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

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***Judgment reserved on: 04.05.2026***  
***Judgment pronounced on: 21.05.2026***

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**OMP (ENF.) (COMM.) 46/2018 & I.A. 4165/2018 (U/O XXI  
Rule 41(2))**

**BUDHIRAJA ELECTRICALS** .....Decree Holder

Through: Ms. Kirti Mewar, Advocate

versus

**PUBLIC WORK DEPARTMENT (GOVT. OF NCT OF  
DELHI)** .....Judgement Debtor

Through: Mr. Dhananjaya Mishra, Mr.  
Navneet Dogra and Mr.  
Bhargav Verma, Advocates

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**O.M.P. (COMM) 207/2017 & I.A. 5261/2017 (Stay)**

**PUBLIC WORK DEPARTMENT (GOVT. OF DELHI)  
THROUGH ITS OFFICE EXECUTIVE ENGINEER  
(ELECTRICAL)** .....Petitioner

Through: Mr. Dhananjaya Mishra, Mr.  
Navneet Dogra and Mr.  
Bhargav Verma, Advocates

versus

**BUDHIRAJA ELECTRICALS THROUGH ITS PARTNER  
MR. MOHINDER LAL BUDHIRAJA** .....Respondent

Through: Ms. Kirti Mewar, Advocate



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

**J U D G M E N T**

**HARISH VAIDYANATHAN SHANKAR, J.**

1. The **Objection Petition, being O.M.P. (COMM.) 207/2017<sup>1</sup>**, has been instituted under Section 34 of the **Arbitration and Conciliation Act, 1996<sup>2</sup>**, seeking setting aside of the **Arbitral Award dated 26.10.2016, as revised on 07.01.2017<sup>3</sup>**, rendered by the learned Sole Arbitrator insofar as it pertains to Claim Nos. 3 and 6, along with the corresponding claims relating to interest.

2. The **Enforcement Petition, being O.M.P.(ENF.)(COMM.) 46/2018<sup>4</sup>**, has been filed under Order XXI Rules 10 and 11 read with Section 151 of the Code of Civil Procedure, 1908 and Section 36 of the A&C Act, seeking enforcement of the aforesaid Impugned Arbitral Award.

3. It is pertinent to note that both the aforesaid proceedings arise from the same Arbitral Award. While the Objection Petition calls into question the validity and sustainability of the Impugned Arbitral Award, the Enforcement Petition seeks its enforcement. In such circumstances, it is expedient that the challenge to the Arbitral Award under Section 34 of the A&C Act be considered prior to, and in conjunction with, the execution proceedings. This course is necessitated to obviate the possibility of inconsistent findings, avoid

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<sup>1</sup> Objection Petition

<sup>2</sup> A&C Act

<sup>3</sup> Arbitral Award

<sup>4</sup> Enforcement Petition



multiplicity of proceedings, and ensure that the enforceability of the Arbitral Award is determined in a coherent and conclusive manner.

4. For the sake of convenience, clarity, consistency, and ease of reference, this Court proposes to refer primarily to the facts and pleadings as set out in the Objection Petition while adjudicating the present matters.

5. Needless to state, the findings and conclusions arrived at in the Objection Petition, insofar as they pertain to the validity and sustainability of the Impugned Arbitral Award, shall have a direct and determinative bearing on the Enforcement Petition, since the execution proceedings arise out of the very same Arbitral Award. Consequently, the conclusions reached in the Petition under Section 34 of the A&C Act shall, to the extent applicable, govern the execution proceedings.

**BRIEF FACTS:**

6. The present disputes arise out of a Tripartite Agreement executed between the Public Works Department, Government of NCT of Delhi, M/s Parnika Commercial & Estate Pvt. Ltd., being the main contractor, and M/s Budhiraja Electricals, being the electrical sub-contractor, in relation to the work pertaining to construction of EDP Cell-cum-Referral Clinic/Administrative Block-cum-OPD Block and Additional Basement Parking at G.B. Pant Hospital, New Delhi, under Composite Contract No. 98/EE(E)/PWD/ED-1/2005-06, subsequently re-allotted as No. 47/EE(E)/B-241/2007-08.

7. The work was commenced from 11.01.2006 and the stipulated date of completion was 10.07.2008. It is not in dispute that the work



was ultimately completed on 30.11.2011 and the delay stood regularised by the Department without the levy of compensation.

8. Disputes subsequently arose between the parties *inter alia* in relation to claims concerning escalation under Clause 10CC of the **General Conditions of Contract**<sup>5</sup>, compensation towards deployment of staff and watch and ward during the extended period, loss of turnover/profitability, withheld amounts and interest thereon.

