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

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Judgment reserved on: 05.02.2026
Judgment pronounced on: 01.04.2026

+ O.M.P. (COMM) 378/2024, I.A. 38340/2024 (Stay) & I.A. 10172/2025 (Dir.)

NATIONAL TECHNICAL RESEARCH ORGANISATION

.....Petitioner

Through: Mr. Vikramjit Banerjee, ASG
with Ms. Arunima Dwivedi
CGSC, Ms. Pinki Pawar GP,
Ms. Himanshi Singh and Mr.
Abhishek, Advocates, Mr. Amit
Kumar (NTRO) and Mr.
Bhaskhar Ghosh (NTRO).

versus

M/S CORPORATE INFOTECH PRIVATE LIMITED

.....Respondent

Through: Mr. Amit Sibal, Senior
Advocate along with Mr.
Bharat Arora and Mr. Gourav
Arora, Advocates.

CORAM:

**HON'BLE MR. JUSTICE HARISH VAIDYANATHAN
SHANKAR**

J U D G M E N T

HARISH VAIDYANATHAN SHANKAR, J.

1. This Petition has been filed under Section 34 of the **Arbitration and Conciliation Act, 1996¹**, assailing the **Arbitral Award dated 02.04.2024²** passed by the learned Sole Arbitrator in the arbitration proceedings titled as “*M/S Corporate Infotech Pvt. Ltd. v. National Technical Research Organisation*”. By the Impugned Award, the

¹ Act

² Impugned Award



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learned **Arbital Tribunal**³ substantially allowed the claims of the Respondent herein.

BRIEF FACTS:

2. The Petitioner, **National Technical Research Organisation**⁴, floated a limited tender enquiry bearing No. NTRO/CPC/07/2017 dated 09.11.2017 for the supply, installation and integration of a network solution for the establishment of a secure intranet infrastructure at various locations across India.

3. Pursuant to the tender process, a **contract dated 10.08.2018**⁵ was executed between NTRO and the Respondent, for the supply, installation and integration of a secure and reliable network infrastructure across twenty-three (23) locations, including the establishment of a wide area network and local area networks, together with associated training, testing and support obligations.

4. The said contract also provides for the payment terms between the parties, which are to be made in different stages, and it also contemplated the provision of a comprehensive warranty and incorporated clauses relating to performance milestones, testing procedures, liquidated damages, and performance security.

5. Under the contractual framework, the Respondent was required to furnish a **Performance Bank Guarantee**⁶ equivalent to ten (10) per cent of the contract value within thirty (30) days of signing the contract, valid up to sixty (60) days beyond the completion of the warranty period and to complete the project within the stipulated

³ Tribunal

⁴ NTRO

⁵ Contract

⁶ PBG



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timeline of twenty-eight (28) weeks, i.e. 20.02.2019. The contract further envisaged completion of **Acceptance Testing procedures**⁷ and **On-Site Acceptance Tests**⁸, upon successful completion of which the system would be treated as fully commissioned, and the warranty obligations would commence.

6. The Respondent furnished the PBG to the Petitioner after the execution of the contract, leading to a delay of eighteen (18) days. Besides, during the course of execution of the contract, the Respondent completed the supply of equipment with a delay of twenty-four (24) weeks, and thereby, the Petitioner, as per the contractual terms, released seventy (70) per cent of the payment to the Respondent.

7. It is not in dispute that, in the backdrop of circumstances prevailing during the COVID-19 pandemic, the payment terms *inter se* the parties were amended, whereby the remaining 30% of the contract price was bifurcated into two components, namely 20% and 10%, to be released upon satisfaction of the Respondent. Pursuant thereto, the amount constituting twenty (20) per cent was released to the Respondent, and the only amount remaining payable to the Respondent was ten (10) per cent.

8. The parties thereafter engaged in the process of finalisation of ATPs, following which phases of OSAT were conducted. During this period, issues arose between the parties regarding the progress of testing, operational readiness of the system, attribution of delays, and compliance with contractual obligations, including renewal of licences

⁷ ATP
⁸ OSAT



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and provision of support services, with each party attributing default and delay to the other.

9. Subsequently, the Petitioner, *vide* Legal Notice dated 08.07.2022, addressed to the Respondent, crystallised the disputes *inter alia* in relation to: (i) attribution of delay in completion of the project and testing phases; (ii) the entitlement of NTRO to levy **Liquidated Damages**⁹ (iii) the commencement of the warranty period; (iv) the release and continued validity of the PBG; and (v) entitlement to the balance payments. In this backdrop, the Petitioner, in accordance with the contractual terms, withheld the ten (10) per cent balance payment, *inter alia*, on account of LD and the subsistence of the PBG.

10. The Respondent, in its reply dated 20.07.2022 to the said notice, called upon the Petitioner to remit the remaining ten (10) per cent of the contract price allegedly due and payable, and further sought return of the PBG.

11. Aggrieved thereby, the Respondent approached this Court by way of preferring a petition, bearing **OMP.(I)(COMM.) 228/2022**, under Section 9 of the Act, wherein this Court *vide* its Order dated 27.07.2022, granted interim protection in favour of the Respondent herein, subject to extension of the PBG for a further six months.

12. Thereafter, *vide* Order dated 24.11.2022, this Court directed that the said Section 9 petition be treated as an application under Section 17 of the Act and proceeded to appoint a learned Sole Arbitrator, Justice (Retd.) R.K. Gauba, to adjudicate the disputes *inter se* the parties.

⁹ LD



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13. Pursuant to the constitution of the learned Tribunal, both parties filed their respective pleadings, including the Statement of Claim, Statement of Defence, and documents in support thereof. Evidence was led by the Respondent, whereas the Petitioner chose not to lead any evidence.

14. *Vide* Award dated 02.04.2024, the learned Tribunal adjudicated the disputes *inter se* the parties, including claims pertaining to payments, levy of LD, commencement of the warranty period, and other contractual obligations.

15. Aggrieved by the said Award, the Petitioner has preferred the present Petition under Section 34 of the Act, assailing the Impugned Award on various grounds.

CONTENTIONS ON BEHALF OF THE PETITIONER/ NTRO:

16. Learned **Additional Solicitor General**¹⁰ appearing for the Petitioner would submit that the Impugned Award is liable to be set aside as it suffers from patent illegality and is contrary to the terms of the contract as well as the evidence on record.

17. It would be contended that the learned Tribunal failed to properly appreciate the contractual framework governing timelines, testing requirements and consequences of delay, and has returned findings which are contrary to the material placed before it.

18. Learned ASG appearing for the Petitioner would further submit that the learned Tribunal erred in holding that the delay in execution of the project was attributable to both parties. As per the learned ASG, the delay was occasioned primarily on account of the Respondent's

¹⁰ ASG



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failure to supply equipment, complete installation, and successfully demonstrate the system in accordance with contractual requirements.

19. Learned ASG appearing for the Petitioner would contend that the learned Tribunal has failed to appreciate the admission of CW-1, who unequivocally stated that media links could not be utilised without the supply of routers. On this basis, it would be argued that since routers had not been delivered at the relevant time, the absence of media connectivity cannot be treated as a contributing factor to delay, and consequently, the delay could not have been attributed to both parties.

20. According to the learned ASG, this admission establishes that commissioning was impossible in the absence of routers, and therefore, the entire delay ought to have been fastened upon the Claimant alone, rendering the learned Tribunal's finding of shared responsibility perverse and contrary to the evidence on record.

21. It is further contended that the learned Tribunal incorrectly determined the date of completion of OSAT and consequently erred in fixing the commencement of the warranty period. According to the learned ASG, successful completion of OSAT never occurred in terms of the contract, and therefore, the warranty could not have been treated as having commenced.

