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

% ***Reserved on: 18th February 2025***

Pronounced on: 13th May 2025

\+ **O.M.P.(COMM.) 486/2018**

UNION OF INDIA THROUGH GENERAL MANAGER

.....Petitioner

Through: Mr. Ruchir Mishra, Mr. Sanjiv Saxena, Mr. Mukesh K. Tiwari, Ms. Poonam Shukla, Ms. Reba Jena Mishra & Ms. Harshita Sharma, Advocates

versus

M/S V.K. SOOD ENGINEER &CONTRACTORS THROUGH ITS MANAGING DIRECTOR ....Respondent

Through: Mr. Manoj Swarup, Sr. Adv. with Mr. Anil Mittal, Mr. Neelmani Pant & Mr. Yash Singhal, Advocates

CORAM:

HON'BLE MR. JUSTICE ANISH DAYAL

JUDGMENT

ANISH DAYAL, J.

1. This petition has been filed under Sections 34 of the Arbitration and Conciliation Act, 1996 ('***A&C Act***') for setting aside the Award dated 9th June 2018 passed by the Sole Arbitrator in the matter of ***M/s. V.K. Sood Engineer and Contractor DDSJV v. Union of India (through General Manager Northern Railway)***.

Factual Background

2. Petitioner / Union of India (*Railways*) invited tenders for fabrication, supplying, assembling, erection and launching at site (*across river Ganga at Garhmukteshwar bridge railway station on Ghaziabad / Muradabad section of Muradabad Division*) of 11x 61m spans, along with loading, leading, unloading materials and other connected works.

3. The entire work was to be completed within 18 months from the date of issue of acceptance letter. The work was awarded to the respondent *vide* letter of acceptance dated 1st May 2006. A formal agreement was executed on 21st June 2006. The maintenance period was for a period of 12 months from the certified date of completion. Contract value was *Rs. 22,50,29,745/-* (after second corrigendum this was *Rs. 24,42,41,284.82*) against which earnest money and performance bank guarantee had to be deposited.

4. Work was awarded to *M/s. V.K. Sood Engineer and Contractor DDSJV*, which subsequently merged with *M/s. V.K. Sood Engineer and Contractor Pvt. Ltd*. (the current respondent) *vide* merger agreement dated 27th March 2012, which was accepted by the petitioner.

5. Original date of completion was 31st October 2007, but the actual completion date was 25th May 2013. Completion Certificate was issued on 21st July 2014 by the Northern Railway. The respondent requested the petitioner to settle long-outstanding claims. On failure to respond, respondent requested for appointment of an Arbitrator which ultimately led to the commencement of arbitration.

6. Arbitration was invoked by the respondent in 2013; Sole Arbitrator was appointed by this Court on 6th December 2016. Award was passed by the sole Arbitrator on 9th June 2018. The Arbitrator allowed ***Claim Nos.2, 3, 4, 6***, & ***12 b*** of the respondent's claim and dismissed the counterclaims filed by the petitioner.

Claims and Counter Claims

7. The claims asserted by the respondent are tabulated as under, followed by tabulation of counterclaims by petitioner:

Claims By Claimant/Respondent

Claim No.	Claim	Amount Claimed	Amount Awarded
1-A	Work done up to 29.10.2009: Claimant submitted bill no.00033 dated 29.10.2009, but amount was not paid. Interim arbitration was invoked.	Rs.2,62,78,660	Rejected
1-B	Work done after 29.10.2009 till 25.5.2013: Additional work including channel sleepers.	Rs.1,28,85,540	Rejected
1-C	Supply of Neoprene Pads: Due to change in size/weight of sleepers and fittings, additional cost incurred.	Rs.29,06,740	Rejected
2	Refund of illegal penalty of 1% under *Clause 28* deducted from bills due to alleged shortfall in progress, even though delay was due to Respondent.	Rs.21,33,262	Partly Allowed (Rs.14,36,529)
3	Wrong deduction of 0.10% rebate: Claimant was not allowed to fabricate at Samba workshop as agreed.	Rs.2,06,000	Allowed (Rs. 2,06,000)
4	Reimbursement of bank charges for extension of BGs due to delay in work completion for no fault of Claimant.	Rs.28,65,182	Allowed (Rs. 28,65,182)

5	Rent Paid by Claimant	Withdrawn	-
6	Reimbursement of insurance premium paid by Claimant due to delay beyond original contract period and extensions granted under *Clause 17A (not 17B)* of GCC.	Rs. 5,31,660	Allowed (Rs.5,31,660)
7	Earthwork for casting pedestals-additional work executed by Claimant after failure of other civil contractor, including building coffer dams and trestles for spans.	Rs. 56,90,000	Rejected
8	Casting of pedestals — extra work executed by Claimant, originally to be done by other civil contractor; included making shuttering, concrete work, bunds, and platform for 44 pedestals in river bed.	Rs. 8,80,000	To Be Considered When Final Bill Is Prepared
9	Reimbursement of loss caused due to payment of bank interest beyond the original contract period as the project was delayed due to Respondent's lapses.	Rs. 12,72,000	Rejected
10	Compensation on account of death of two workers due to Respondent's failure to restrict traffic during work, forcing Claimant to work under unsafe conditions.	Rs. 8,00,000	Rejected
11	Loss of profit/turnover due to prolongation of contract	Rs.11,60,000	Dropped by Claimant
12-A	Admitted payment of final bill	Rs.52,46,000	Under Relief and Cost
12-B	Balance Price Variation (PVC)	Rs.1,55,00,000	Allowed [In principle (PVC Entitlement At 20%), but quantum to be settled later.]
12-C	Balance Performance Security	Rs.9,15,000	Under Relief and

			Cost
12-D	Interest on delayed payment @12% per annum	Matter of calculation	Under Relief and Cost
12-E	Other payments for work done	Matter of calculation	Not Pressed
13-A	Interest @12% P.A from due date till 25.05.2013	Rs.1,73,39,420	Under Relief and Cost
13-B	Interest @12% P.A from 25.05.2013 to 15.10.2016	Rs.3,07,37,968	Under Relief and Cost
13-C	Interest from 15.10.2016 to date of award	Matter of calculation	Under Relief and Cost
14	Future interest @18% P.A on awarded amount (post-award to actual payment)	Matter of calculation	Under Relief and Cost
15	Cost of arbitration including fees, etc.	Matter of calculation	Shall Be Borne Equally by Parties