9. Upon invocation of arbitration, this Court, in proceedings under Section 11 of the A&C Act, appointed Shri Vinod Jain, District & Sessions Judge (Retd.), as the learned Sole Arbitrator to adjudicate the disputes between the parties.

10. The learned Arbitrator rendered the Impugned Arbitral Award dated 26.10.2016, subsequently revised on 07.01.2017 under Section 33 of the A&C Act, whereby various claims of the Claimant were allowed.

11. Aggrieved thereby, the Petitioner instituted the Objection Petition under Section 34 of the A&C Act, seeking the setting aside of the Impugned Arbitral Award, whereas the Award Holder instituted the Enforcement Petition seeking enforcement thereof.

12. The challenge by the Petitioner before this Court is confined primarily to the findings returned by the learned Arbitrator in respect of Claim No. 3 relating to escalation under Clause 10CC of the GCC and Claim No. 6 concerning loss of turnover/profitability on account of prolongation of the contract, along with the corresponding claims relating to interest.

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<sup>5</sup> GCC



13. It is in the aforesaid backdrop that the present matters have come up for consideration before this Court.

**SUBMISSIONS BY THE PARTIES:**

14. Learned counsel appearing on behalf of the Petitioner would submit that the challenge to the Impugned Arbitral Award is, in substance, confined to the findings returned by the learned Arbitrator in respect of Claim Nos. 3 and 6, along with the corresponding claims relating to interest.

15. It would be submitted that Claim No. 3 pertains to the grant of escalation under Clause 10CC of the GCC, which has been erroneously granted for the extended period of the contract. Claim No. 6 relates to the award of compensation towards alleged loss of profits on account of the prolongation of the contract, which is assailed as being without evidentiary foundation.

16. Learned counsel appearing on behalf of the Petitioner would contend that the Impugned Arbitral Award, insofar as it allows Claim No. 3 (Rs.38,96,175/- towards escalation) and Claim No. 6 (Rs.16,23,195/- towards loss of profits), is liable to be set aside as being contrary to the public policy of India and suffering from patent illegality.

17. It would be further contended that the findings returned by the learned Arbitrator are *sans* any cogent evidence, and the Impugned Arbitral Award, to that extent, is non-speaking and devoid of reasons, thereby falling foul of the mandate under Section 31(3) of the A&C Act. It would also be contended that an arbitral award which is based on no evidence or fails to disclose intelligible reasons would warrant interference under Section 34 of the A&C Act. In support of this



proposition, reliance would be placed on *Associate Builders v. DDA*<sup>6</sup> and *Ssangyong Engineering & Construction Co. Ltd. v. National Highways Authority of India*<sup>7</sup>.

18. Learned counsel would further contend that the award of Rs.38,96,175/- under Claim No. 3 towards escalation under Clause 10CC of the GCC is wholly untenable, inasmuch as the said clause is confined to the stipulated period of the contract and does not extend to the prolonged period. It would further be urged that the learned Arbitrator has erroneously invoked Section 73 of the **Indian Contract Act, 1872**<sup>8</sup> in the absence of any proof of actual loss or damage suffered by the Respondent. It would also be submitted that damages cannot be awarded on mere assumptions or equitable considerations, but must be founded upon clear evidence of loss. Reliance in this regard is placed on *General Manager, Northern Railway v. Sarvesh Chopra*<sup>9</sup>.

19. Insofar as Claim No. 6 is concerned, learned counsel would contend that the award of Rs.16,23,195/- towards loss of profits is equally unsustainable, having been granted on a purely notional and formulaic basis. It would be submitted that the learned Arbitrator has mechanically applied a 15% benchmark (10% towards overheads and 5% towards profit) on the value of the work, purportedly relying upon a **Central Public Work Department**<sup>10</sup> memorandum dated 14.12.2007, without any evidence to demonstrate that the contractor had in fact suffered loss of profits or was prevented from undertaking other works. It would be contended by the learned counsel for the

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<sup>6</sup> (2015) 3 SCC 49

<sup>7</sup> (2019) 15 SCC 131

<sup>8</sup> ICA

<sup>9</sup> (2002) 4 SCC 45

<sup>10</sup> CPWD



Petitioner that loss of profit cannot be presumed and must be strictly proved. In this regard, reliance is placed on *M/S Kailash Nath Associates v. Delhi Development Authority*<sup>11</sup> and *Bharat Coking Coal Ltd. v. L.K. Ahuja*<sup>12</sup>.