22. Learned ASG appearing for the Petitioner would further submit that the learned Tribunal failed to properly appreciate the contractual framework, which expressly entitled NTRO to levy LD on account of delay and to retain the PBG as security for due performance. It would be contended that the rejection of the Petitioner's claim for LD is contrary to the express terms of the contract and amounts to an



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erroneous interpretation thereof. In support of this submission, reliance is placed upon the decision of the Hon'ble Supreme Court in ***Consolidated Construction Consortium Limited v. Software Technology Parks of India***¹¹ to contend that contractual stipulations relating to LD must ordinarily be given effect to in accordance with their terms.

23. Learned ASG appearing for the Petitioner would further contend that the learned Tribunal has erred in its findings relating to the PBG. It would be submitted that the learned Tribunal has wrongly treated the issue of the PBG as consequential to its findings on LD and attribution of delay. According to the learned ASG, the contractual stipulation governing the PBG operates independently and entitles NTRO to retain or invoke the same as security for due performance of contractual obligations.

24. Learned ASG appearing for the Petitioner would also submit that the learned Tribunal overlooked material evidence regarding non-renewal of licences and alleged deficiencies in performance, which demonstrated continued non-compliance by the Respondent of its contractual obligations.

25. It would further be contended that the learned Tribunal erred in directing the release of the PBG and in allowing claims for payment, and that the conclusions reached amount to rewriting the contract and ignoring binding contractual stipulations.

26. Learned ASG appearing for the Petitioner would further contend that the learned Tribunal has failed to properly appreciate the admitted delay in completion of the project. Even if, *arguendo*, the

¹¹ (2025) 7 SCC 757



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date of 17.03.2020 is accepted as the relevant completion date, the delay of several weeks beyond the stipulated contractual timeline renders the Respondent liable for the levy of LD in terms of the contract.

27. Learned ASG appearing for the Petitioner would submit that the learned Tribunal, despite noting the delay, has erroneously declined to permit levy of LD and has instead proceeded to award the balance consideration amounting to Rs. 7,14,61,511/- as due and payable as on 17.03.2020. According to the learned ASG, such a conclusion is inconsistent with the contractual framework governing delay and LD and overlooks the consequence of breach expressly agreed between the parties.

28. It would be contended that once a delay beyond the contractual completion period stood established, the entitlement of the Petitioner to impose LD arose automatically under the contract, and the learned Tribunal's refusal to give effect to the same amounts to an erroneous interpretation of the contract and non-consideration of material facts on record.

29. Learned ASG appearing for the Petitioner additionally questions the award of interest as being excessive and unwarranted in the facts of the case and places reliance upon the ruling of the Hon'ble Apex Court in *ONGC v. Saw Pipes*¹², to contend that the Impugned Award is patently illegal and contrary to the terms of the contract.

30. On the aforesaid grounds, it would be urged by the learned ASG appearing for the Petitioner that the Impugned Award warrants interference under Section 34 of the Act.

¹² (2003) 5 SCC 705



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CONTENTIONS ON BEHALF OF THE RESPONDENT:

31. **Per contra**, learned senior counsel appearing for the Respondent would submit that the present petition is nothing but an attempt to re-agitate factual issues and to seek a re-appreciation of evidence, which is impermissible in proceedings under Section 34 of the Act.

32. It would be contended that the learned Tribunal has undertaken a detailed examination of the contractual provisions, correspondence exchanged between the parties, evidence led during the proceedings, and the conduct of the parties, and has returned a reasoned Award which does not warrant interference.

33. Learned senior counsel appearing for the Respondent would submit that issues relating to attribution of delay, progress of testing phases, operational readiness of the system and interpretation of contractual provisions were all examined by the learned Tribunal, which concluded that responsibility for delay could not be attributed exclusively to one party.

34. It would further be contended that the learned Tribunal rightly considered the operationalisation of the system, including the handing over of credentials and conduct of testing, and arrived at a plausible conclusion regarding completion of contractual milestones and commencement of warranty obligations.

35. It would also be submitted that the Petitioner did not lead any evidence before the learned Tribunal. Despite having raised serious allegations regarding delay, non-compliance, and deficiencies in performance, the Petitioner chose not to examine any witness or adduce independent oral evidence in support of its assertions. In such



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circumstances, the learned Tribunal was constrained to decide the issues on the basis of the pleadings, documentary record, and the evidence led by the Respondent.

36. It would be submitted that the Petitioner, having elected not to substantiate its case by leading evidence, cannot now assail the factual findings of the learned Tribunal or seek a re-appreciation of the evidentiary record under the limited jurisdiction of Section 34 of the Act.

37. Learned senior counsel appearing for the Respondent would submit that the learned Tribunal rightly rejected the Petitioner's claim for levy of liquidated damages, having found that such levy was not justified in the factual matrix of the case, particularly in view of the shared nature of delays. It would be contended that the learned Tribunal correctly applied the settled principles governing liquidated damages and reasonable compensation.

38. In this regard, reliance would be placed upon the judgments of the Hon'ble Supreme Court in *Kailash Nath Associates v. Delhi Development Authority & Anr*¹³ and the decision of this Court in *Vishal Engineers Builders v. Indian Oil Corporation Limited*¹⁴ to submit that even where a contract provides for liquidated damages, compensation must be reasonable and cannot be imposed mechanically in the absence of established loss or breach exclusively attributable to the contractor.

39. It would be argued that the findings relating to the PBG and payment obligations are based on an interpretation of the contract and

¹³ (2015) 4 SCC 136

¹⁴ (2011) SCC Online Del 5124



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appreciation of evidence and fall squarely within the jurisdiction of the learned Tribunal.

40. Learned senior counsel appearing for the Respondent would further submit that in prayer clauses (c), (d), (e) and (g) of the present Petition, the Petitioner seeks, *inter alia*, imposition of liquidated damages, forfeiture of the PBG, and other consequential reliefs. However, no such independent counter-claims or substantive reliefs were sought by the Petitioner before the learned Arbitrator, and therefore, the present Petition is liable to be dismissed.

41. Learned senior counsel appearing for the Respondent would further submit that the Impugned Award does not suffer from any perversity, patent illegality or violation of public policy, and that the challenge is in substance an appeal on merits, which is not maintainable.

42. On these grounds, learned senior counsel appearing for the Respondent would pray for dismissal of the petition.

ANALYSIS:

43. This Court has heard the learned counsel appearing on behalf of the parties at length and, with their able assistance, carefully perused the paper-book and other material documents placed on record, including the record of the learned Tribunal, as well as the written submissions filed by the respective parties.

44. At the outset, it is apposite to note that this Court is conscious of the limited scope of its jurisdiction while examining an objection petition under Section 34 of the Act. The contours of judicial intervention in such proceedings have been authoritatively delineated



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and settled by a consistent and evolving line of precedents of the Hon'ble Supreme Court.

45. In this regard, a three-Judge Bench of the Hon'ble Supreme Court, after an exhaustive consideration of a catena of earlier decisions, in *OPG Power Generation (P) Ltd. v. Enxio Power Cooling Solutions (India) (P) Ltd.*¹⁵, while dealing with the grounds of conflict with the public policy of India and perversity, grounds which have also been urged in the present case, made certain pertinent observations, which are reproduced hereunder:

“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.

35. In *Renusagar Power Co. Ltd. v. General Electric Co.*, 1994 Supp (1) SCC 644, a three-Judge Bench of this Court observed that the doctrine of public policy is somewhat open—textured and flexible. By citing earlier decisions, it was observed that there are two conflicting positions which are referred to as the “narrow view” and the “broad view”. According to the narrow view, courts cannot create new heads of public policy whereas the broad view

¹⁵ (2025) 2 SCC 417



countenances judicial law making in these areas. In the field of private international law, it was pointed out, courts refuse to apply a rule of foreign law or recognise a foreign judgment or a foreign arbitral award if it is found that the same is contrary to the public policy of the country in which it is sought to be invoked or enforced. However, it was clarified, a distinction is to be drawn while applying the rule of public policy between a matter governed by domestic law and a matter involving conflict of laws. It was observed that the application of the doctrine of public policy in the field of conflict of laws is more limited than that in the domestic law and the courts are slower to invoke public policy in cases involving a foreign element than when a purely municipal legal issue is involved. It was held that contravention of law alone will not attract the bar of public policy, and something more than contravention of law is required.