* *Under Relief and Cost – Arbitrator directed that if the total amount is not paid on or before 30th September 2018, it will carry interest @ 18% per annum from 30th September 2018 till payment.*

Claims by Counter-Claimant/Petitioner

Claim No.	Claim	Amount Claimed	Award
1	Overpayment of PVC. Claimant was overpaid beyond the 10% limit per *Clause 25.7(b)*. Railway Vigilance held officials responsible. Claimant advised to return the amount.	Rs. 1,79,00,000	Rejected
2	Cost of packing plates required for correction of track parameters on DN Line Bridge due to fabrication defects.	Rs. 15,00,000	Rejected
3	Loss suffered by Respondent due to speed restriction on DN Line Bridge because of fabrication defects. (Amount being worked out)	To be advised	Rejected
4	Cost of metallizing of field	Rs. 31,23,484	Rejected

	joint rivets of DN Line Bridge not done by Claimant.		
5	Cost of metallizing of field joint rivets of UP Line Bridge not done by Claimant.	Rs. 30,23,243	Rejected
6	Cost of replacing 1801 loose rivets on DN Line Bridge.	Rs. 2,29,093	Rejected
7	Cost of replacing 1215 loose rivets on UP Line Bridge.	Rs. 1,55,435	Rejected

Crux of respondent's case as claimant in Arbitration

8. Essentially, the respondent's claim was based on an allegation that the petitioner failed to perform various obligations under the agreement. There were numerous delays and defaults, and despite the respondent's best efforts to expedite the work, petitioner failed to perform its reciprocal obligations and make timely monthly payments. This adversely impacted the respondent's productivity and profitability. The losses broadly claimed on account of extra costs incurred off-site and on-site overheads, depreciation of tools and plants, and idle labour, staff, and other resources.

9. As per respondent, the work, which was to be completed within 18 months was delayed by 5.5 years and ultimately completed on 25th May 2013 (*84 months instead of 18 months*). Thirteen extensions were granted without levying any penalty. Respondent not only completed the original allotted work of Rs. 22.5 crores, but also additional work amounting to approximately Rs. 2.5 crores. The work was completed to satisfaction, and a Completion Certificate was also issued. Security deposit was released, but the cash security of Rs. 9.15 lakhs, deducted from the bills, was not released.

10. The petitioner's delays were essentially *inter alia* on account of material not supplied in time, delays in approval of drawings and inspections, non-handover of the entire worksite, and delayed payments, which hampered progress.

Crux of petitioner's case as respondent in Arbitration

11. To the claims of the respondent, petitioner contended before the Arbitrator that time extension records and subsequent deliberations would reveal that delay was primarily on account of the respondent. However, in order to maintain business harmony and in the interest of work, petitioner showed some restraint.

12. It was asserted that losses suffered due to the defects in the work carried out by the respondent. Petitioner had filed counterclaims to recover excess PVC of Rs.1.79 crores. However, the counterclaims were rejected by the Arbitrator.

Directions by Arbitrator

13. The following directions were passed by the Arbitrator:

(i) Total amount awarded to the respondent Rs.50,39,371/- with interest @ 9% per annum from 25th May 2014 to 30th September 2018 and thereafter @ 18% per annum;

(ii) Petitioner to prepare final bill in accordance with the arbitral award on or before 30th August 2018 and amount payable to claimant shall be on or before 30th September 2018.

(iii) If the total amount is not paid on or before 30th September 2018, it will carry interest @ 18% per annum from that date till payment;

Objections

14. Essentially, objections to the award, as presented in the petition, were that it was contrary to public policy and liable to be set aside *inter alia* on the following grounds:

a. Respondent was responsible for delay in execution of work since assembling an election of one span by staging method could be done in one month whereas it took nine months for completion. Justification by the respondent was without any substantiation and *mala fide*.;

b. Arbitrator did not assign any reasons for rejecting the counterclaim;

c. Reimbursement of bank charges for extension of BG was beyond the scope of agreement;

d. Extensions granted to respondent were to save them from penalty and PVC but could not cover the reimbursement of insurance premiums paid by the respondent under *Clause 17A*;

e. Delay was on account of the respondent or at best on account of both parties and the entire liability could not be fastened on the petitioner;

f. *Clause 17A(iii)* specifically precludes any claim for compensation or damages;

g. Extension of bank guarantee and insurance is inherent in the performance of the contract and was in the contemplation of parties, to be incurred on the currency of the contract;

h. *Clause 25.7* provided that if the contract is for 1-2 years, total recovery due to variation shall be limited to 10%.;

i. *Clause 25.9* on the other hand, provided for inclusion of the extension period also, meaning thereby that variation in prices of material beyond the date of completion would be considered for calculation of the variation and would be subject to limitation at 10%. Arbitrator did not interpret this harmoniously.

Principal Argument by Petitioner's Counsel

15. During the arguments before this Court, however, counsel for petitioner mounted his case essentially on two grounds, which were not grounds taken up in the petition:

i) Petitioner contended that the claims were within the purview of *"excepted matter*" covered by *Clause 63* of General Conditions of Contract ('***GCC***') and therefore not arbitrable. The said clause unequivocally stipulates that disputes arising from designated provisions shall be determined solely by the Railway Authority and are expressly excluded from the purview of arbitration. *Clause 63* of GCC reads as under:

> "*63. Matters finally determined by the Railway - All disputes and differences of any kind whatsoever arising out of or in connection with the contract, whether during the progress of the work or after its completion and whether before or after*

> *the determination of the contract shall be referred by the contractor to the Railway and the Railway shall within 120 days after receipt of the Contractor's representation make and notify decisions on all matters referred to by the contractor in writing provided that matters for which provision has been made in clauses 8 (a), 18,22 (5), 39, 43 (2), 45 (a), 55, 55-A (5), 57, 57A, 61 (1), 61 (2) and 62 (1) (b) of General Conditions of Contract or in any clause of the Special Conditions of the Contract shall be deemed as 'excepted matters' and decisions of the Railway authority, thereon shall be final and binding on the contractor provided further that 'excepted matters' shall stand specifically excluded from the purview of the arbitration clause and not be referred to arbitration.*"
>
> (emphasis added)

It was submitted that claims arising out of any of the designated clauses of GCC or in any clause of Special Conditions of Contract ('***SCC'***) would be deemed to be "*excepted matters*" and decisions of Railway Authority shall be final and binding and these will be excluded from the purview of arbitration.

ii) The award of interest against petitioner by Arbitrator was contrary to the terms of contract. It was argued that on the basis of Special Tender Conditions & Instructions for Tenderers ('***SIT'***) which form part of the contract, *inter alia* in *Clause 3* did not allow interest on earnest money, *Clause 5* did not allow interest on security deposit and therefore could not be awarded. Besides *Clause*

64.5 of GCC extracted as under, again precluded the award of interest.