20. Learned counsel would further contend that the grant of interest in the Arbitral Award by the learned Arbitrator is wholly consequential to the aforesaid claims and cannot be sustained independently. It would be submitted that once the principal amounts awarded under Claim Nos. 3 and 6 are liable to be set aside; the award of interest thereon in any manner would necessarily fall.

21. It would thus be contended by the learned counsel for the Petitioner that the Impugned Arbitral Award, to the aforesaid extent, is liable to be set aside.

22. *Per contra*, learned counsel appearing on behalf of the Respondent would oppose the contentions advanced on behalf of the Petitioner concerning the above-mentioned claims.

23. Learned counsel for the Respondent would contend that the Impugned Arbitral Award does not warrant any interference under Section 34 of the A&C Act, inasmuch as the same is founded upon a proper, detailed and reasoned appreciation of the pleadings, evidence, and material placed on record.

24. It would be submitted that the learned Arbitrator has, after duly considering the claims and upon a comprehensive evaluation of the oral and documentary evidence, including the cross-examination of witnesses, rendered a well-reasoned and speaking award which reflects due application of mind.

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<sup>11</sup> 2015 (4) SCC 136

<sup>12</sup> (2004) 5 SCC 109



25. It would further be contended that the present Petition is, in substance, an attempt by the Petitioner to seek a re-adjudication of the disputes on merits, which is impermissible within the limited scope of Section 34 of the A&C Act.

26. Learned counsel for the Respondent would submit that the Impugned Arbitral Award is just, proper, and intelligible, and does not suffer from any perversity or patent illegality, particularly in view of the fact that the findings returned therein are, *inter alia*, based upon admissions made by the Petitioner's witness during cross-examination.

27. Learned counsel would further contend that the Petitioner has failed to establish any ground falling within the limited contours of interference under Section 34 of the A&C Act, including any demonstrable conflict with the public policy of India. It would be submitted that the scope of judicial interference with arbitral awards stands considerably circumscribed, and the Court cannot act as a court of appeal by re-appreciating evidence or substituting its own view for that of the learned Arbitrator.

28. In support of the aforesaid submission, reliance would be placed by the learned counsel for the Respondent on *Ssangyong Engineering (supra)* contending that the expression "*public policy of India*" is confined to contravention of the fundamental policy of Indian law or the most basic notions of justice or morality, and that "*patent illegality*" must go to the root of the matter and does not include mere erroneous application of law. Further, re-appreciation of evidence is impermissible in proceedings under Section 34 of the



A&C Act. The said position, as per the Respondent, has been reiterated in *Delhi Airport Metro Express (P). Ltd. v. DMRC*<sup>13</sup>.

29. Learned counsel would further contend that the findings recorded by the learned Arbitrator are squarely founded upon admissions made by the Petitioner in its pleadings as well as by its witness during cross-examination, and such admissions constitute the best form of evidence. In this regard, reliance would be placed on *Delhi Transport Corporation v. Shyam Lal* and *Union of India v. Ibrahim Uddin*<sup>14</sup> to contend that admissions, though not conclusive, are decisive unless successfully explained or withdrawn.

30. It would be contended that the award towards escalation under Claim No. 3 and loss of profitability under Claim No. 6, along with the corresponding interest, has been rightly granted by the learned Arbitrator upon a categorical finding that the delay in completion of the work was not attributable to the Respondent. It would be submitted that the said finding stands duly supported by the admission of the Petitioner's own witness. It would further be submitted that the said witness has also admitted that escalation under Clause 10CC of the GCC is not barred during the extended period where the delay is attributable to the Department.

31. Learned counsel for the Respondent would also contend that the learned Arbitrator has correctly applied the provisions of Section 73 of the ICA, read with Clause 10CC of the GCC, while allowing the claim towards escalation, and such findings, being based on evidence and admissions, do not suffer from any perversity so as to warrant

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<sup>13</sup> (2022) 1 SCC 131

<sup>14</sup> (2004) 8 SCC 88



interference. Reliance in this regard would be placed on *Deconar Services Pvt. Ltd. v. NTPC Ltd.*<sup>15</sup>.

32. In conclusion, learned counsel for the Respondent would submit that the present Petition instituted under Section 34 of the A&C Act is nothing but an attempt to assail the correctness of the findings returned by the learned Arbitrator on merits, which is wholly impermissible in law. It would, therefore, be contended that the Petition is devoid of merit and is liable to be dismissed.

**ANALYSIS:**

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

34. At the outset, it is apposite to note that this Court remains conscious of the limited scope of its jurisdiction while examining an objection petition under Section 34 of the A&C Act. There is a consistent and evolving line of precedents whereby the Hon'ble Supreme Court has authoritatively delineated and settled the contours of judicial intervention in such proceedings.

