and (b) the cost for the component of Plant and Machinery for the balance work as on the scheduled date of completion as communicated by the PE to the DRB, to the Table provided by NHAI, the cost of additional mobilization of plant and equipment was worked out to ₹ 74679422/-. Deducting, from this, the admissible claim of bonus raised by Unitech of ₹ 38701242/-, an amount of ₹ 35978180/- was awarded.	(xiii)	Deduction of the claim for bonus from the amount awarded against Claim 3 was patently illegal as, for earning bonus of ₹ 38701242/-, Unitech would not have deployed machinery or resources worth the same amount.	
<u>Claim 4</u>	<u>Claim 4(a)</u>	<u>Re. Claim 4(a)</u>				
Compensation for	<u>Claimed</u>					

⁵⁸ “MORTH” hereinafter



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losses incurred as a consequence of breach of contract on NHAI's part and consequent prolongation of the contract period, on mobilization of machinery, labour, materials, infrastructural facilities, overheads, site establishment, etc. <u>Claim 4(a)</u> Idling of machinery and work force <u>Claim 4(b)</u> Idling of materials <u>Claim 4(c)</u> Idle overheads	₹ 127336568/- <u>Awarded</u>	(i)	The MPRs for the period August 2001 to January 2005 have already been held to be contemporary record within the meaning of Claus 53.4 of the GCC, of the number of machinery actually deployed.	(i)	The claim was allowed without evidence. The claim was for "deemed idling", not for actual idling.	(i)	The claim was for mobilization of machinery, labour, materials, infrastructural facilities, overheads and site establishment, etc., during the prolongation period. This was merely termed "deemed idling".
	₹ 32995870/- <u>Claim 4(b)</u> <u>Claimed</u>	(ii)	Unitech claimed that as the completion of the work was delayed by 12 months owing to NHAI's lapse, for which purpose EOT was also granted, the minimum essential machinery lay idle for a period 8 June 2001 to 7 February 2004.			(ii)	The two reasons for prolongation were accepted, viz. handing over of the land in bits and pieces and not providing the project area in the manner as scheduled in the CA.
	₹ 5072089/- <u>Awarded</u>					(iii)	On account of the breach by NHAI, the plant and machinery mobilized by Unitech remained idle and could not be utilized to optimum capacity.
	Nil <u>Claim 4(c)</u> <u>Claimed</u>					(iv)	There was no conflict between Claim 3 and Claim 4(a) as the former was for additional plant and machinery and the latter was for mobilization of scheduled plant and machinery beyond the scheduled contract period. This claim was also supported by letter dated 5 December 2003 of the PE.
	₹ 24793302/- <u>Awarded</u>			(ii)	The claim was contrary to the Claim 3 for additional deployment of resources. It could not be that the existing deployed resources remained idle and Unitech nonetheless had to deploy additional resources during the same period.		
	₹ 17098829/-						



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				(iii)	Clauses 42, 63 and 69.4 of the GCC and Section 73 ⁵⁹ of the Contract Act were not applicable for the reasons already stated in respect of Claim 3.		
		(iii)	The value of the contract was ₹ 1469667435/-, for a total contract period of 32 months, which worked out, <i>pro rata</i> , to ₹ 45927107/- per month. Total value of work executed by Unitech was ₹ 1562244345/-. @ ₹ 45927107/- per month, it would take 34 months to execute work valued at ₹ 1562244345/-. This would imply an additional period of 10 months at site. Unitech's claim could only be, therefore, for 10 months, not 12 months.				
		(iv)	Applying the Hire Charges from the Data Book of the MORTH to each item (the award tabulates this), the total idling cost of equipment for 10 months worked out to ₹				

⁵⁹ 73. **Compensation for loss or damage caused by breach of contract.** – When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.

Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.



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			32995870/-. This amount was, therefore, awarded.				
		<u>Re. Claim 4(c)</u>					
		(i)	Unitech claimed ₹ 24793302/- for idle overheads and establishment. The claim was based on expenditure incurred on overheads and establishment during the extended period from 6 February 2004 to 20 April 2005.				
		(ii)	Clauses 42.2 and 69.4 of the GCC provided for determination by the PE of the EOT under Clause 44 and additional costs incurred, in consultation with NHAI and Unitech.				
		(iii)	The entitlement of Unitech to additional costs towards overheads and decreased profit for the extended period could not be denied, especially in view of the judgement of the Supreme Court in <i>Mc Dermott International v Burn Standard Co. Ltd.</i> In that case, the Supreme Court also	(i)	<i>Mc Dermott</i> was wrongly applied. Claim was without evidence.	(i)	The claim was not without evidence, as Unitech had placed before the Arbitral Tribunal its General Ledger and records as evidence of expenses towards overheads, establishment, salaries and allowances, and a CA certificate certifying these expenses. <i>Mc Dermott</i> was correctly applied.