> "***64.5*** *Where the arbitral award is for the payment of money, no interest shall be payable on whole or any part of the money for any period till the date on which the award is made.*"

Despite these clear prohibitions, the Arbitrator awarded interest at the rate of 9% per annum from 25th May 2014 to 30th September 2018, and thereafter at an exorbitant rate of 18% per annum till payment. This finding is patently erroneous and contrary to the contractual terms binding upon the parties.

16. Counsel for petitioner has also stated that Arbitrator has failed to appreciate the binding effect of the contract governing parties. The Impugned Award disregards the following:

a) The clear exclusion of "*excepted matters*" from arbitration under *Clause 63* of GCC.

b) The express prohibition on the grant of interest under *Clause 64.5* of GCC and SIT.

c) The jurisdictional limitation placed upon the Arbitrator in determining matters beyond the scope of the arbitration agreement.

17. Counsel submitted that it is well settled that an arbitral award that contravenes fundamental contractual stipulations or is in conflict with public policy is liable to be set aside under Section 34 of A&C Act.

Response by respondents to the Objections

18. The primary objection raised by petitioner related to "*excepted matters*" and award of interest being precluded by the contract. Senior counsel for the respondents submitted that, as regards the objections which were taken in the OMP by petitioner, these were mostly issues relating to the merits of the matter, which could not have been examined, and which cannot form a ground under Section 34 A&C Act, particularly in view of Section 34 (2) (b) (ii) Explanation 2, which precludes a review on the merits of the dispute.

19. As regards the issue relating to "*excepted matters*" and award of interest by the Arbitrator being not permitted by the contract, it was submitted that these arguments had been raised for the first time before this Court and were neither raised before the Arbitrator nor in the petition filed. The occasion for the Arbitrator to deal with the same in the award therefore did not arise. Petitioner mounting its Section 34 petition on the basis of these two principal objections and clubbing them under issues of conflict with public policy and in contravention with the fundamental policy of Indian law, was therefore untenable.

Analysis

20. The objections which were raised on each of the claims are essentially based upon who was responsible for the resulting delay. Perusal of the arbitral award, in respect of the findings arrived at, would be useful for assessment as to whether the arbitral award has veered outside the contract or there is fundamental flaw or does it shock the conscience of the Court, for assessment under Section 34 A&C Act.

This is notwithstanding that the Court is not expected to entertain a review on the merits of the matter.

Document References

21. For the purposes of assessment, it is important to clarify the reference to various documents made by the parties and by the Arbitrator, and in this assessment as under:

22. The petitioner was assigned the work under Contract Agreement dated 21st June 2006 ('***the agreement***'). There are various parts of the agreement which are as under:

(i) Modified Price Bid and Technical Bid;

(ii) Special Tender Contract and Instructions to Tenderers. This runs from *Clause 1 to 26* ***(SIT)***;

(iii) Special Conditions relating to Site, Data and Specifications ('***SCSDS***'). This runs from *Clause 1 to 32*;

(iv) Guidelines for joint venture for tender costing more than Rs.5 crores.

(v) GCC published as part of the **Works Handbook Part – I & II**, of which the GCC is in Part II (***GCC***).

The description of various parts is being stated since there is some confusion in the reference employed, of these parts of agreement, by the parties as well as the Arbitrator. The clauses which the petitioner is relying up and which have been noted by the Arbitrator, mostly form

part either of SIT or SCSDS. SCSDS has sometimes been referred to as the SCC or 'the agreement.'

Claims Assessment

23. Regards ***Claim 2***, as per *Clause 28* of SCSDS a total penalty of one percent if there is a shortfall in providing a consistent progress of a minimum of Rs.50 lakh per month would be imposed. The arbitral award notes that the respondent did not achieve progress of a minimum of Rs.50 lakh per month was not disputed, however the question was whether there was any deliberate delay on the part of the respondent and it could not achieve the targeted progress.

24. Notice was taken of the communication dated 31st July 2012 by the Deputy Chief Engineer (TNC) which was an internal letter which noted as under:

> "*it was not practically feasible to achieve the desired progress of minimum of Rs.50 lakhs per month due to various problems at site of work, which are not attributable to the agency and applicability of Penalty Clause 28 regarding achieving the progress of Rs.50 lakhs per month appears to be defective, as scope of work decreases with progress of work, the minimum progress of Rs.50 lakhs does not sustain as the workload of the contractor reduces with reduced number of items of the contract to be executed. There is no fault on account of contractor for not achieving progress of Rs, 50 Lacs per month".*
>
> (emphasis added)

25. It was further noted that the majority of the extension work was given under *Clause 17-A* of the GCC and not under *Clause 17-B* of

GCC. *Clause 17-A* of GCC provided for extension of time at the request of the respondent/ contractor due to issues which were beyond control whereas *Clause 17-B* required extension of time for delay *due to contractor*. It was noted by the Arbitrator that the respondent had communicated his grievance to petitioner dated 18th November 2006 subsequent to which response of 31st July 2012 was available. In the view of this Court, the Arbitrator was not incorrect in noting that the letter of 31st July 2012 amounted to a recognition of the fact that the respondent could not be blamed for the delay of achieving minimum progress of Rs.50 lakhs per month.

26. Regards ***Claim 3***, a rebate of 0.10% was offered to the respondent to carry out the fabrication work in Samba at its site. However, the respondent fabricated the girders at the bridge site only as desired by the petitioner. The deduction therefore which was made was wrongful. The extra cost which was incurred by the respondent in this regard would not entail a deduction of 0.10% from the running bills.