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.

40. In *ONGC Ltd. v. Western Geco International Ltd.*, (2014) 9 SCC 263, paras 35, 38 & 39, which also related to the period prior to the 2015 Amendment of Section 34(2)(b)(ii), a three-Judge Bench of this Court, after considering the decision in *ONGC Ltd. v. Saw Pipes Ltd.*, (2003) 5 SCC 705, without exhaustively enumerating the purport of the expression “fundamental policy of Indian law”, observed that it would include all such fundamental principles as providing a basis for administration of justice and enforcement of law in this country. The Court thereafter illustratively referred to three fundamental juristic principles, namely:

(a) that in every determination that affects the rights of a citizen or leads to any civil consequences, the court or authority or quasi-judicial body must adopt a judicial approach, that is, it must act bona fide and deal with the subject in a fair, reasonable and objective manner and not actuated by any extraneous consideration;

(b) that while determining the rights and obligations of parties the court or Tribunal or authority must act in accordance with the principles of natural justice and must apply its mind to the attendant facts and circumstances while taking a view one way or the other; and

(c) that its decision must not be perverse or so irrational that no reasonable person would have arrived at the same.

41. In *Associate Builders v. DDA*, (2015) 3 SCC 49, a two-Judge Bench of this Court, held that *audi alteram partem* principle is



undoubtedly a fundamental juristic principle in Indian law and is enshrined in Sections 18 and 34(2)(a)(iii) of the 1996 Act. In addition to the earlier recognised principles forming fundamental policy of Indian law, it was held that disregarding:

(a) orders of superior courts in India; and

(b) the binding effect of the judgment of a superior court would also be regarded as being contrary to the fundamental policy of Indian law.

Further, elaborating upon the third juristic principle (i.e. qua perversity), as laid down in **ONGC Ltd. v. Western Geco International Ltd., (2014) 9 SCC 263**, it was observed that where:

(i) a finding is based on no evidence; or

(ii) an Arbitral Tribunal takes into account something irrelevant to the decision which it arrives at; or

(iii) ignores vital evidence in arriving at its decision, such decision would necessarily be perverse [**Associate Builders case, (2015) 3 SCC 49, para 31**].

To this a caveat was added by observing that when a court applies the “public policy test” to an arbitration award, it does not act as a court of appeal and, consequently, errors of fact cannot be corrected; and a possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. It was also observed that an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on that score. Thus, once it is found that the arbitrator's approach is not arbitrary or capricious, it is to be taken as the last word on facts.

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:

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.

45. At this stage, it would be pertinent to note that we are dealing with a case where the application under Section 34 of the 1996 Act was filed after the 2015 Amendment, therefore the newly substituted/added Explanations would apply [**SsangyongEngg. & Construction Co. Ltd. v. NHAI, (2019) 15 SCC 131**].

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



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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.

49. In the instant case, there is no allegation that the making of the award was induced or affected by fraud or corruption, or was in violation of Section 75 or Section 81. Therefore, we shall confine our exercise in assessing as to whether the arbitral award is in contravention with the fundamental policy of Indian law, and/or whether it conflicts with the most basic notions of morality or justice. Additionally, in the light of the provisions of sub-section (2-A) of Section 34, we shall examine whether there is any patent illegality on the face of the award.

50. Before undertaking the aforesaid exercise, it would be apposite to consider as to how the expressions:

(a) “in contravention with the fundamental policy of Indian law”;

(b) “in conflict with the most basic notions of morality or justice”;

and

(c) “patent illegality” have been construed.

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.*, 1994 Supp (1) SCC 644, 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
- (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).

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 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 reappraisal of evidence.



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66. In *ONGC Ltd. v. Saw Pipes Ltd.*, (2003) 5 SCC 705, while dealing with the phrase “public policy of India” as used in Section 34, this Court took the view that the concept of public policy connotes some matter which concerns public good and public interest. If the award, on the face of it, patently violates statutory provisions, it cannot be said to be in public interest. Thus, an award could also be set aside if it is patently illegal. It was, however, clarified that illegality must go to the root of the matter and if the illegality is of trivial nature, it cannot be held that award is against public policy.

67. In *Associate Builders v. DDA*, (2015) 3 SCC 49, this Court held that an award would be patently illegal, if it is contrary to:

- (a) substantive provisions of law of India;
- (b) provisions of the 1996 Act; and
- (c) terms of the contract [See also three-Judge Bench decision of this Court in *State of Chhattisgarh v. SAL Udyog (P) Ltd.*, (2022) 2 SCC 275].

The Court clarified that if an award is contrary to the substantive provisions of law of India, in effect, it is in contravention of Section 28(1)(a) of the 1996 Act. Similarly, violating terms of the contract, in effect, is in contravention of Section 28(3) of the 1996 Act.

68. In *Ssangyong Engg. & Construction Co. Ltd. v. NHAI*, (2019) 15 SCC 131 this Court specifically dealt with the 2015 Amendment which inserted sub-section (2-A) in Section 34 of the 1996 Act. It was held that “patent illegality appearing on the face of the award” refers to such illegality as goes to the root of matter, but which does not amount to mere erroneous application of law. It was also clarified that what is not subsumed within “the fundamental policy of Indian law”, namely, the contravention of a statute not linked to “public policy” or “public interest”, cannot be brought in by the backdoor when it comes to setting aside an award on the ground of patent illegality [See *Ssangyong Engg. & Construction Co. Ltd. v. NHAI*, (2019) 15 SCC 131]. Further, it was observed, reappreciation of evidence is not permissible under this category of challenge to an arbitral award [See *Ssangyong Engg. & Construction Co. Ltd. v. NHAI*, (2019) 15 SCC 131].

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.*, (2014) 9 SCC 263. 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.

70. In *Associate Builders v. DDA*, (2015) 3 SCC 49 certain tests were laid down to determine whether a decision of an Arbitral Tribunal could be considered perverse. In this context, it was observed that where:



- (i) a finding is based on no evidence; or
(ii) an Arbitral Tribunal takes into account something irrelevant to the decision which it arrives at; or
(iii) ignores vital evidence in arriving at its decision, such decision would necessarily be perverse.

However, by way of a note of caution, it was observed that when a court applies these tests it does not act as a court of appeal and, consequently, errors of fact cannot be corrected. Though, a possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon. It was also observed that an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on that score.

71. In *Ssangyong Engg. & Construction Co. Ltd. v. NHAI*, (2019) 15 SCC 131, which dealt with the legal position post the 2015 Amendment in Section 34 of the 1996 Act, it was observed that a decision which is perverse, while no longer being a ground for challenge under “public policy of India”, would certainly amount to a patent illegality appearing on the face of the award. It was pointed out that an award based on no evidence, or which ignores vital evidence, would be perverse and thus patently illegal. It was also observed that 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 [See *Ssangyong Engg. & Construction Co. Ltd. v. NHAI*, (2019) 15 SCC 131].

72. The tests laid down in *Associate Builders v. DDA*, (2015) 3 SCC 49 to determine perversity were followed in *Ssangyong Engg. & Construction Co. Ltd. v. NHAI*, (2019) 15 SCC 131 and later approved by a three-Judge Bench of this Court in *Patel Engg. Ltd. v. North Eastern Electric Power Corpn. Ltd.*, (2020) 7 SCC 167.