35. In this regard, a three-Judge Bench of the Hon'ble Supreme Court, after an exhaustive consideration of a catena of earlier judgments, in *OPG Power Generation (P) Ltd. v. Enxio Power Cooling Solutions (India) (P) Ltd.*<sup>16</sup>, while dealing with the grounds of conflict with the public policy of India and patent illegality, grounds which have also been urged in the present Petitions, made certain pertinent observations, which are reproduced hereunder:

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<sup>15</sup> 2009 SCC OnLine Del 4109

<sup>16</sup> (2025) 2 SCC 417



***“Relevant legal principles governing a challenge to an arbitral award***

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

***Public policy***

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

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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 reappraisal of evidence.

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

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

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

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

- (a) “in contravention with the fundamental policy of Indian law”;
- (b) “in conflict with the most basic notions of morality or justice”;
- and
- (c) “patent illegality” have been construed.

***In contravention with the fundamental policy of Indian law***

**51.** As discussed above, till the 2015 Amendment the expression “in contravention with the fundamental policy of Indian law” was not found in the 1996 Act. Yet, in *Renusagar Power Co. Ltd. v. General Electric Co.*, 1994 Supp (1) SCC 644, in the context of enforcement of a foreign award, while construing the phrase “contrary to the public policy”, this Court held that for a foreign award to be contrary to public policy mere contravention of law would not be enough rather it should be contrary to:

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

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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 reappraisal 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 interfere [See: *SAIL v. Gupta Brother Steel Tubes Ltd.*, (2009) 10 SCC 63; *Pure Helium India (P) Ltd. v. ONGC*, (2003) 8 SCC 593; *McDermott International Inc. v. Burn Standard Co. Ltd.*, (2006) 11 SCC 181; *MMTC Ltd. v. Vedanta Ltd.*, (2019) 4 SCC 163]. But where, on a full reading of the contract, the view of the Arbitral Tribunal on the terms of a contract is not a possible view, the award would be considered perverse and as such amenable to interference [*South East Asia Marine Engg. & Constructions Ltd. v. Oil India Ltd.*, (2020) 5 SCC 164].

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

**85.** Ordinarily, terms of the contract are to be understood in the way the parties wanted and intended them to be. In agreements of arbitration, where party autonomy is the *grund norm*, how the parties worked out the agreement, is one of the indicators to decipher the intention, apart from the plain or grammatical meaning of the expressions used [*BALCO v. Kaiser Aluminium Technical Services Inc.*, (2016) 4 SCC 126].



86. However, reading an unexpressed term in an agreement would be justified on the basis that such a term was always and obviously intended by the parties thereto. An unexpressed term can be implied if, and only if, the court finds that the parties must have intended that term to form part of their contract. It is not enough for the court to find that such a term would have been adopted by the parties as reasonable men if it had been suggested to them. Rather, it must have been a term that went without saying, a term necessary to give business efficacy to the contract, a term which, although tacit, forms part of the contract [Adani Power (Mundra) Ltd. v. Gujarat ERC, (2019) 19 SCC 9].

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

(a) it must be reasonable and equitable;

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

(c) it must be obvious that “it goes without saying”;

(d) it must be capable of clear expression;

(e) it must not contradict any terms of the contract [Nabha Power Ltd. v. Punjab SPCL, (2018) 11 SCC 508, followed in Adani Power case, (2019) 19 SCC 9].”

*(emphasis supplied)*

36. In view of the aforesaid settled principles governing the scope of jurisdiction under Section 34 of the A&C Act, this Court shall now proceed to examine the challenge raised by the Petitioners in respect of Claim No. 3 pertaining to escalation, Claim No. 6 relating to loss of profits, and the corresponding interest is awarded by the learned Arbitrator under the Impugned Arbitral Award.

### **Claim No. 3 - Escalation under Clause 10CC of the GCC**

37. The first issue that arises for consideration pertains to the legality and sustainability of the award of Rs.38,96,175/- under Claim No. 3, which was adjudicated as Issue No. 2 in the Impugned Arbitral Award.



38. The controversy, in its essential formulation, concerns the reconciliation of the contractual regime governing escalation under Clause 10CC of the GCC with the Respondent's attempt, as Claimant before the learned Arbitral Tribunal, to seek compensation under Section 73 of the ICA for the period beyond the stipulated date of completion.