27. In this regard a communication of 31st July 2012 by the Deputy Chief Engineer was noted which read as under:

> "…*agency has given rebate of 0.10% to carry out fabrication work in contractor's heavy plant yard workshop at Samba only to avoid extra expenditure, and to have close supervision, Railway has decided fabrication work at site itself. Therefore, the deduction made on account of rebate 0.10% Form entire account bill amounting to Rs.2.24,675/- may be released to agency as the agency has fabricated the girders at Bridge site as desired by the Railway Department*."
>
> (emphasis added)

28. In view of this matter, the Court does not consider this issue sustains an objection under Section 34 petition.

29. Regards ***Claim 4*** for reimbursement of bank charges for extension of bank guarantees, it is noted that bank guarantee had been given by the respondent as performance guarantee, but since there was a delay of 5.5 years, the contract was extended from time to time. Respondent had to provide commission to the bank for the extension of the bank guarantee for which Rs. 28,65,182/- was claimed. Petitioner objected under *Clause 17 A (iii)* GCC on the ground that for the extended period no compensation would be payable. The Arbitrator rightly held that once the period was extended for no fault of the respondent and the delay was actually due to the petitioner, the additional cost for extension of bank guarantee ought to be reimbursed by the petitioner.

30. Regards ***Claim 6*** for reimbursement of insurance premium, respondent claimed that it had to incur extra premium for getting insurance on various machinery, stocks, and materials to cover up for the extended period, which was refuted by the petitioner on the basis of *Clause 29* of the SCSDS, stating that railways would not be responsible for any loss of machinery, material, or equipment. It was rightly noted by the Arbitrator that the respondent was not seeking any compensation for the loss of any equipment or machinery but only additional expenses since the contract period had been extended for no fault of theirs. This view of the Arbitrator is also therefore merited and an objection under Section 34 A&C Act cannot sustain.

31. The other issue which was raised by the petitioner was the dismissal of the ***Claim 12B***. Respondent claimed that the petitioner inadvertently reimbursed the amount in excess of 10% of the amount payable to the respondent and the sum of Rs.1.79 crores was paid in excess to the respondent and the petitioner was entitled to (refund of) the same. In this regard, *Clause 25.7* SCSDS was considered as per which contracts of 1 and 2 years, the total amount of reimbursement/recovery due to variation in price was limited to 10% whereas contracts of more than 2 years of duration, the limitation was 20%.

32. It is stated in *Clause 25.7* SCSDS that duration of the contract shall be prescribed in the tender documents at the time of inviting tenders and will not include the extended period due to extension of any kind. *Clause 25.9 A* SCSDS was noted which specifically dealt with price issue during extension of contract and provided that the price adjustment would either increase or decrease as applicable to the stipulated date of completion and for all extensions of time granted, except extensions granted under *Clause 17-B of the GCC*. The Arbitrator noted that there were 8 extensions under *Clause 17-A* of the GCC and since it was for a more than 2-year period, the total reimbursement due to part price variation should be 20%. In view of *Clause 25.9-A* SCSDS, this plea of the petitioner was rejected.

33. The attempt to recover the amount from the respondent on the ground that there was excess payment was found to be misplaced.

34. The Court does not find any basis to object to the findings of the Arbitrator on these aspects, since neither they come within the purview

of conflict with public policy or are in contravention with fundamental policy of Indian law or in conflict with basic notions of morality or justice. In fact, as per Explanation 2 to Section 34 (2) (b) (ii), the test of fundamental policy of Indian law shall not entail a review on the merits of the dispute.

35. The Supreme Court in ***MMTC Ltd. v. Vedanta Ltd.***[1], held that interference with an arbitral award under Section 34(2)(b)(ii) of A&C Act is limited to grounds of public policy, including fundamental policy of Indian law, conflict with justice or morality, and patent illegality, but does not entail a review on merits unless the findings are arbitrary, capricious, perverse, or shock the conscience of the Court. Relevant paragraphs are extracted as under:

> "*11. As far as Section 34 is concerned, the position is well-settled by now that the Court does not sit in appeal over the arbitral award and may interfere on merits on the limited ground provided under Section 34(2)(b)(ii) i.e. if the award is against the public policy of India. As per the legal position clarified through decisions of this Court prior to the amendments to the 1996 Act in 2015, a violation of Indian public policy, in turn, includes a violation of the fundamental policy of Indian law, a violation of the interest of India, conflict with justice or morality, and the existence of patent illegality in the arbitral award. Additionally, the concept of the "fundamental policy of Indian law" would cover compliance with statutes and judicial precedents, adopting a judicial approach, compliance with the principles of natural justice, and Wednesbury [Associated Provincial Picture Houses v. Wednesbury Corpn., (1948) 1 KB 223 (CA)] reasonableness. Furthermore, "patent illegality" itself*

[1] (2019) 4 SCC 163

has been held to mean contravention of the substantive law of India, contravention of the 1996 Act, and contravention of the terms of the contract.
12. It is only if one of these conditions is met that the Court may interfere with an arbitral award in terms of Section 34(2)(b)(ii), but such interference does not entail a review of the merits of the dispute, and is limited to situations where the findings of the arbitrator are arbitrary, capricious or perverse, or when the conscience of the Court is shocked, or when the illegality is not trivial but goes to the root of the matter. An arbitral award may not be interfered with if the view taken by the arbitrator is a possible view based on facts. (See Associate Builders v. DDA [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204]. Also see ONGC Ltd. v. Saw Pipes Ltd. [ONGC Ltd. v. Saw Pipes Ltd., (2003) 5 SCC 705]; Hindustan Zinc Ltd. v. Friends Coal Carbonisation [Hindustan Zinc Ltd. v. Friends Coal Carbonisation, (2006) 4 SCC 445]; and McDermott International Inc. v. Burn Standard Co. Ltd. [McDermott International Inc. v. Burn Standard Co. Ltd., (2006) 11 SCC 181])."