73. In a recent three-Judge Bench decision of this Court in *DMRC Ltd. v. Delhi Airport Metro Express (P) Ltd.*, (2024) 6 SCC 357, the ground of patent illegality/perversity was delineated in the following terms: (SCC p. 376, para 39)

“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. 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 its jurisdiction or violating a fundamental principle of natural justice.”

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.

75. In *Dyna Technologies (P) Ltd. v. Crompton Greaves Ltd.*, (2019) 20 SCC 1, paras 27-43, a three-Judge Bench of this Court held that courts need to be cognizant of the fact that arbitral awards are not to be interfered with in a casual and cavalier manner, unless the court concludes that the perversity of the award goes to the root of the matter and there is no possibility of an alternative interpretation that may sustain the arbitral award. It was observed that jurisdiction under Section 34 cannot be equated with the normal appellate jurisdiction. Rather, the approach ought to be to respect the finality of the arbitral award as well as party's autonomy to get their dispute adjudicated by an alternative forum as provided under the law.

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

84. An Arbitral Tribunal must decide in accordance with the terms of the contract. In a case where an Arbitral Tribunal passes an award against the terms of the contract, the award would be patently illegal. However, an Arbitral Tribunal has jurisdiction to interpret a contract having regard to terms and conditions of the contract, conduct of the parties including correspondences exchanged, circumstances of the case and pleadings of the parties. If the conclusion of the arbitrator is based on a possible view of the matter, the Court should not interfere [See: *SAIL v. Gupta Brother Steel Tubes Ltd.*, (2009) 10 SCC 63; *Pure Helium India (P) Ltd. v. ONGC*, (2003) 8 SCC 593; *McDermott International Inc. v. Burn Standard Co. Ltd.*, (2006) 11 SCC 181; *MMTC Ltd. v. Vedanta Ltd.*, (2019) 4 SCC 163]. 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.*, (2020) 5 SCC 164].



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., (2016) 4 SCC 126***].

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, (2019) 19 SCC 9***].

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;
- (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, (2018) 11 SCC 508***, followed in ***Adani Power case, (2019) 19 SCC 9***].

(emphasis supplied)

46. A careful and comprehensive perusal of the Impugned Award demonstrates that the learned Arbitrator has examined the pleadings, documentary material, correspondence exchanged between the parties, and the evidence led in support of their respective claims and assertions. The Impugned Award reflects due consideration of the relevant facts and surrounding circumstances germane to the disputes. The Petitioner has assailed the Impugned Award primarily on the grounds that the learned Tribunal (i) erred in attributing delay to both



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parties, (ii) wrongly rejected the levy of LD, (iii) incorrectly determined the completion of OSAT and commencement of the warranty period, (iv) unjustifiably directed release of the PBG, and (v) incorrectly determined the entitlement to the balance payments. In view of the aforesaid, the grounds of challenge are addressed hereunder:

(i) DELAY:

47. The principal grievance of the Petitioner pertains to the attribution of delay in performance of the contract by the Respondent. It has been contended that the delay in execution and testing phases was solely attributable to the Respondent and that the learned Tribunal erred in holding that both parties contributed to the delay.

48. A perusal of the Award, however, demonstrates that the learned Tribunal undertook a detailed examination of the contractual milestones, the stipulated completion period of twenty-eight (28) weeks, the admitted delay in supply of equipment, the sequence of ATP finalisation, the conduct of OSAT in phases, and the correspondence exchanged between the parties.

49. The learned Tribunal has recorded specific findings that the delay in operationalisation could not be attributed exclusively to one party. It has considered the issues relating to the availability of sites, provision of bulk encryption units and media connectivity, vetting of ATP documentation, and compilation of test results. On the basis of the material before it, the learned Tribunal concluded that both parties had contributed, in varying degrees, to the delay in completion of testing. The decision of the learned Tribunal pertaining to the delay in the Impugned Award is reproduced herein below:

“On Delay

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145. It is admitted case of the parties that there has been delay in *"Delivery, Installation and Commissioning of the systems"* stipulated *"to be completed within 28 weeks from the date of signing of Contract (10.08.2018)"*, as per Clause 4 of Part-I (Ex. C-I) which period would have ended on 08.02.2019. Each party accuses the other of being responsible for delay while defending itself with assertion that it did not contribute to delay in any manner.

146. Indisputably, the supply of equipment, was completed by CIPL on 09.08.2019, entailing a delay of more than 26 weeks beyond the scheduled date of completion of the project, which was 20.02.2019. The sequence admittedly was supply of more than 85% of the equipment before 20.02.2019, equipment under 7-line items being pending at that stage, and out of them 4-line items having been delivered on 30.04.2019, 1-item on 03.06.2019 and the last 2 items delivered on 08.08.2019, copies of related delivery challans/invoices (Ex. R-2, Colly.) being not in dispute.

147. It is admitted that vide letter nos. CIPL/PMO/NTRO_STTC/19 dated 25.10.2018 (Ex. C-9) and CIPL/PMO/NTRO_SITC/26 dated 31.10.2018 (Ex. C-10) along with location wise list of engineers, the Claimant sought permission for all the site engineers to access the sites but since the Respondent's outstation sites were not ready for laying the LAN Cabling Infra, the work could not commence. The LAN Diagram for all the outstation sites were admittedly submitted vide CIPL letter No.CIPL/PMO/NTRO-SITC/64 dated 30.11.2018 (Ex. C-11). It is not in dispute that the Claimant vide its letter No. CIPL/PMO/NTRO_SITC/27 dated 31.10.2018 (Ex. C-13) stated that infra at the MDC was not ready. There was no 3-phase power supply in the UPS room No. 301 at MDC and 300 Meter 3 Phase power cable was provided by M/s CIPL as the UPS installation work was getting delayed after the request from NTRO vide Letter No. XXXIII68/05/2018-SMNY-2545 dated 29.10.2018 (Ex. C-14). Further, the NTRO officials were informed by Claimant vide letter No CIPL/PMO/NTRO_SITC/331 dated 05.03.2019 (Ex. C-12) about completion of Lah/UTP & OFC Cabling at all the outstation sites. It is also not in dispute that the Respondent, vide its letter dated. 07.06.2019 (Ex. C-27), had acknowledged that MPLS Links for the project were being provided by M/s Railtel and delivery was under process and, further, that, to reduce the implementation delay, the Claimant might start configuration of network equipment as well as end terminal desktops at remote sites through their on-site reps.

148. There is no denial that the Respondent was expected under the contract to provide the media links and sites to the claimant immediately on the award of the contract in the year 2018, it is also admitted that the Claimant had addressed Letters dated 14.06:2019 (Ex. C-28) and 12.07.2019 (Ex. C-29) requesting the Respondent,



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inter: alia, for media-connectivity and informing that non availability of the same (media-connectivity had caused an unnecessary and substantial delay in the project execution and loss to the Claimant. It is not denied that on 14.11.2019 (Ex. C-30), the Respondent wrote on the issue of non-availability of sites and media connectivity asking the Claimant to use the physical media connectivity of existing functional networks, albeit only at 7-8 locations. Admittedly, the Claimant had to follow up by other letters (Ex. C-46 to C-49) lastly by email dated 09.12.2022 (Ex. C-50). Indisputably, three sites had not been provided by the respondent to the claimant for connectivity ie. even after more than 4 years from the date of award of contract.