39. A bare reading of Clause 10CC of the GCC demonstrates that the said provision constitutes a complete and self-contained code governing escalation arising out of an increase or decrease in the prices of labour and material. The clause, by its express language, restricts the grant of escalation only to work executed during the stipulated period of the contract and unequivocally excludes any entitlement for work executed during the extended period. Significantly, the clause specifically stipulates that no escalation shall be payable for work executed during the extended contract period, even where extension of time has been granted without taking action under Clause 2. Clause 10CC, therefore, is not merely an enabling provision prescribing the methodology for the computation of escalation, but also a limiting provision defining the temporal boundaries within which such entitlement may be claimed. Clause 10CC of the GCC is reproduced herein below for ready reference:

**“CLAUSE 10 CC - Payment due to Increase/Decrease in Prices/Wages after Receipt of tender for works:** If the prices of materials (not being materials supplied or services rendered at fixed prices by the department in accordance with clause 10 & 34 thereof) and/or wages of labour required for execution of the work increase, the contractor shall be compensated for such increase as per provisions detailed below and the amount of the contract shall accordingly be varied, subject to the condition that such compensation for escalation in prices shall be available only for the work done during the stipulated period of the contract. No escalation shall be paid for work executed in extended contract



period even if extension of time is granted without any action under clause 2 and also no such compensation shall be payable for a work for which the stipulated period of completion is equal to or less then the time as specified in Schedule F. Such compensation for escalation in the prices of materials and labour, when due, shall be worked out based on the following provisions:-

- i. The base date for working out such escalation shall be the last stipulated date of receipt of tenders including extension, if any.
- ii. The cost of work on which escalation will be payable shall be reckoned as below:
  - a) Gross value of work done upto this quarter:
  - b) Gross value of work done upto this last quarter:
  - c) Gross value of work done since previous quarter:
  - d) Full assessed value of secured advance fresh paid in this quarter:
  - e) Full assessed value of secured advance recovered in this quarter:
  - f) Full assessed value of secured advance for which escalation is payable in this quarter:
  - g) Advance payment made during this quarter:
  - h) Advance payment recovered during this quarter:
  - i) Advance payment for which escalation is payable in this quarter:
  - j) Extra items paid as per clause 12 based on prevailing market rates during this quarter:  
Then,  
 $M = C \pm F \pm I - J$   
 $N = 0.85 M$
  - k) Less cost of material supplied by the department as per clause 10 and recovered during the quarter
  - l) Less cost of services rendered at fixed charges as per clause 34 and recovered during the quarter.”

*(emphasis supplied)*

40. Significantly, the contractual position in this regard is not in dispute. It is also borne out from the record that the Respondent, in its Statement of Claim before the learned Arbitral Tribunal, expressly admitted that escalation under Clause 10CC of the GCC was admissible only up to the stipulated period of completion and that no



contractual entitlement survived beyond such period. It was further acknowledged that escalation amounts on labour and material components up to the stipulated completion period had already been released. The Respondent, therefore, consciously shifted the foundation of its claim and asserted that the present claim was, in substance, one for damages under Section 73 of the ICA, while merely adopting the formula under Clause 10CC as a convenient mechanism for quantification.

41. It is in the backdrop of these pleadings that the findings returned by the learned Arbitrator are required to be examined. The relevant extracts concerning Claim No. 3 from the Impugned Arbitral Award read as follows:

“Claim No.3:-

Dispute formed due to non-payment against second and final escalation bill under Clause 10 cc-Rs38,96,175/-.

**11.** It is pleaded by Claimant that this claim has arisen on account of prolongation of contract and the Claimant is claiming damages in the shape of labour and material escalation. As the Claimant was not responsible for delay, in completion of the work, so this claim is tenable for the work done beyond stipulated date of completion. His case is basically, for compensation for damages u/s 73 of Contract Act, 1873 i.e. on account of failure on the part of the Respondent to get the work completed within the stipulated period of 30 months i.e. by 10.7.2008 but prolonged the contract upto 30.11.2011 i.e. with delay of 3 years 4 months and 20 days. The Claimant has adopted the rational procedure laid down under Clause 10 cc of the Agreement to calculate this amount and is so entitled for this Calculated amount of Rs 38,96,175/-.

**12.** To contest this Claim, Respondent pleaded that as per Clause 10 cc of General Contract Condition, no escalation is permissible for the work executed in the extended contract period, even if extension of time is granted, without any action under Clause 2 thereof and therefore, this claim of the Claimant is not tenable.

**13.** However, it is also pleaded by the Respondent that a sum of Rs. 5,35,522/- was duly sanctioned, in terms of Clause 10 CC by the



Respondent vide its office order dated 30.9.2009 and this amount, has already been paid to the Claimant as escalation, upto the stipulated date of completion of the work.

