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

Date of decision: 14.05.2026

\+ O.M.P. (COMM) 51/2016, I.A. 11301/2021 (For placing on record the renewed bank guarantee), I.A. 14222/2022 (For placing on record the renewed bank guarantee), I.A. 18890/2023 (For placing on record the renewed bank guarantee) & I.A. 36267/2024 (For placing on record the renewed bank guarantee)

NATIONAL HIGHWAYS AUTHORITY OF INDIA

.....Petitioner

Through: Mr. Nikhil Mehta and Mr. Harsh Vikram Trivedi, Advocates

versus

ORIENTAL STRUCTURAL ENGINEERS PVT. LTD

.....Respondent

Through:

CORAM:
HON'BLE MR. JUSTICE HARISH VAIDYANATHAN SHANKAR

JUDGMENT (ORAL)

1. The present Petition has been instituted under Section 34 of the **Arbitration and Conciliation Act, 1996**[1] by **National Highways Authority of India**[2], seeking setting aside of the **Arbitral Award dated 18.11.2015**[3] rendered by the learned Arbitral Tribunal in disputes arising out of the **Contract Agreement dated 29.09.2005**[4] executed between the parties for the work pertaining to construction of

[1] A&C Act
[2] NHAI
[3] Impugned Award
[4] Agreement

the Jhansi Bypass Project on National Highway-25 in the State of Uttar Pradesh, Package EW-II (UP-3).

2. The disputes adjudicated by the learned Arbitral Tribunal, at the instance of the Respondent herein, principally arose in relation to three claims, *namely*:

(i) **Claim No. 1** - concerning payment of additional costs incurred on account of wrongful recovery and subsequent non-payment towards Construction Workers Welfare Cess, claimed as additional expenditure arising due to subsequent legislation under **Conditions of Particular Application**[5];

(ii) **Claim No. 2** - pertaining to compensation sought on account of the prolongation of the contract period and delays allegedly occasioned during execution of the project; and

(iii) **Claim No. 3** - relating to non-payment for Tack Coat provided pursuant to BOQ Item No. 4.02 above the DBM first layer.

3. The said claims ultimately culminated in the Impugned Award, whereby the learned Arbitral Tribunal allowed the aforesaid claims in favour of the Respondent.

4. Aggrieved by the findings and conclusions returned in the Impugned Award insofar as the aforesaid claims are concerned, the Petitioner, NHAI, has instituted the present petition before this Court under Section 34 of the A&C Act.

5. At the outset, it is pertinent to note that the parties are *ad idem* insofar as Claim Nos. 1 and 3 are concerned. Learned counsel appearing on behalf of the parties, and particularly learned counsel for the Petitioner, fairly submitted that the controversies arising under the

[5] COPA

said claims are no longer *res integra* and stand authoritatively settled by judicial precedents.

6. Insofar as Claim No. 1 is concerned, the same stands squarely covered by the judgment of the Hon'ble Supreme Court in ***Prakash Atlanta (JV) v. National Highways Authority of India***[6]. Likewise, Claim No. 3 is stated to be governed by the judgment rendered by this Court in ***National Highways Authority of India v. Ssangyong Engineering & Construction Co. Ltd. - Oriental Structural Engineers Ltd. (JV)***[7].

7. Considering the aforesaid undisputed position, and in view of the fact that the said issues were not pressed before this Court during the course of arguments, this Court does not deem it necessary to undertake any further examination of Claim Nos. 1 and 3 or the findings returned thereon in the Impugned Award.

8. In view of the foregoing, the challenge in the present petition substantially survives only in relation to Claim No. 2, pertaining to compensation awarded on account of prolongation of the contract period and delays in execution of the project, which accordingly forms the subject matter of adjudication before this Court.

SUBMISSIONS ON BEHALF OF THE PARTIES:

9. Learned Counsel for the Petitioner submits that the Impugned Award, insofar as it grants compensation in favour of the Respondent, towards delay and prolongation costs, is patently illegal and contrary to the terms of the Agreement.