149. There is no clear or cogent answer to the plea of the Claimant of lack of cooperation from the Respondent illustrated by no results having come forth in response to letter dated 24.05.2019, requesting the Respondent to comply with their obligations and provide media links at all the sites on an urgent basis, along with other network requirements i.e. cooling, earthing and input power supply to power on the devices, for progress of the project and to establish the network connectivity, Indeed, the letter dated 07.06.2019 (Ex. C-27) of the Respondent, on the subject of MPLS Links for project HSTN to be provided by M/s Railtel, calling upon the Claimant to start configuration of network equipment as well as end terminal desktops at remote sites through their on-site reps, is reflective of the Respondent having contributed to the delay in as much as under Clause 1 of Enclosure 1B of the Contract (Ex. C-1), it was obliged to provide media-connectivity so essential for the installation and commissioning. The communications dated 14.06.2019 (Ex. C-28) and 12.07.2019 (Ex. C-29), do demonstrate that work at the remote sites was hampered due to non-provisioning of Media Links and bulk encryption units by the Respondent. The solution suggested by letter 14.11.2019 (Ex. C-30), for use of the physical media connectivity of existing functional networks, albeit only at 7-8 locations, was nothing but a stop gap or *ad-hoc* one.

150. It is clear from the Contract (Ex. C-1) that the Claimant was expected to arrange imports of the equipment from various international vendors, whose manufacturing plants were out-side China. It is the case of the Claimants that the said condition of non-China products had caused slight delay which was not objected to and instead the Claimant was allowed to proceed with installation and commissioning of the equipment as per the Contract. It is also the plea of Claimant that late delivery of last two items DX -80 VoIP, delivered on 08.08.2019, was due to the force Majeure events and & other reasons, covered by para 7 in Part III of the Contract (Ex. C-1), and did not have any impact on commissioning of Network. In this context, reference is made to (i) Notification of Govt, of India ("Gol"), Ministry of Finance ("MoF") regarding

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enhancement in custom tariff vide notification no 6); (ii) Cisco Distributors Letter dated 19.03.2019 (Ex. C-7) clearly stated global material constraints as the material had to be of the latest manufacture for which reason Cisco started manufacturing components in different factories across globe thus getting delayed for adherence of the contract clause; (iii) BIS Certification made applicable after award of contract resulted in delayed delivery of Cisco products like IP. Phone which required BIS certification got delayed by BIS department and, thus, delivery was delayed for 16-18 weeks and finally effected on 09.08.2019; and (iv) Cisco letter dated 01.04.2019 (Ex. C-8) to NTRO mentioned challenges in delivering Cisco products due to global material constraints and supply chain issues.

151. The argument of the Respondent that the Claimant was well aware of the condition in the contract that imports of the equipment be arranged, from various international vendors whose manufacturing plants were out-side China has merit. This obliged the Claimant to be in readiness in terms of its contractual obligations to arrange items and services as per the technical specifications and functional requirement given in the contract within contracted timelines, ever since the evaluation stage of the tender ie May 2018. The delay attributable to reasons such as Notification dated 11.10.2018 (Ex. C-6) of MoF (GOI) regarding enhancement in custom tariff, Cisco Distributors Letters dated 19.03.2019 (Ex. C-7) and 01.04.2019 (Ex. C-8) on the subjects of global material constraints or BIS Certification made applicable after award of contract to Cisco products like IP Phone can also not be accepted as force majeure since these are not covered by the clause. But, even if the same are treated as having contributed they were not the sole cause of delay in commissioning, the end objective. Thus, nothing turns on this part of the controversy for the reason the contract was not merely for supply but also installation and commissioning of the equipment.

152. The argument of the Respondent, founded on letter dated 07.06.2019 (Ex. C-2T) asking the Claimant to finish LAN side infrastructure/Civil work and deployment and configuration of end points at all sites, to the effect that there was delay on the part of the Claimant in Configuration of Equipment and also LAN side infrastructure and deployment of end points as per contract requirement, such LAN side work having continued till July 2019 and End point deployment till Oct 2019 does not impress since there were delays on its part as well primarily in making the sites available and providing media connectivity and bulk encryption units even as late as end of 2019.

153. On the foregoing facts, and in the circumstances, both parties must share the blame for delay in meeting the time line specified as the Delivery Period under the contract (Ex. C-1).”

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50. The petitioner's contention that the learned Arbitrator ignored the admission of the Respondent's witness is wholly misconceived. The statement of CW-1 that media links cannot be utilised without routers is merely a technical acknowledgement of the functional interdependence between connectivity infrastructure and routing hardware; it does not establish that routers were the sole prerequisite for commissioning nor that the Respondent had otherwise fulfilled its own contractual obligations. The proposition is reciprocal in nature; just as media links cannot function without routers, routers are equally incapable of establishing a network in the absence of media connectivity.

51. The evidence on record demonstrates that media links, bulk encryption units, and complete site readiness were not made available in accordance with contractual timelines. Commissioning was the ultimate contractual objective, and it required simultaneous availability of equipment as well as connectivity and infrastructure.

52. The learned Tribunal, upon a holistic appreciation of correspondence and admissions on both sides, concluded that the delay was attributable to both parties. The Petitioner's argument is, in substance, an attempt to isolate one answer in cross-examination and invite a re-appreciation of evidence, which is impermissible within the limited scope of interference under Section 34 of the Act.

(ii) REJECTION OF LIQUIDATED DAMAGES:

53. Insofar as the challenge to the rejection of LD is concerned, this Court finds no infirmity in the reasoning adopted by the learned Tribunal. The learned Tribunal has noted that the Petitioner did not adduce evidence to establish actual loss suffered on account of the



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alleged delay, nor demonstrate that the stipulated amount was justified in the factual context of the case.

54. The Impugned Award reflects that the learned Tribunal considered the legal position governing LD, including the relevant judicial precedents on the requirement of reasonable compensation and the non-automatic nature of such clauses. Upon appreciation of the contractual terms, the conduct of the parties, and the evidentiary record, the learned Tribunal concluded that the levy of liquidated damages was not justified in the circumstances.

55. The reliance placed upon ***Consolidated Construction Consortium Limited*** (*supra*) by the Petitioner does not advance its case. The said decision reiterates that contractual clauses must be interpreted in accordance with their terms; however, it equally recognises that the application of such clauses depends upon the factual determination of breach and entitlement. In the present case, the learned Tribunal's interpretation of the clause and its conclusion that unilateral levy was not justified is a plausible construction of the contract based on an appreciation of the evidence.

56. The contention regarding the levy of LD is also intrinsically linked to the finding on delay attribution. The contractual clause relating to LD presupposes delay, attributable to the contractor. Once the learned Tribunal, upon appreciation of evidence, has held that responsibility for delay was shared and not exclusively attributable to the Respondent, the rejection of unilateral levy of LD flows logically from such a finding. Thus, the view taken by the learned Tribunal is certainly a possible and plausible view and does not entail interference from this Court in the exercise of the present jurisdiction.



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(iii) COMPLETION OF OSAT:

57. The Petitioner has further contended that successful completion of OSAT never occurred in terms of the contract and, therefore, the learned Tribunal erred in determining the commencement of the warranty period.

58. The Impugned Award, however, reveals that the learned Tribunal examined the phases of OSAT conducted, the operational readiness of the system, the handing over of credentials, and the conduct of parties subsequent to testing.

59. A reading of the Impugned Award further indicates that the learned Tribunal has taken into consideration the sequence of events relating to the handing over of sites and operationalisation of the system. The learned Tribunal recorded that there were delays not only in the execution by the Respondent but also on the part of the Petitioner in making sites available and facilitating completion of testing. The learned Tribunal further noted that the login credentials were taken over by the Petitioner on 17.03.2020 and treated the OSAT as having been completed on that date.