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Issue No.2:

This issue pertains to Claim No.3 of the Claimant, under which he is claiming escalation amount of Rs. 38,96,175/-, calculated as per provisions of Clause 10 CC. As far as quantum of the Claim and its calculation is concerned, there is no dispute, regarding the correctness thereof. But the Respondent has resisted this Claim, by contending that Clause 10 cc of general conditions, does not allow this Claim. In this regard it is contended by Ld. Counsel of the Respondent that clause 10 cc do not permit escalation in the extended contract period, even if extension of time is granted without any action under Clause 2 of general contract condition. But it is also pleaded that a sum of Rs. 5,35,522/- was duly sanctioned and paid, under Clause 10 CC for escalation, up to the stipulated date of completion.

**54.** On the other hand Ld. Counsel for the Claimant has contended that this Claim is not under Clause 10 cc but is also u/s 73 of the Contract Act, 1873, dealing with a situation of failure on the part of the Respondent to get the work completed within the stipulated period. It is also contended that when clause 10 cc is read with clause 2 of General Conditions, then it leads to the conclusion that payment of escalation amount, during the extended period is barred only when there is default on the part of the contractor even when no action was taken against the contractor by the department.

**55.** On careful consideration of rival contentions of both the parties, no doubt is left that there is every merits in the case of the Claimant and there is no merit in the case of the Respondent. If there is any fault on the part of the contractor, in not completing the work within the stipulated time period, then action under Clause 2 can be taken against him by the department. But it is the sweet wish of the department, to take or not to take, action against defaulting contractor. If once clause 2 is applicable, for the fault on the part of the contractor, then Clause 10 cc bars the contractor to claim escalation for the work executed on the extended contract period.

**56.** As above noted, there is nothing to prove or to presume any fault on the part of the Claimant, rather fault if any may be on the part of the Respondent. Even sole witness of the Respondent, who is responsible officer of the Respondent in Cross-examination has admitted that delay in the completion of work was not attributable



to the Claimant but it can be attributable to the Respondent. Therefore, it is cleared that Clause 10 cc does not help the Respondent.

**57.** In this regard it is also pertaining to mention that, finding no fault on the part of the contractor, the Respondent has already released a sum of Rs. 5,35,522/as escalation of up-to the stipulated date of completion work. Had there been any fault on the part of the contractor, then perhaps even this amount would not have been released to the contractor by the department. Therefore, as per the provisions of Section 73 of the Contract Act, as well as, as per the provisions of Clause 10 cc read with Clause 2C of General Conditions, it is very clear that the Claimant is entitled for claimed, rightly calculated escalation amount of Rs 38,96,175/-

**58.** Consequently, this issue is hereby decided in favour of the Claimant and against the Respondent, to the effect that Claimant is entitled for Second and final escalation amount of Rs.38,96, 175/- from the Respondent.

**59.** Claim no. 4 of the Claimant, for refund of Rs 89123/- withheld by the Respondent on account of table of milestone drawn, was also set at naught by releasing it on 24.4.2015 during the pendency of these proceedings and that is why the Claimant claimed no issue for this Claim.”

42. A perusal of the aforesaid findings reveals that the learned Arbitrator has himself categorically recorded that Clause 10CC of the GCC does not permit escalation during the extended period of the contract. However, notwithstanding such express finding, the learned Arbitrator proceeded to award a sum of Rs.38,96,175/- towards escalation by invoking Section 73 of the ICA read with Clause 10CC of the GCC, primarily on the reasoning that the delay in execution was not attributable to the Respondent and could instead be attributed to the Petitioner.

43. The reasoning adopted by the learned Arbitrator, when tested against the pleadings and the contractual framework governing the parties, discloses an inherent contradiction which renders the finding legally unsustainable. Once it stood accepted, both by the Respondent



in its Statement of Claim and by the learned Arbitrator in the Award itself, that Clause 10CC of the GCC ceased to apply beyond the stipulated period of completion, it became incumbent upon the learned Arbitrator to independently examine the claim strictly within the framework of Section 73 of the ICA. However, instead of undertaking such an exercise, the learned Arbitrator proceeded to apply the very formula contained in Clause 10CC of the GCC, despite simultaneously holding that the said clause was contractually inapplicable to the extended period.