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			held that the manner of computation of delay damages was within the province of the Arbitrator.			
		(iv)	However, the additional period would only be 10 months, and not 12 months as claimed, as already held <i>supra</i> .			
		(v)	On proportionate basis, the expenditure on overheads for 10 months worked out to ₹ 17098829/-.			
<u>Claim 7</u> Extension of contract and entitlement to bonus	<u>Claimed</u> ₹ 88180046/- <u>Awarded</u> ₹ 38701242/-	(i)	The case set up by Unitech was that (a) the PE had granted EOT under Clause 44.3 of the GCC upto 20 April 2005, <i>vide</i> letter dated 5 May 2004, which had been accepted by Unitech <i>vide</i> letter dated 18 May 2004, (b) Clause 44.3 proscribed decrease of EOT determined by the PE at the stage of final review, (c) Clause 2.1(b) of the GCC deemed any such authority exercised by the PE to be with the approval of the NHAI, (d) however, NHAI was granting only provisional piece meal extensions, with the last extension			



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			granted till 20 March 2005, which breached Clause 44.3, (e) Clause 47.3 of the GCC provided for payment of bonus for early completion of the project, (f) this Clause was unfair as it denied bonus to the contractor even when the delay was attributable to NHAI, (g) substantial work had been completed by Unitech by October 2004, more than 6 months in advance of 20 April 2005, and (h) Unitech was, therefore, entitled to EOT till 20 April 2005 and for the maximum bonus of 6% for the period from October 2004 to 20 April 2005.				
		(ii)	Unitech's claim, on principle, was acceptable, because (a) the stipulated period for completion of the contract was till 7 February 2004, (b) the PE had, <i>vide</i> letter dated 5 May 2004, determined EOT till 20 April 2005, (c) NHAI also consented	(i)	The award was contrary to Clause 2.1(d) and Clause 47.3 of the Conditions of Particular Application. Clause 2.1(d) required the PE to obtain the specific approval of NHAI before granting EOT. NHAI's decision, therefore, prevailed. In holding that Unitech was entitled to EOT till 20 April 2005,	(i)	The claim was always for damages for the inability of Unitech to claim bonus due to the act of breach of contract by NHAI. Reference was invited to paras 9 to 16 of the Statement of Claim.



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			thereto, <i>vide</i> letter dated 18 May 2004, (d) it was only a year thereafter, on 11 April 2005, after the taking over certificate had been issued on 20 February 2005, that NHAI granted EOT only till 20 March 2005, (e) the delay in approval of EOT by NHAI was bound to have affected the progress of the work and cash flow, etc., (f) in any case, there was no justification for delaying grant of EOT after the taking over certificate had been issued, and (g) Unitech was, therefore, entitled to EOT till 20 April 2005 as claimed, as per the determination by the PE, (h) EOT was given by the PE without any levy of LD under Clause 47.1, (i) in view of the judgement of the Supreme Court in <i>K.N. Sathyapalan v State of Kerala</i> ⁶⁰ , Clause 47.3, to the extent it denied		therefore, the Arbitral Tribunal transgressed the CA.		
				(ii)	The award was contradictory in terms, as, earlier, the Arbitral Tribunal held that Unitech had been granted EOT till 20 March 2005.	(ii)	It is for this reason that the Arbitral Tribunal has deducted the amount awarded towards Claim 7 from the amount awarded towards Claim 3. NHAI's objection is based on the erroneous premise that Claims 3 and 7 have both been awarded.
				(iii)	The award was contrary to the specific prohibition in the CA to grant of bonus in the case of EOT.		
				(iv)	The Arbitral Tribunal exceeded its jurisdiction in holding Clause 47.3 to be in conflict with Section 73 of the Contract Act. The decision in <i>Sathyapalan</i> was distinguishable.		
				(v)	The Arbitral Tribunal did not deal with the objection of the claim not having been presented before the DRB.		

⁶⁰ (2007) 13 SCC 43



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			bonus to Unitech even where the EOT was owing to defaults of NHAI, was in conflict with Section 73 of the Contract Act, and (j) Unitech's claim for bonus was, therefore, justified.			
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