60. On that basis, the learned Tribunal determined that the warranty period stood commenced from 17.03.2020 and consequently expired on 16.03.2023. The computation of the warranty period thus flowed from a factual determination of completion and operational acceptance of the system. Such determination is rooted in an appreciation of material on record and contractual interpretation. The relevant portions of the Impugned Award dealing with completion of OSAT and commencement of the warranty period are extracted herein below:

“On OSAT



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162. It is admitted position under the contract (Ex. C-1) that upon successful completion of OSAT, the seller and buyer were to sign a certificate of conformity. This certificate was not issued and the grievance of the Claimant in this regard forms subject matter of the reliefs sought. The dispute came to the fore with the Respondent (buyer) issuing the notice dated 08.07.2022 (Ex. C-68), alleging non-fulfillment of contractual terms and conditions invoking the provisions mentioned in para 4, part-I of the contract stating, inter alia, that the Claimant (seller) could not successfully conduct OSAT, the Claimant having replied sending Demand Notice dated 20.07.2022 (Ex. C-69) seeking balance payment and return of PBG.

163. As noted earlier, *On-Site Acceptance Test* ("OSAT") is one of the important conditions of the contract, referred to in the preamble and stipulated in terms as pre-requisite, along with completion of training, for the discharge of contractual obligations of the Claimant and having a bearing on the commencement of the three-year free comprehensive onsite warranty with operational support for the Respondent. As also already noted, in terms of the original contract (Ex. C-1) the balance 30% of the contract value after payment of 70% against successful delivery for complete system Hardware, Software, related documents/ Certificate from OEM and PBG) was stipulated to be paid - per Clause 4 (b) of Part III - on "*user's certificate of successful completion of installation/ Integration, commissioning, Site Acceptance Test (OST) and onsite training*". Admittedly, the above clause 4(b) post-amendment (Ex, C-43), carried on 28.05.2020, split the balance 30% into two tranches - one of 20% (on deployment of 70% of data terminals and commencement of services at minimum eight locations duly certified by the user) and the balance 10% still contingent on user's certificate of successful completion of installation/ integration, commissioning Site Acceptance Test (OSAT) and onsite training". It is clear from the pleadings and the evidence that 90% of the contract value has already been paid, the dispute being over the balance 10%, it being the case of the Respondent that OSAT has not been completed and so the amount has not become due.

164. Closely connected to the above is also the case of the Respondent that the obligations of the Claimant towards three-year free comprehensive onsite warranty with operational support for the Respondent are yet to commence since that would occur only when OSAT is completed. Per contra, it is the case of the Claimant that the Respondent has abused its position to deny certificate of completion of OSAT even after six rounds, all tests having been successfully demonstrated, and redemonstrated, the process adopted being non-transparent, dilatory and unilateral, the denial of OSAT completion being not fair since the Claimant took control of all equipment to the exclusion of the Claimant after handing over of the log-in credentials on 17.03.2020, The Claimant relies upon,

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inter alla, letter dated 01.07.2022 (Ex C-70) to assert that it had been informing the Respondent having successfully redemonstrated all the points to the OSAT committee at all available locations, It is contended that after completion of training before 07.10.2019, the project was complete and the 3-year on-site warranty had commenced from the said date i.e., 07.10.2019. It is pleaded that owing to immense financial pressure, the amendment of contract dated 28.05.2020 and consequent release of 20% payment was accepted, and 10% contract value and PBG left to be claimed later, the work of the Claimant being complete in all aspects.

165. The submission of the Claimant that OSAT was to be conducted before the training (Part I Para 6 of Contract) cannot be accepted since the Contract (Ex. C-1) does not specify that to be the sequence of the two events. Further, the training of the personnel has nothing to do with the successful testing of functionality of the system, the latter being covered by OSAT, a requisite step separate from training.

166. Under the contract (Ex. C-I), the OSAT was to be completed within four, weeks of commissioning of the services (Clause 17 of Part III). That the OSAT has been delayed is not in dispute. Since there was delay in installation and commissioning, and there was delay in ATP document being finalized, the delay in OSAT was a natural consequence to follow.

167. Concededly, in terms of the procedure stipulated in para 17 of Part III of the contract (Ex. C-1) an *Independent committee* was required to undertake OSAT in accordance with the mutually formulated ATP, initiated by the Claimant and vetted by the Respondent, by verifying parameters and functionalities *albeit* in the presence of representatives of the Seller (the Claimant). In the context of letters (Ex. C-61 to Ex. C-64) relied upon by the Claimant, the Respondent has, inter alia, asserted that the OSAT team has 09 scientists, who had the requisite expertise and domain knowledge to conduct the OSAT as per the mutually agreed ATP document. The plea of the Claimant that the OSAT conducting team members had no domain experience is not supported by any evidence and, thus, need not be given any credence.

168. The assertion of CW-I that there was no express provision in the contract as to the period within which document for ATP was to be submitted prior to offering OSAT cannot be accepted since the time-line for OSAT was prescribed (within 4 weeks after Installation and commissioning of the system"). At the same time, however, it cannot be ignored that ATP was to be vetted and accepted by the Respondent. This also took time. Admittedly, the ATP document was submitted on 12.11.2019, after a request was forwarded by the respondent vide letter dated 11.09.2019 (Ex.R-4), with reference to para 17(b) of part-III of contract agreement (Ex.C-1), Respondent having sought amendments of the ATP as



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per letter dated 02.12.2019 (Ex.C-90), reference being made to letter dated 19.12.2019 (Ex.C-91) of the Claimant, the latter being agreeable to discuss and include specific tests as desired by the respondent. Concededly, the final vetted ATP document was submitted by the claimant on 10.02.2020 (Ex. R-6) and approved by the Respondent on 14.02.2020. In this chronology, neither side can blame the other exclusively for delay in ATP document being developed.

169. Would It be fair to blame one party or the other for delay in initiation or timely completion of OSAT at the connected sites? The answer is in the negative

170. The case of the Respondent that the Claimant had been requested to first configure the central site, followed by single link connectivity with two remote sites, before replicating the configurations to other remote sites or further that the sites came up, one after another, owing to sequencing and rotation of manpower by CIPL is not substantiated by any evidence. There is nothing presented to refute the case of the Claimant that the sites were provided for connectivity in six (6) batches during the period of three years and accepted by the Respondent after successful testing and commissioning. Indeed, if there was any problem in functioning of any of the sites, the respondent would have been reluctant to provide the other sites. It is admitted in the pleadings by the Respondent that it had offered WAN connectivity after ascertaining viable configurations at the central' site to ensure security of the network It is the plea of the Respondent itself that the Claimant was to complete the OSAT only at the *connected sites*, and joining issue with the Claimant on its contention based on non-availability of links and BUs at the other sites (terming it as a ruse), expressly stating that at no time it had sought conduct of OSAT for *not connected sites*. It is also own case of the Respondent, and conceded by CW-2, that OSAT arranged for the connected sites, accounted for most of the project resources, the configurations at each of the remote sites other than MDC and DRS being the same, such configuration, if completed at one remote site, being easily replicable at the other sites, even without connectivity.

171. Though not denying that such arrangement by the Respondent under the contract was expected to be made by August 2018, it is own averment of the Respondent that the BEUs and links for the OSAT had been provided in December 2019 Le. when that Claimant was able to credibly show that the systems had been configured and the lines will be used. Notwithstanding denial by CW-1, it is established by letter dated 03.12.2019 (Ex. C-31) of the Claimant that OSAT was offered on 03.12.2019 and not earlier. It is, however, also conceded that OSAT had commenced in February 2020, 194 out of 966 parametric test cases having failed in initial phase, per OSAT reports issued vide letter No.

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XXXIII/68/05/2018-SMNY-Vol-III dated 28 May 2020 (Ex. R-24), also indicating 19 functional tests and 303 parametric tests as "not conducted"

172. As noted earlier, it is conceded that the Respondent vide letter No. XXXIII/68/05/2018-SMNY-109 dated 13.01.2020 (Ex. R-21) had requested the Claimant to confirm implementation of network configurations of all devices and activation of data terminals for *initiating* OSAT whilst the Claimant vide their letter CIPL/PMO/NTRO_SITC/941 dated 15.01.2020 (Ex. R-22) had claimed that they had implemented all security policies and baseline configurations communicated by NTRO, also saying that they were prepared for OSAT only at MDC, Aya Nagar.