[6] 2026 SCC OnLine SC 98
[7] 2012:DHC:8203

10. It is contended that the learned Arbitral Tribunal failed to appreciate that the Respondent itself was responsible for the slow progress of works. Learned counsel for the Petitioner further submits that the contemporaneous correspondence exchanged between the parties, including the communications issued by the Engineer, clearly demonstrates that the delay was not only attributable solely to the Petitioner.

11. Learned Counsel appearing on behalf of the Petitioner has vehemently assailed the observations recorded by the learned Arbitral Tribunal while adjudicating Claim No. 2 in the Impugned Award, particularly the finding to the following effect:

> "2.3.15 …….
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> *****
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> Notes of the AT:
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> *****
>
> 4. All delays have been attributed to the Respondent and all interim as well as final EOT have been recommended without LD.."

12. It has been contended that the aforesaid observation forms the foundational basis for the learned Arbitral Tribunal's determination on Claim No. 2 and materially influences the findings returned with respect to attribution of delay and the consequent entitlement arising therefrom. Learned counsel for the Petitioner submits that the said conclusion is erroneous, contrary to the material available on record, inasmuch as the learned Arbitral Tribunal has allegedly failed to properly appreciate the contemporaneous correspondence exchanged between the parties, as well as the factual matrix governing the grant of extensions of time.

13. It is submitted by the learned Counsel for the Petitioner that the aforesaid finding is contrary to the contemporaneous record and overlooks the material communications issued by the Engineer,

wherein only certain specific grounds were considered while recommending interim extensions of time. It is contended that the learned Arbitral Tribunal erroneously proceeded on the premise that the entirety of the delay was attributable to the Petitioner despite the existence of contractor-attributable delays reflected in the record.

14. ***Per contra***, Mr. Anil K. Airi, learned Senior Counsel appearing on behalf of the Respondent, has drawn the attention of this Court to paragraphs 2.3.17 and 2.3.20 of the Impugned Award pertaining to Claim No. 2, to contend that the Engineer had, from time to time, recommended grant of interim as well as final **Extension of Time**[8] up to the actual date of completion of the project, i.e., 31.08.2010, without levy of Liquidated Damages.

15. It is submitted that, notwithstanding such categorical recommendations made by the Engineer, the Petitioner failed to take any final decision with respect to the grant of EOT for an inordinate and considerable period of time.

16. Learned Senior Counsel further submits that the learned Arbitral Tribunal, upon due appreciation of the contractual framework, contemporaneous records, and the material placed on record, rightly concluded that the prolonged and continued inaction on the part of the Petitioner in taking a final decision on the recommendations for grant of EOT clearly established that the delays in execution of the project were not attributable to the Respondent herein. It is contended that, in view of such findings, the Respondent could neither have been held liable for the delays nor disentitled from claiming the consequential reliefs arising therefrom.

[8] EOT

17. It is further submitted by the learned Senior Counsel that the findings rendered by the learned Arbitral Tribunal are pure findings of fact based on appreciation of evidence and contractual interpretation and, therefore, do not warrant interference within the limited scope of jurisdiction exercisable under Section 34 of the A&C Act.

ANALYSIS:

18. This Court has heard the learned counsel appearing for the parties at length and, with their able assistance, has carefully perused the Award and the other material placed on record.

19. 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 A&C Act. The contours of judicial intervention in such proceedings have been authoritatively delineated and settled by a consistent and evolving line of precedents of the Hon'ble Supreme Court.

20. 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. Enexio Power Cooling Solutions (India) (P) Ltd.***[9], 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)

[9] (2025) 2 SCC 417

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.

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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 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.

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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.

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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:

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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 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 reappreciation 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.

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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*).

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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 reappreciation of evidence.

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 ***SsangyongEngg. & 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 ***SsangyongEngg. & 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 ***SsangyongEngg. & 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 ***SsangyongEngg. & 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 ***SsangyongEngg. & 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 ***SsangyongEngg. & 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.