(emphasis added)

Re: Arbitrability

36. As regards the issue of "*excepted matters*," the Court was not convinced of the argument raised by the petitioner. Nowhere on the record can it be ascertained that the argument was raised before the Arbitrator or indeed raised before this Court in the section 34 petition. These arguments were clearly raised and substantiated during oral arguments. Petitioner states that *Clause 63* of the GCC would *except* out any matter which would arise under specified clauses of the GCC or '*any clause of the Special Conditions of Contract*'. If the interpretation of the

petitioner was to be accepted, then *any dispute* arising under the contract would be outside the arbitration clause. That can never be the intention of a contract of this nature where the arbitration clause provided as under:

> "***64(1)(i) —*** *Demand for Arbitration.- In the event of any dispute or difference between the parties hereto as to the construction or operation of this contract, or the respective rights and liabilities of the parties n any matter in question, dispute or difference on any account or as to-the withholding by the Railway of any certificate to which the contractor may claim to be entitled to, or if the Railway fails to make a decision within 120 days, then and in any such case, but except in any of the 'excepted matters' referred to in clause 63 of these conditions, the contractor, after 120 days but within 180 days of his presenting his final claim on disputed matters, shall demand in writing that the dispute or difference be referred to arbitration.*
> ***64 (1)(ii)*** *—The demand for arbitration shall specify the matters which are in question or subject of the dispute or difference as also the amount of claim itemwise: Only such dispute(s) or difference (s) in respect of which the demand has been made, together with counter claims or set off shall be referred to arbitration and other. matters shall not be included in the reference.*
> ***64 (1)(ii)(a)*** *— the Arbitration proceeding shall be assumed to have commenced from the day, a written and valid demand for arbitration is received by the Railway.*
> ***(b)*** *The claimant shall submit his claim stating the facts supporting the claim along with all relevant documents and the relief or remedy sought against each claim within a period of 30 days from the date of. appointment of the Arbitral Tribunal.*
> ***(c)*** *The Railway shall submit its defence statement and counter claims), it any, within a period of 60 days of*

receipt of copy of claim from Tribunal thereafter unless otherwise extension has been granted by Tribunal.

***64(1)(iii)**—No new claim shall be added during proceedings by either party. However, a party may amend or supplement the original, claim or defence thereof during the course of arbitration proceedings subject to acceptance by Tribunal having due regard to the delay in making it.*

***64(1)(iv)—**If the contractors) does/do not prefer his/their specific and final claim in writing, within a period of 90 days of receiving the intimation from the Railways that the final bill is ready for payment, he/they will be deemed to have waived his/their claims) and the Railway shall be discharged and released of all liabilities under the contract in respect of these claims:*

***64(2)—**Obligation during pendency of arbitration. — Work under the contract shall, unless otherwise directed by the Engineer, continue during the arbitration proceeding, and no payment due or payable by the Railway shall be withheld on account of such proceedings, provided, however, it shall be open for Arbitral Tribunal to consider and decide whether or not such work should continue during arbitration proceedings.*

***64 (3)(a)(i)**—In cases where the total value of all claims in question added together does not exceed R$ 10,00,000/- (Rupees ten lakhs only), the Arbitral Tribunal consist of a sole arbitrator who shall be either the General Manager or a gazetted officer of Railway not below the grade of JA grade nominated by the General Manager in that behalf. The sole arbitrator shall be appointed within 60 days from the day when a written and valid demand for arbitration is received by Railway.*

***64 (3)(a)(ii)** —In cases not covered by clause 64(3) (a) (i), the Arbitral Tribunal shall consist of a panel of three Gazetted Rly. officers not below JA grade, as the arbitrators. For this purpose, the Railway will send a*

panel of more than 3 names of Gazetted Fly. Officers of one or more departments, of the Rly. to the contractor who will be asked to suggest to General Manager up to 2 names out of panel for appointment as contractor's nominee. The General Manager shall appoint at least one out of them as the contractor's nominee and will, also simultaneously appoint the balance number of arbitrators either from the panel or from outside the panel, duly indicating the 'presiding arbitrator from amongst the 3 arbitrators so appointed. While nominating the arbitrators It will be necessary to ensure that one of them is from the Accounts department. An officer of Selection Grade of the Accounts department shall be considered of equal status to the officers in SA grade of other departments of the Railways for the purpose of appointment of arbitrators.

64 (3)(a)(iii)—*If one or more of the arbitrators appointed as above refuses to act as arbitrator, withdraws from his office as arbitrator, or vacates his/their office/offices or is/are unable or unwilling to perform his functions as arbitrator for any reason whatsoever or dies or in the opinion of the General Manager fails to act without undue delay, the General Manager shall appoint new arbitrator/arbitrators to act in his/their place in the same manner in which the earlier arbitrator/arbitrators had been appointed. Such re-constituted Tribunal may, at its discretion, proceed with the reference from the stage at which it was left by the previous arbitrator(s):*

64 (3)(a)(iv)*—The arbitral Tribunal shall have power to call for such evidence by way of affidavits or otherwise as the Arbitral Tribunal shall think proper, and it shall be the duty of the parties hereto to do or cause to be done all such things as may be necessary to enable the Arbitral Tribunal to make the award without any delay.*

64 (3)(a)(v)*—While appointing arbitrator(s) under sub clause (i), (ii) and (iii) above, due care shall be taken*

that he/they is/are not the one/those who had an opportunity to deal with the matters to which the contract relates or who in the course of his/their duties as Railway servants(s) expressed views on all or any of the matters under dispute or differences. The proceedings of the Arbitral Tribunal or the award made by such Tribunal will, however, not be invalid merely for the reason that one or more arbitrator had, in the course of his service, opportunity to deal with the matters to which the contract relates or who in the course of his/their duties expressed views on all or any of the matters under dispute.

64(3)(b)(i)—*The arbitral award shall state itemwise, the sum and reasons upon which it is based.*

64(3)(b)(ii)*— A party may apply for corrections of any computational errors, any typographical or clerical errors or any other error of similar nature occurring in the award and interpretation of a specific point of award to tribunal within 30 days of receipt of the award.*

64(3)(b(iii)*—A party may apply to tribunal within 30 days of receipt of award to, make an additional award as to claims presented in the arbitral proceedings but omitted from the arbitral award.*

64.4 *In case of the Tribunal, comprising of three members, any ruling or award shall be made by a majority of Members of Tribunal: in the absence of such a majority, the views of the Presiding Arbitrator shall prevail.*

64.5 *Where the arbitral award is for the payment of money, no interest shall be payable on whole or any part of the money for any period till the date on which the award is made.*

64.6 *The cost of arbitration shall be borne by the respective parties. The cost shall inter alia include fee of the arbitrator(s) as per the rates fixed by the Rly. Administration from time to time.*

64.7 *Subject to the provisions of the aforesaid Arbitration and Conciliation Act 1996 and the rules*

> *there under and any statutory modification thereof shall apply to the arbitration proceedings under this clause.*"
>
> (emphasis added)

37. The GCC and SCC usually work in tandem in any large-scale contract. While the GCC is a generic set of terms and conditions, the SCC correlates to specific clauses of the GCC in order to provide a modification, alteration, embellishment, or specification. Therefore, reference to specific *Clauses i.e. 8 (a), 18,22 (5), 39, 43 (2), 45 (a), 55, 55-A (5), 57, 57A, 61 (1), 61 (2) and 62 (1) (b) of GCC* refer to particular clauses of the GCC and necessarily would have to be correlated to specific clauses of the SCC. The fundamental dispute as to who was responsible for the delay was a question of fact, but whether the extensions were granted due to fault of the contractor or otherwise due to unavoidable reasons, was an issue which arose under *Clauses 17A* and *17B* of the GCC, which in any case did not find mention in *Clause 63* of the GCC.