173. As is expressly admitted by CW-1, there is no doubt that OSAT had to be conducted six times between February 2020 and June 2022, it covering 1269 tests (both parametric and functional), including VC, VoIP, TP and Data Services, and since a number of parametric and functional tests were failing or had failed, they were re-demonstrated to OSAT team even after handing over of credentials. The first phase of OSAT was from 17.02.2020 to 06.03.2020 whilst the last phase of OSAT was from 10.06.2022 to 23.06.2022, Reference is to be made in this context to various communications such as letter dated 17.02.2020 (Ex. R-23), letter dated 17.03.2020 (Ex.C-38), letter dated 20.03.2020 (Ex.C-39), letter dated 07.04.2020 (Ex.C-40), letter dated 14.04.2020 (Ex.C-41) and letter dated 20.04.2020 (Ex.C-42), letter dated 28.05.2020 (Ex. R-24), letter dated 11.06.2020 (part of Ex.R-7), letter dated 16.09.2021 (Ex. R-13), letter dated 01.10.2021 (Ex. R-9), letter dated 29.04.2022 (Ex.R-16), and letter dated 08.07.2022 (Ex: C-68). The plea of the Respondent, as put to CW-2, that the OSAT could not be conducted from March 2020 to November 2020, and again from April 2021 going beyond May 2021, due to COVID restrictions might be accepted based on *judicial notice* of the pandemic conditions then prevailing. Even after the last phase of OSAT (10.06.2022 to 23.06.2022), per communication dated 08.07.2022 (Ex. C-68), based on conduct of OSAT, carried out in presence of representatives of the claimant, as admitted by CW-1, two tests viz. Test 1 and Test 3. (out of total 1269) had statedly failed to be successfully demonstrated, this being brought out during testimony of CW-2 based on the joint test reports, pertaining to "*High Availability*" Test (HA Test), particularly Test 1, the observations to such effect having been endorsed by representatives of both sides.

174. Indisputably. by email dated 27.06.2022 (Ex. C-67), the Respondent had communicated to the Claimant that OSAT team was compiling reports of OSATs done between 10.06.2022 to 23.06.2022 at various sites and observations of OSAT team, if any, shall be communicated. No communication thereafter sharing the report of OSAT Committee has been shown the light of the day by



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the Respondent, the notice dated 08.07.2022 (Ex. C-68), mentioning that the claimant had failed Test 1 and 3, two out of total 1269 tests.

175. The "OSAT Document for Project "HSTN", classified as "Confidential", the respondent being the custodian, produced during the cross-examination of CW-2, reflected that representative of the claimant had signed relevant pages of the spiral book shown relating to tests conducted on 03.03.2020, 31.12.2020, 19.03.2021 and some other dates post 05.03.2020. It was, however, also brought out that there are a number of pages of the said document pertaining to passed tests which do not bear signatures, CW-2 having pointed out test nos. 4, 5, 6, 8 and 10 at page nos.6, 7, 8 and 9 of the OSAT document to illustrate this point. The "*Joint test reports conducted during /0.06.2022 to 23.06.2022*" with which CW-2 was confronted during his cross-examination is a document similar to the "OSAT Document for Project "HSTN", also classified as "Confidential". Seen in light of letter dated 08.07.2022 (Ex. C-68) of the Respondent stating that two tests i.e, test 1 at two sites and test 3 at all sites remained to be successfully demonstrated, giving impression that all but the said two tests had been successfully demonstrated, the plea of the Claimant that its representative was allowed to sign only when the representative of the respondent would show the relevant page or specific place on a particular page of the book relating to the specific tests cannot be rejected, there being no evidence adduced to affirm to the contrary.

176. As was highlighted by the Claimant at the final hearing, letter dated 28.05.2020 (Ex.R-24) and Annexure-1, mentioned total test conducted to be 966 and passed test 772 and test failed 194, no details of the balance 284 tests having been set out. Subsequent letter dated 16.09.2021 (Ex. R-13) put the number of failed tests as 18 tests. However, Letter dated 23.09.2021 (Ex. R-14) relied upon by the Respondent itself stated that all tests had been successfully demonstrated to the members of S-NOC, and this would definitely include test 1 and 3. The response of the Respondent by letter dated 01.10.2021 (Ex. R-9) did not take the position that S-NOC was not the authority for conducting tests, as was the argument raised at final hearing. The letter dated 01.10.2021 simply stated that verification by OSAT Committee was under progress. No records of the OSAT Committee have been shared nor any member of the said Committee was called In as a witness to explain as to how their assessment vis-à-vis Tests 1 and 3 was different from that of the S-NOC.

177. The above deficiencies in the material relied upon by the Respondent put a question mark on the transparency, objectivity, and fairness of the procedure of OSAT which was expected to be a collaborative exercise.

178. From the above, it emerges that the Respondent has also contributed substantially to the non-completion of OSAT in time. It

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is granted in its favor that it could not be expected to wait indefinitely for the seller to complete the supply, installation and commissioning. There was inordinate delay in each of the said stages But as concluded earlier, the Respondent must partake the blame for this delay, it not having readily handed over all the sites, it being in default in timely providing BEUs and media connectivity, taking its own time in vetting the ATP document and compiling of test results of OSAT in various phases and such other indulgences. Just as the Respondent was entitled to fill delivery within time stipulated under the contract, the Claimant would also legitimately be expecting timely completion, discharge and exit. The delays on the part of the Respondent meant the Claimant was also stuck in uncertainty. The timelines having gone haywire, there had to be a fresh understanding of remaining obligations under the contract, and this required some initiative from the Buyer which is found amiss.

179. Going by the text of the contract, the Claimant could not get the certificate of completion without Test 1 and 3 also being certified formally, Assuming, however, that they had failed to pass the muster, is it fair to expect the Claimant to have demonstrated them when the systems had not been in its control? This is where the takeover of the log-in credentials by the Respondent on 17.03.2020 becomes crucial. It was not merely take-over of the log-in credentials but a direction accompanied by a command to the personnel of the Claimant to keep hands off, to maintain a *beat-bay* approach. The use by the Respondent of the systems put in position by the Claimant under the contract (Ex C-1), and the sites where the same were installed and commissioned, to the absolute exclusion of the Claimant, except when called upon for operational support, with effect from 17.03.2020 made it difficult, if not impossible, for the Claimant to demonstrate (or redemonstrate the pending functional or parametric tests through an objective and transparent process, the Respondent controlling not only the access to the sites and the systems but also the documentation of conduct of OSAT, an exercise which has been rather opaque.

180. The decision of the Respondent to exclude the Claimant as above can only be construed as waiver on its part of the clause for completion of OSAT to the extent balance as on the said date (17.03.2020). The complete take over on 17.03.2020 only means the Claimant could not thereafter be held accountable, the respondent being in full control of all the systems and sites, independently making changes/modifications of system configurations, which had the effect on functioning of systems including OSAT. That the Claimant continued even subsequently to collaborate for remaining OSAT will be of no consequence.

181. On the above facts, and in the circumstances, it is fair and just to deem the OSAT to have stood completed, for purposes of triggering the consequences in the contract to follow (viz.

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commencement of warranty, period of validity of PBG, and payment obligations) on 17.03.2020. It is held accordingly.