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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 intefere [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)

21. At the outset, this Court deems it apposite to take note of the categorical findings returned by the learned Arbitral Tribunal, particularly in paragraph nos. 2.3.17 and 2.3.20 of the Impugned Award pertaining to Claim No. 2, while dealing with the objections now sought to be raised by the Petitioner. The said findings assume considerable significance, inasmuch as the learned Arbitral Tribunal has comprehensively examined the issue relating to EOT, attribution of delay, levy of Liquidated Damages, and the consequential entitlement of the Respondent to additional costs arising out of prolongation of the contract period. The relevant extracts of the Impugned Award are reproduced herein below:

"**2.3.17** The Respondent, during oral hearings, had stated that the EOT case is lying with the NHAI (HQ). It is now more than 5 years since the Engineer's recommendation of the EOT was forwarded to the Respondent. In absence of the contractual requirement of the approval of the NHAI to the EOT recommended by the Engineer, the Engineer has not finally determined the EOT.

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2.3.20 Now, the work is not in progress, having been completed more than 5years back, the opportunity to issue a show cause notice, even if there had been any valid reason for issuing such a notice, has been totally lost. NHAI is, thus, not in a legal position to levy any LD. Therefore, the Arbitral Tribunal is of the view that the Claimant is entitled to grant of EOT upto the date of completion i.e. upto 31-08-2010 without levy of LD, even though it is yet to be formally approved by NHAI, which will now be only a contractual requirement, before the Engineer or NHAI can formally communicate it to the Claimant. Various reasons of delay as

brought out hereinabove have been analysed by the AT and: it has found that the delays are attributable to the Respondent. AT agrees-with the Extension of Time (EOT) upto 31-08-2010 without LD , as finally recommended by the Engineer vide his letters dated 18-09-2010 (Ex. C-2/54) and 24-09-2010 (Ex. C-2/55); o giving reasons of delay as (i) ROB.s block not provided by Railways as per schedule , (ii) 0 Work suspended due to stretch Km. 96+850 to 98+000 objected by Army Aviation Q Authority as "No Construction Zone" .and (iii) Land acquisition i.e. delay in award declaration and disbursement of compensation by the Competent Authority , Jhansi The EOT has been recommended under Clause 44 of OA by the Engineer for 832 days Q i.e. from 21-05-2008 to 31-08-2010 against 955 days claimed by the Contractor However, the Engineer, while making recommendation, has stated, "There shall be no additional cost/compensation or any additional claim except normal escalation /price adjustment where admissible as per contract" but has not assigned any reason to deny the additional cost/compensation which is payable as per specific provisions in the .CA because the events necessitating EOT fall under Clauses 12.2, 40.2 & 42.2 of CA, which also necessitate determination of additional cost on account of these reasons of delays besides Extension of Time . Moreover, the Sections 54 & 73 of the 'Indian Contract Act ,1872 also recognize payment of compensation to a party in case of breach of the contract by the other party. The AT is of the view that the Engineer's failure to determine the additional cost cannot O disentitle the Contractor from his claim for compensation/additional cost on account of O these delays. The AT, therefore, holds that the Claimant is entitled to EOT upto 31-08- 0 2010without LD as well as additional cost on account of the delay of 832 days mentioned above."

22. The findings recorded in the afore-extracted portions of the Impugned Award, in the considered opinion of this Court, categorically negate the submissions advanced on behalf of the Petitioner. A careful reading of the said findings demonstrates that the learned Arbitral Tribunal has returned clear, cogent, and reasoned conclusions explaining why the delays in execution of the project could not have been attributed to the Respondent herein. The learned Tribunal has specifically identified the causes of delay, analysed the contemporaneous material placed on record, and thereafter concluded that the impediments leading to prolongation of the project arose due

to factors beyond the control of the Respondent and were attributable to the acts and omissions of the authorities concerned.

23. This Court has also carefully perused the remaining portions of the discussion and analysis undertaken by the learned Arbitral Tribunal while adjudicating Claim No. 2 of the Impugned Award and finds that the learned Tribunal carried out an extensive, detailed, and nuanced examination of the disputes arising between the parties before rendering its findings. The Impugned Award reflects a comprehensive appreciation not merely of isolated contractual clauses, but of the entire factual matrix governing the dispute, including the contemporaneous correspondence exchanged between the parties, the conduct of the parties during execution of the project, the recommendations made by the Engineer from time to time, the contractual scheme governing grant of EOT, and the evidence adduced before the learned Tribunal.