38. The other clauses under which the issue arose was the interpretation of, *Clauses 28.0* and *29.0* of the SCSDS and *Clauses 25.7* and *25.9* of the SCSDS at best. Considering these were not clauses which were clauses correlated under the GCC, it cannot be argued that these were non-arbitrable in nature.

39. Petitioner's argument was that the contract itself referred to the GCC and had reference at various clauses including *Clause 8.1* of the SIT would bear out that the GCC was in a sense applicable to the contract.

40. Aside from the discussion above on the scope of *Clause 63* of GCC defining "*excepted matters*", what is more striking is that such a drastic objection to jurisdiction was not taken by petitioner under section 16 of A&C Act, or at the stage of filing of pleadings or at the stage of arguments before the Arbitrator, or even at the stage of filing their objections under section 34 of the A&C Act. This, in the opinion of this Court, completely divests and disentitles petitioner from raising the objection at this stage, as a matter of argument.

41. Notwithstanding, that this aspect in any case has been dealt with by the Court above, it is to be noted that the courts have been quite categorical in asserting that objections as to jurisdiction of Arbitral Tribunal ought to be taken at the *first instance*, in fact not later than the submission of the statement of defence as per section 16 (2) of A&C Act. The omission to take such an objection at the earlier stage amounts to a waiver of the right to object.

42. Arbitral Tribunals are now the *first preferred authority* to determine and decide all questions of non-arbitrability. At best, under Section 34 proceedings, the Court can have a '*second look'* at it, the first look being preserved of the Arbitral Tribunal in consonance with the jurisprudence enunciated with respect to Section 16 A&C Act. In this regard it will be instructive to peruse the text of Section 16 A&C Act, which is extracted as under:

> "***16. Competence of arbitral tribunal to rule on its jurisdiction. —***
>
> *(1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with*

respect to the existence or validity of the arbitration agreement, and for that purpose,—

(a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and

(b) a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however, a party shall not be precluded from raising such a plea merely because that he has appointed, or participated in the appointment of, an arbitrator.

(3) A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.

(4) The arbitral tribunal may, in either of the cases referred to in sub-section (2) or sub-section (3), admit a later plea if it considers the delay justified.

(5) The arbitral tribunal shall decide on a plea referred to in sub-section (2) or sub-section (3) and, where the arbitral tribunal takes a decision rejecting the plea, continue with the arbitral proceedings and make an arbitral award.

(6) A party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with Section 34."

(emphasis added)

43. The Supreme Court and this Court, in spirit of Section 16 of the A&C Act and in line with the arbitral concept of *kompetenz-kompetenz*, have time and again held that objections pertaining to jurisdiction/ authority of the Arbitral Tribunal, cannot, for the first time, be raised in a

Section 34 A&C Act petition. Relevant paragraph(s) of the decisions in this regard, are as under:

i. ***Union of India v. Pam Development (P) Ltd.***[2]**:**

> "*10. The learned counsel pointed out that no plea of lack of jurisdiction of the learned arbitrator was taken by the appellant in the statement of defence. Furthermore, the appellant also led evidence in defence. He also pointed out that the appellant, in fact, categorically accepted the jurisdiction of the learned arbitrator by filing a counterclaim in the proceedings. He submits that, in such circumstances, the appellant had clearly waived its right to object to the constitution of the Arbitral Tribunal. Similarly, the plea of excepted matters was also never raised by the appellant during the entire arbitration proceedings. All claims have been decided on merits.*
>
> .....
>
> *15. As noticed above, by order dated 10-7-1998, the High Court appointed Mr Justice Satyabrata Mitra as the sole arbitrator. It is important to notice that this order dated 10-7-1998 was not challenged by the appellant and, therefore, the same became final and binding. This apart, the appellant failed to raise any objection to the lack of jurisdiction of the Arbitral Tribunal before the learned arbitrator.*
>
> *16. As noticed above, the appellant not only filed the statement of defence but also raised a counterclaim against the respondent. Since the appellant has not raised the objection with regard to the competence/jurisdiction of the Arbitral Tribunal before the learned arbitrator, the same is deemed to have been waived in view of the provisions contained in Section 4 read with Section 16 of the Arbitration Act, 1996.*
>
> *17. Section 16 of the Arbitration Act, 1996 provides that the Arbitral Tribunal may rule on its own*

[2] (2014) 11 SCC 366

jurisdiction. Section 16 clearly recognises the principle of kompetenz-kompetenz. Section 16(2) mandates that a plea that the Arbitral Tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. Section 4 provides that a party who knows that any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay shall be deemed to have waived his right to so object.

18. In our opinion, the High Court has correctly come to the conclusion that the appellant having failed to raise the plea of jurisdiction before the Arbitral Tribunal cannot be permitted to raise for the first time in the Court. Earlier also, this Court had occasion to consider a similar objection in BSNL v. Motorola India (P) Ltd. [(2009) 2 SCC 337 : (2009) 1 SCC (Civ) 524] Upon consideration of the provisions contained in Section 4 of the Arbitration Act, 1996, it has been held as follows: (SCC p. 349, para 39)

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

19. In our opinion, the obligations are fully applicable to the facts of this case. The appellant is deemed to have waived the right to object with regard to the lack of jurisdiction of the Arbitral Tribunal."