On Warranty

182. As noted earlier, the preamble of the contract indisputably stated that *"Seller is required to provide three-year free comprehensive onsite warranty with operational support to buyer from the date of completion of Site Acceptance Test (OSAT) and training ..."*. Admittedly, in terms of clause 8 of Part-I of the contract (Ex. C-1), the claimant was to supply the three (3) years comprehensive onsite warranty *"at all 23 pan India locations mentioned in the contract" in respect of "(a)ll the equipment, hardware, software, components, services" of the project "against defective workmanship and materials, faulty designs or inferior quality of materials"*, this covering *"(a)ll consumables &g. LAN, OFC cables, Connectors, wires etc."*, the *"comprehensive warranty services to also include software services and software upgrades and troubleshooting"*, there being a liability on the part of the Claimant (seller) to have the defects or faults etc. to be *"repaired / replaced / resolved at any site free of charges"*. Crucially, the said clause 8 of the contract (Ex. C-1) stipulated that warranty period will commence from successful completion of Site Acceptance Test (ST) and training".

183. It is the case of the Claimant that after completion of training before 07.10.2019, the project was complete at the end of the Claimant and the 3-year on-site warranty had commenced from 07.10.2019 ie. after completion of training. Per contra, it is contended by the Respondent that mere completion of training is not sufficient. The other requirement of successful completion of OSAT also had to be met, the training was to follow OSAT and not the other way around. It was pleaded that OSAT has not been completed and so the warranty period cannot be said to have commenced

184. The contention of the Respondent that warranty is yet to commence and there is no question of determination of the end date cannot be accepted. The argument that OSAT must have preceded training has been rejected earlier. The core question to be addressed here is as to whether, in the given facts and circumstances, the warranty period had commenced with completion of training, notwithstanding the dispute over OSAT completion, as is contended by the Claimant.

185. There can be no denial of the fact that the warranty, License and services from the original equipment manufacturer commences once the equipment is activated. It is admitted that the Specialized Advance Level training required the products under warranty, as installed at the site where training was organized, to come in usage by the Respondent from their date of activation ie., since 07.10.2019. This naturally means that the OEM warranty period had commenced from 07.10.2019 in respect of such equipment.



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Though some stray instances of deficiency in support in operations have been quoted, there is no denial in the course of evidence by the Respondent that the personnel of the Claimant (Ex. CW-1/3) had been stationed at the sites of the Respondent to provide on-site support and have continued beyond the period of three (3) years for operational support and that post the confirmation by the Respondent that VC, VolP, TP, Data services had been made functional at seven (7) sites and demanding handover, *inter alia*, vide Letter dated 06.03.2020 (Ex. C-36) & 10.03.2020 (Ex. C-37), the Claimant was made to hand over the login credentials of all the network equipment and devices of the seven sites including MDC & DRS to the employees of the Respondent vide Letter dated 17.03.2020 (Ex. C-38), and thereafter, the Respondent has been using the equipment and services, provided by the claimant in terms of the contract, for the last more than three years, a fact proved by CW-1 and not refuted in evidence by the Respondent. Based on these facts, it has been concluded earlier that the Respondent had *waived* strict compliance with the balance OSAT and that the said exercise (OSAT) is deemed to have been completed on 17.03.2020.

186. The plea of the Claimant, that the warranty clause in the contract (Ex. C 1) would have come into play with completion of training (07.10,2019) cannot be accepted. As noted earlier, the other prerequisite was completion of OSAT which is found to be complete on 17.03.2020, the date on which the Respondent compelled the Claimant to hand over the log-in credentials and also the systems and sites, excluding the Claimant even from access, except when called for operational support. Since OSAT is deemed to have been completed on 17.03.2020, that is the date from which the consequences in the contract would follow, including commencement of warranty, and, thus, the warranty clause under the contract (Ex. C-1) would have begun from 17.03.2020 and, being for three years, ended on 16.03.2023.

187. It needs to be examined if there have been breaches committed by the Claimant vis d vis the obligations under the warranty clause during the above-mentioned period and, if so, with what consequences. These issues are considered in context of case of the Respondent asserting its right to impose Liquidated Damages and invoke PBG.”

61. It is also evident from the Impugned Award that the learned Tribunal did not determine the issue of completion of OSAT in isolation. The learned Tribunal took into account multiple relevant factors, including delays in handing over sites, the conduct of the parties during execution and testing, the contemporaneous

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correspondence exchanged between them, the impact of the COVID-19 pandemic on contractual timelines, and the overall procedural fairness of the process adopted. The conclusion regarding completion of OSAT and commencement of the warranty period thus emerged from a cumulative assessment of factual and contractual circumstances, and cannot be said to be arbitrary or based on extraneous considerations.

(iv) RELEASE OF PERFORMANCE GUARANTEE (PBG):

62. Insofar as the PBG is concerned, the direction for its release is a corollary to the findings recorded on completion, shared delay, and rejection of LD. Retention of a performance security must have contractual justification. Once the learned Tribunal found the absence of exclusive default and unjustified levy of liquidated damages, the direction for release of the PBG cannot be termed arbitrary or contrary to the contract.

63. The Petitioner has also alleged that the learned Tribunal overlooked material evidence regarding non-renewal of licences and deficiencies in performance. A reading of the Impugned Award, however, indicates that these aspects were noted and considered. Merely because the learned Tribunal did not accept the Petitioner's interpretation of such material does not imply non-consideration. An erroneous appreciation of evidence, even if assumed, does not amount to patent illegality unless it goes to the root and renders the decision perverse.

(v) RELEASE OF WITHHELD PAYMENT:

64. With regard to entitlement to the balance payment, the learned Tribunal has recorded that it was an admitted position that ten (10) per



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cent of the contract value remained withheld by the Petitioner. Having rejected the claim for levy of LD and having found no established loss or subsisting breach, justifying retention of the said amount, the learned Tribunal concluded that the Respondent was entitled to the release of the withheld balance consideration. The direction for payment thus flows as a natural consequence of the rejection of LD and the determination of completion of contractual milestones.

65. The Impugned Award, in directing release of the balance amount, does not rewrite the contract but gives effect to the reciprocal obligations of the parties upon completion of performance. Such a finding, being founded on an appreciation of facts and an interpretation of contractual provisions, does not suffer from patent illegality or perversity warranting interference under Section 34 of the Act.

66. The reliance placed by the Petitioner upon *ONGC (supra)* to contend that the Award is patently illegal must be examined in the context of the post-2015 statutory framework. The expression “patent illegality” does not permit re-appreciation of evidence or correction of errors of fact. The illegality must go to the root of the matter and be apparent on the face of the Award. No such illegality is demonstrated in the present case.

CONCLUSION:

67. In view of the law laid down by the Hon’ble Supreme Court in *OPG Power (supra)*, and upon consideration of the detailed examination undertaken by the learned Tribunal of the contractual



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provisions and the material on record, this Court finds no ground warranting interference under Section 34 of the Act.

68. The Impugned Award reflects a plausible and reasoned interpretation of the contract and an evaluation of evidence within the jurisdiction of the learned Tribunal. It is well settled that a court exercising limited supervisory jurisdiction under Section 34 cannot re-appreciate evidence or substitute its own interpretation of contractual clauses where the view taken by the learned Tribunal is a possible and reasonable one.

69. Viewed in its entirety, the Impugned Award reflects a reasoned and structured adjudication of the disputes by the learned Tribunal within the confines of the contractual terms agreed upon by the parties, the material placed on record, and the jurisdiction vested in the learned Arbitral Tribunal. The Impugned Award demonstrates due application of mind to the pleadings, evidence, and relevant contractual provisions.

70. In view of the foregoing discussion, this Court is of the considered opinion that the Petitioner has failed to establish any ground under Section 34(2) or Section 34(2A) of the Act warranting interference with the Impugned Award.

71. The present Petition, along with pending application(s), if any, stands disposed of in the above terms.

72. No Order as to costs.

HARISH VAIDYANATHAN SHANKAR, J.

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