44. This approach, in the considered view of this Court, amounts to a clear departure from the contractual regime agreed between the parties. The Respondent's case, as pleaded, was not that Clause 10CC of the GCC itself conferred any right to escalation beyond the stipulated period, but only that the said clause could be utilised as a notional basis for computation of damages. The learned Arbitrator, however, failed to examine whether the essential ingredients necessary for sustaining a claim under Section 73 of the ICA, *namely*, proof of actual loss and a demonstrable causal nexus between the alleged breach and the loss claimed, stood established on the basis of evidence led before the learned Tribunal. The Award is conspicuously silent with respect to any evidence demonstrating the actual increase in costs or substantiating the quantified figure of Rs.38,96,175/-.

45. The learned Arbitrator has merely observed that there is no dispute regarding the correctness of the calculation, without disclosing the evidentiary basis on which such conclusion has been arrived at. There is no discussion of the documentary material relied upon by the Respondent, no scrutiny of the computation reflected in the exhibits



placed on record, and no analysis whatsoever of the actual financial loss allegedly suffered by the Respondent. The finding, therefore, rests not upon proof, but upon assumption, which is impermissible in law while adjudicating a claim for damages under Section 73 of the ICA.

46. It is well settled that damages under Section 73 of the ICA cannot be awarded in the absence of proof of actual loss. Mere adoption of a contractual formula, particularly one which itself stands excluded by the terms of the contract for the relevant period, cannot substitute the requirement of evidence. By treating the formula under Clause 10CC of the GCC as a proxy for proof of damages, the learned Arbitrator has effectively dispensed with the fundamental burden resting upon the claimant to establish actual loss and its quantification. Such an approach renders the Award legally vulnerable.

47. The legal position governing claims for damages and the necessity of proof of actual loss has been comprehensively explained by the Hon'ble Supreme Court in *McDermott International Inc. v. Burn Standard Co. Ltd.*<sup>17</sup>, wherein it was held as under:

“100. While claiming damages, the amount therefor was not required to be quantified. Quantification of a claim is merely a matter of proof.

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***Actual loss: Determination of***

108. A contention had been raised both before the learned arbitrator as also before us that MII could not prove the actual loss suffered by it as is required under the Indian law viz. Sections 55 and 73 of the Indian Contract Act as Mr D.J. Parson had no personal knowledge in regard to the quantum of actual loss suffered by MII. D.J. Parson indisputably at one point of time or the other was associated with MII. He applied the Emden Formula while calculating the amount of damages having regard to the books of accounts and other documents maintained by MII. The learned arbitrator did insist that sufferance of actual damages must be

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<sup>17</sup> (2006) 11 SCC 181



proved by bringing on record books of accounts and other relevant documents.

109. Sections 55 and 73 of the Indian Contract Act do not lay down the mode and manner as to how and in what manner the computation of damages or compensation has to be made. There is nothing in Indian law to show that any of the formulae adopted in other countries is prohibited in law or the same would be inconsistent with the law prevailing in India.

110. As computation depends on circumstances and methods to compute damages, how the quantum thereof should be determined is a matter which would fall for the decision of the arbitrator. We, however, see no reason to interfere with that part of the award in view of the fact that the aforementioned formula evolved over the years, is accepted internationally and, therefore, cannot be said to be wholly contrary to the provisions of the Indian law.

111. In *State of U.P. v. Allied Constructions* [(2003) 7 SCC 396] this Court held: (SCC p. 398, para 4)

“4. Any award made by an arbitrator can be set aside only if one or the other term specified in Sections 30 and 33 of the Arbitration Act, 1940 is attracted. It is not a case where it can be said that the arbitrator has misconducted the proceedings. It was within his jurisdiction to interpret clause 47 of the agreement having regard to the fact-situation obtaining therein. It is submitted that an award made by an arbitrator may be wrong either on law or on fact and error of law on the face of it could not nullify an award. The award is a speaking one. The arbitrator has assigned sufficient and cogent reasons in support thereof. Interpretation of a contract, it is trite, is a matter for the arbitrator to determine (see *Sudarsan Trading Co. v. Govt. of Kerala* [(1989) 2 SCC 38]). Section 30 of the Arbitration Act, 1940 providing for setting aside an award is restrictive in its operation. Unless one or the other condition contained in Section 30 is satisfied, an award cannot be set aside. The arbitrator is a Judge chosen by the parties and his decision is final. The court is precluded from reappraising the evidence. Even in a case where the award contains reasons, the interference therewith would still be not available within the jurisdiction of the court unless, of course, the reasons are totally perverse or the judgment is based on a wrong proposition of law. An error apparent on the face of the records would not imply closer scrutiny of the merits of documents and materials on record. Once it is found that the view of the arbitrator is a plausible one, the court will refrain itself from interfering (see *U.P. SEB v. Searsole Chemicals Ltd.* [(2001) 3 SCC 397] and *Ispat Engg. &*