(emphasis added)

ii. ***Gauri Shankar Educational Trust v. Religare Finvest Ltd.***[3]**:**

"*15. In my opinion, the argument urged on behalf of the petitioners with reference to para 22 of the Fifth Schedule is without any merit for two reasons. The first reason is that any objection under Section 16 of the Arbitration and Conciliation Act with respect to lack of jurisdiction of the arbitration tribunal has to be taken up at the very first instance in the arbitration proceedings. If no such objection is taken in the arbitration proceedings, then after passing of an award, such an objection cannot be taken. This issue has been dealt with by the Hon'ble Supreme Court in its recent judgment in the case of Madhya Pradesh Rural Road Development Authority v. L.G. Chaudhary Engineers and Contractors, (2018) 10 SCC 826. Therefore, even assuming for the sake of arguments that the petitioners could have raised a valid objection under para 22 of the Fifth Schedule for challenging the jurisdiction of the Ld. Arbitrator, yet this objection is no longer open to the petitioners for the first time in this petition at the stage of challenging the Award under Section 34 of the Act, as no such objection was raised in the arbitration proceedings at the first instance as required by Section 16(2) of the Act. Merely because petitioners chose not to appear in the arbitration proceedings would not mean that the provision of Section 16 will not apply inasmuch as the provision of Section 16 applies to contested arbitration proceedings and also uncontested arbitration proceedings resulting in an ex parte Award. Sub-section 2 of Section 16 leaves no doubt of any manner with respect to the issue of the arbitral tribunal lacking*

[3] 2019 SCC OnLine Del 6987

jurisdiction and the same has to be necessarily and shall be raised before the submission of the defence, meaning thereby that this objection of lack of jurisdiction of the arbitrator has to be raised immediately on service/appearance in the arbitration proceedings by the respondents i.e. before filing the statement of defence. Admittedly, since no defence has been raised under Section 16(2) of the Act in the arbitration proceedings, the petitioners therefore now in a Section 34 petition cannot object to the jurisdiction of the Ld. Arbitrator by placing reliance upon para 22 of the Fifth Schedule of the Act.

(emphasis added)

iii. ***Quippo Construction Equipment Ltd. v. Janardan Nirman (P) Ltd.[4]:***

16. In the circumstances, it is clear that:
(i) Though each of the four agreements provided for arbitration, the award rendered by the arbitrator was a common award; and
(ii) In one of the agreements the venue was stated to be Kolkata and yet the proceedings were conducted at Delhi;
However, at no stage, the aforesaid objections were raised by the respondent before the arbitrator and the respondent let the arbitral proceedings conclude and culminate in an ex parte award. Therefore, the question that arises is whether the respondent could be said to have waived the right to raise any of the aforesaid objections.

……

24. It was possible for the respondent to raise submissions that arbitration pertaining to each of the agreements be considered and dealt with separately. It was also possible for him to contend that in respect of the agreement where the venue was agreed to be at Kolkata, the arbitration proceedings be conducted

[4] (2020) 18 SCC 277

> *accordingly. Considering the facts that the respondent failed to participate in the proceedings before the arbitrator and did not raise any submission that the arbitrator did not have jurisdiction or that he was exceeding the scope of his authority, the respondent must be deemed to have waived all such objections.*
> (emphasis added)

44. Further, this Court, while deciding a petition under Section 34 of the A&C Act, is only permitted to take a '*second-look*', as regards an objection which primarily falls within the purview of Section 16 of the A&C Act. The Supreme Court in **V*idya Drolia and Others v. Durga Trading Corporation*[5]**, has opined as under**:**

> "*154. Discussion under the heading "Who Decides Arbitrability?" can be crystallised as under:*
> *154.1. Ratio of the decision in Patel Engg. Ltd. [SBP & Co. v. Patel Engg. Ltd., (2005) 8 SCC 618] on the scope of judicial review by the court while deciding an application under Sections 8 or 11 of the Arbitration Act, post the amendments by Act 3 of 2016 (with retrospective effect from 23-10-2015) and even post the amendments vide Act 33 of 2019 (with effect from 9-8-2019), is no longer applicable.*
> *154.2. Scope of judicial review and jurisdiction of the court under Sections 8 and 11 of the Arbitration Act is identical but extremely limited and restricted.*
> *154.3. The general rule and principle, in view of the legislative mandate clear from Act 3 of 2016 and Act 33 of 2019, and the principle of severability and competence-competence, is that the Arbitral Tribunal is the preferred first authority to determine and decide all questions of non-arbitrability. The court has been conferred power of "second look" on aspects of non-arbitrability post the award in terms of sub-clauses (i),*

[5] (2021) 2 SCC 1

(ii) or (iv) of Section 34(2)(a) or sub-clause (i) of Section 34(2)(b) of the Arbitration Act."

(emphasis added)

Re: Interest

45. As regards interest, an objection has been taken by petitioner that as per *Clause 64.5* of GCC, no interest could have been awarded by the Arbitrator. The argument to the contrary, by the respondent, is based on Section 31 (7) A&C Act which reads as under:

> ***"Section 31. Form and contents of arbitral award***
> .....
> *(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.*
> *1[(b) A sum directed to be paid by an arbitral award shall, unless the award otherwise directs, carry interest at the rate of two per cent. higher than the current rate of interest prevalent on the date of award, from the date of award to the date of payment.*
> *Explanation. —The expression "current rate of interest" shall have the same meaning as assigned to it under clause (b) of section 2 of the Interest Act, 1978 (14 of 1978).]*
> *2[(8) The costs of an arbitration shall be fixed by the arbitral tribunal in accordance with section 31A.]*
> *Explanation. —For the purpose of clause (a), "costs" means reasonable costs relating to—*
> *(i) the fees and expenses of the arbitrators and witnesses,*
> *(ii) legal fees and expenses,*

> *(iii) any administration fees of the institution supervising the arbitration, and*
> *(iv) any other expenses incurred in connection with the arbitral proceedings and the arbitral award.*
> (emphasis added)

46. The issue would arise whether *Clause 64.5* of GCC would act as a complete exclusion to the grant of interest, or whether Section 31 (7) of A&C Act would override any such exclusion under the contract.

47. There are three aspects to the issue of interest, the *first* relates to all the refunds and reimbursements which have been sought, in respect of which the Arbitrator has awarded 9% interest from 25th May 2014 till 30th September 2018, and thereafter 18% per annum till the date of payment. The *second* aspect pertains to the quantification of amounts post-preparation of the final bill, which was directed to be prepared and amounts paid on or before 30th September 2018. The *third* aspect is that if the total amount was not paid till 30th September 2018, then it would carry an interest rate of 18% per annum till the date of payment.

48. Aside from the fact that the petitioner never took up this issue of bar under *Clause 64.5* of GCC, to argue disentitlement of the Arbitrator from awarding interest, it is evident that the Arbitrator exercised his power to award interest under Section 31 (7) of A&C Act.

49. This aspect was never raised by the petitioner before the Arbitrator, and the award of the Arbitrator is, therefore, in consonance with Section 31 (7) of the A&C Act.