24. This Court finds substance in the reasoning adopted by the learned Tribunal that the Respondent could not have been expected to await a formal decision on EOT from the Petitioner indefinitely. The record reveals that the Respondent had periodically sought EOT together with consequential costs commencing from 03.06.2008, whereas the Engineer had been recommending interim EOT from as early as 13.07.2007 without the levy of Liquidated Damages.

25. The chronology of correspondence considered by the learned Tribunal further reveals that *vide* communications dated 18.09.2010 and 24.09.2010, the Engineer ultimately recommended extension upto the actual date of completion i.e., 31.08.2010. Despite such repeated recommendations, the Petitioner admittedly failed to take any final

decision on the issue for more than five years, when the Impugned Award was passed.

26. The learned Tribunal was therefore justified in observing that a contracting party cannot remain indolent for years together, keep the issue in a state of uncertainty, and thereafter seek to prejudice the opposite party on the ground that the EOT had not attained formal approval. Such a contention, if accepted, would strike at the very commercial efficacy of infrastructure contracts and render the contractual dispute resolution mechanism otiose.

27. This Court further finds that the learned Tribunal correctly appreciated the contractual provisions governing possession of the site and delays attributable thereto. Clauses 42.2 of the GCC unequivocally cast an obligation upon the Employer to provide possession of such portions of the site and such access thereto as would enable the Contractor to proceed with the execution of the works in accordance with the programme contemplated under the Contract. The learned Tribunal, after considering the contemporaneous record, arrived at the conclusion that the site was not handed over in an encumbrance-free and workable condition within the contractual timelines.

28. The material considered by the learned Tribunal demonstrated that portions of the land continued to remain unavailable on account of pending acquisition, delayed declaration of awards, and delayed disbursement of compensation by the competent authorities. The learned Tribunal was therefore justified in concluding that the delays attributable to non-availability of site and land acquisition were squarely referable to the Petitioner and not to the Respondent.

29. This Court also cannot lose sight of the fact that the Engineer's recommendations, which now form the subject matter of challenge by the Petitioner, were never rejected contemporaneously by the Petitioner itself. The Petitioner, despite being the beneficiary of repeated consultations and recommendations under the contractual framework, chose to maintain complete silence for years. Having consciously failed to act upon the Engineer's recommendations at the relevant stage, the Petitioner cannot now selectively rely upon portions of the record in an attempt to reopen factual determinations already rendered by the learned Tribunal.

30. This Court further notes that the learned Tribunal did not proceed mechanically in quantifying compensation. The Award reflects a detailed analysis of the various heads of claim, including overheads, financing costs, additional material costs, and prolongation expenses. In view thereof, the methodology adopted by the learned Tribunal, therefore, cannot be said to be arbitrary or unsupported by evidence.

31. It is well settled that the jurisdiction of this Court under Section 34 of the A&C Act does not permit a re-appreciation of evidence as though sitting in appeal over the Award. The view adopted by the learned Tribunal is clearly a plausible and legally sustainable view arising from the material placed before it. Merely because another interpretation may also be possible would not justify interference under Section 34 of the A&C Act.

32. Accordingly, in the considered opinion of this Court, no patent illegality, perversity, jurisdictional infirmity, or conflict with the fundamental policy of Indian law is discernible from the impugned Award. The challenge mounted by the Petitioner is essentially an

invitation to this Court to revisit pure findings of fact already adjudicated upon by the learned Tribunal after exhaustive consideration of the record, which is impermissible in the exercise of jurisdiction under Section 34 of the A&C Act.

CONCLUSION:

33. In view of the foregoing discussion, this Court is of the considered opinion that the Impugned Arbitral Award dated 18.11.2015 does not suffer from any infirmity warranting interference under Section 34 of the A&C Act.

34. Accordingly, the present instituted by NHAI stands dismissed. Consequently, the Impugned Award is upheld.

35. All pending application(s), if any, also stand disposed of in the aforesaid terms.

36. No order as to costs.

HARISH VAIDYANATHAN SHANKAR, J.

MAY 14, 2026/rk/kv/kr