50. As regards the issue of interest, the petitioners, in their reply and counterclaim, raised objections only with reference to *Clauses 52, 52A*,

and 17A(iii) of the GCC. Notably, no objection was raised in relation to *Clause 64.5* of the GCC, which was conspicuously absent.

51. Although we are not invited to speculate why the restriction on payment of interest as per *Clause 64.5* of GCC was not raised by the petitioner, the fact that it was indeed not raised is indisputable. Petitioners attempt to rake up this issue at this stage will therefore be hit by the *doctrine of waiver*. Petitioner cannot take advantage of it at this stage of Section 34 of the A & C Act, having given up its option to raise, what it now professes to be a fundamental ground.

52. Though it may be academic, there is also jurisprudence to suggest that standard form (dotted line) contracts are prone to be diluted/set aside as being improvident or unconscionable, since the deprived and affected party is denied a remedy to which, commercially, they ought to be entitled. Decisions of the Supreme Court in this regard in ***Central Inland Water Transport Corporation. v. Brojo Nath Ganguly and Another***[6]***, LIC of India and Another v. Consumer Education & Research Centre and Others***[7] and ***Lombardi Engineering Ltd. v. Uttarakhand Jal Vidyut Nigam Limited***[8] are instructive.

53. In ***Reliance Cellulose Products Ltd. v. ONGC Ltd***.[9], the Supreme Court observed that "*since interest is compensatory in nature and parasitic upon a principal sum not paid in time, courts have generally disapproved of contractual clauses that bar the payment of interest*."

[6] (1986) 3 SCC 156
[7] (1995) 5 SCC 482
[8] (2024) 4 SCC 341
[9] (2018) 9 SCC 266

This position was further affirmed by the Supreme Court in ***Ferro Concrete Construction (India) Pvt Ltd. v. State of Rajasthan***[10].

Scope of Section 34

54. A brief note may be made on the scope of interference by a Court under Section 34 of the A&C Act. The decisions passed by the Supreme Court in this regard have been usefully and succinctly chronicled by a Coordinate Bench of this Court in ***NDMC v. R&T Enterprise***[11]. Relevant paragraphs of the same are extracted hereunder:

> "*55. The decisions on the scope of Section 34 of the 1996 Act are too numerous to justify any paraphrasing, but the position is, by now, certain. UHL Power Co. Ltd. v. State of H.P.[(2022) 4 SCC 116] and Dyna Technologies (P) Ltd. v. Crompton Greaves Ltd. .[(2019) 20 SCC 1] 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..[(2019) 15 SCC 131] and Parsa Kente Collieries Ltd. v. Rajasthan Rajya Vidyut Utpadan Nigam Ltd.[(2019) 7 SCC 236]. 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 [Dyna Technologies]. Instances where the construction of the contractual clauses, by*

[10] 2025 SCC OnLine SC 708
[11] 2024 SCC OnLine Del 5436

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.[(2020) 5 SCC 164] and Patel Engineering Ltd. v. North Eastern Electric Power Corporation Ltd. [(2020) 7 SCC 167].

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 viced of irrationality. 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:

> *"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."*

57. In Associate Builders and Indian Oil Corporation Ltd. v. Shree Ganesh Petroleum, 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 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:

"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., 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.I., the Arbitral Tribunal could not award a claim at a rate higher than that 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), Union Territory of Pondicherry v. P.V. Suresh, Shree Ambica Medical Stores v. Surat People's Co-operative Bank Ltd.. IFFCO Tokio General Insurance Co. v. Pearl Beverages Ltd., Tata Consultancy Services v. Cyrus Investments (P) Ltd. and Maharashtra State Electricity Distribution Co. v. Maharashtra Electricity Regulatory Commission.

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, further clarified that an arbitral award could not be modified by the Court, as held in N.H.A.I. v. M. Hakeem and Dakshin Haryana Bijli Vitran Nigam Ltd. v. Navigant Technologies (P) Ltd. 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, could only quash the award leaving the parties to reinitiate arbitration should they so choose, but could not itself rewrite or modify the award.*
>
> *62. As held by a coordinate Bench of this Court in N.H.A.I. v. Trichy Thanjavur Expressway Ltd., the M. Hakeem proscription against modification of an arbitral award by Court does not extend to setting aside of the award in part, where that part is found to be severable from the rest of the award.*
> *63. These principles also stand exhaustively delineated in Reliance Infrastructure Ltd. v. State of Goa.*"
>
> (emphasis added)

55. There are various judicial deliberations on the scope of Section 34 of the A&C Act, and there is no necessity for reiterating the same. Essentially recourse against an arbitral award can only be made by an aggrieved party and can be set aside by the Court only if, *inter alia*, the award is in conflict with the public policy of India or is vitiated by patent illegality, in addition to other procedural objections. *Firstly*, an award is considered to be in conflict with the public policy of India as per *Explanation 1* to Section 34 (2) (b) if it is induced by *fraud* or *corruption*, is in contravention with *fundamental policy of Indian law*, or is in conflict with the *most basic notions of morality and justice*. *Secondly*, *patent illegality*, though not embellished in Section 34 (2) (a), has been deliberated, as noted above by the Courts. Distinctive exception to both aspects of *fundamental policy* and *patent illegality* has been provided in the Act, specifically through *Explanation 2* to Section 34 (2) (b) and to Section 34 (2) A, essentially excluding review on the merits of dispute, erroneous application of law, or re-appreciation of evidence.

The objections raised by the petitioner clearly fall within these exceptions and do not persuade this Court to set aside the award.

56. For the purpose of assessing these objections, the petitioner has invited the Court to review merits of the dispute, re-appreciate evidence, and has drawn attention to an erroneous application of law. These, having statutorily excluded from the purview of Section 34 assessment, persuade the Court to dismiss this petition and the petitioner's objections for setting aside the award.

57. Moreover, there is nothing in the award which shocks the conscience of the Court, or is fundamentally illegal, or is so perverse as to go to the root of the matter.

58. The fulcrum of petitioner's assertion were arguments which do not stand their ground, besides they have not been raised before the Arbitrator or even in Section 34 A & C Act petition, and have merely been trussed up at this stage, only to result in rejection by this Court.

59. Accordingly, this petition stands dismissed in above terms.

60. Judgement be uploaded on the website of this Court.

(ANISH DAYAL)
JUDGE

MAY 13, 2025/SM/*tk-kp*