**Foundry Works v. Steel Authority of India Ltd. [(2001) 6 SCC 347].”**

**112.** It is trite that the terms of the contract can be express or implied. The conduct of the parties would also be a relevant factor in the matter of construction of a contract. The construction of the contract agreement is within the jurisdiction of the arbitrators having regard to the wide nature, scope and ambit of the arbitration agreement and they cannot be said to have misdirected themselves in passing the award by taking into consideration the conduct of the parties. It is also trite that correspondences exchanged by the parties are required to be taken into consideration for the purpose of construction of a contract. Interpretation of a contract is a matter for the arbitrator to determine, even if it gives rise to determination of a question of law. (See *Pure Helium India (P) Ltd. v. ONGC [(2003) 8 SCC 593]* and *D.D. Sharma v. Union of India [(2004) 5 SCC 325]*.)

**113.** Once, thus, it is held that the arbitrator had the jurisdiction, no further question shall be raised and the court will not exercise its jurisdiction unless it is found that there exists any bar on the face of the award.

**114.** The above principles have been reiterated in *Chairman and MD, NTPC Ltd. v. Reshmi Constructions, Builders & Contractors [(2004) 2 SCC 663]*, *Union of India v. Banwari Lal & Sons (P) Ltd. [(2004) 5 SCC 304]*, *Continental Construction Ltd. v. State of U.P. [(2003) 8 SCC 4]* and *State of U.P. v. Allied Constructions [(2003) 7 SCC 396]*.

**115.** A court of law or an arbitrator may insist on some proof of actual damages, and may not allow the parties to take recourse to one formula or the other. In a given case, the court of law or an arbitrator may even prefer one formula as against another. But, only because the learned arbitrator in the facts and circumstances of the case has allowed MII to prove its claim relying on or on the basis of Emden Formula, the same by itself, in our opinion, would not lead to the conclusion that it was in breach of Section 55 or Section 73 of the Indian Contract Act.”

*(emphasis supplied)*

48. Furthermore, the invocation of Clause 10CC of the GCC for the purpose of quantification, despite a categorical finding that the said clause does not govern the extended period, effectively results in a rewriting of the contractual bargain between the parties. An arbitral tribunal, while interpreting contractual provisions, remains bound by the express limitations incorporated therein and cannot, under the



guise of equitable considerations, extend contractual benefits beyond what the parties themselves contemplated. The Impugned Arbitral Award, in effect, grants escalation for a period expressly excluded under the contract and does so solely by relying upon a clause which even the Respondent had conceded to be inapplicable for such period.

49. The reasoning adopted by the learned Arbitrator, therefore, suffers from a dual infirmity, *namely*, firstly, a failure to adhere to the contractual stipulation expressly governing escalation; and secondly, a failure to apply the settled legal principles governing the award of damages under Section 73 of the ICA. The Impugned Arbitral Award does not disclose any intelligible nexus between the pleadings, the evidence on record, and the conclusions ultimately reached. The Award, therefore, falls short of the requirement of a reasoned determination as mandated under Section 31(3) of the A&C Act.

50. This Court is of the considered opinion that although the delay in execution of the work may have been attributable to the Petitioner, such circumstance by itself could not have empowered the learned Arbitrator to award escalation by way of compensation for the post-stipulated period of the contract, *dehors* the express contractual stipulations and the settled legal requirements governing proof and quantification of damages under Section 73 of the ICA.

51. In view of the aforesaid discussion, this Court is of the considered opinion that the Award, insofar as it relates to Claim No. 3, cannot be sustained and is accordingly liable to be set aside.

**Claim No. 6 - Loss of Turnover/Profitability**

52. The next issue that arises for consideration pertains to the award of Rs.16,23,195/- under Claim No. 6 towards alleged loss of turnover



and profitability on account of prolongation of the contract, which came to be adjudicated as Issue No. 4 in the Impugned Arbitral Award.

53. Before advertng to the merits of the controversy, this Court deems it appropriate to extract the relevant findings returned by the learned Arbitrator in relation to Claim No. 6. The relevant portion of the Impugned Arbitral Award reads as under:

“Claim No. 6:-

Dispute formed due to loss of turn over /profitability as a result of prolongation of contract.... Rs. 16,23,195/-

**21.** It is pleaded by the Claimant that he had anticipated, quantum of his profit on the original set up of the tender, under which completion of work was 30 months, but it prolonged to 69.70 months. Therefore, anticipated profit, has been divided into total period of completion, including the extended period. The delay was not attributable to him but to the Respondent, and so the Claimant is entitled for loss of profit, besides other consequential claim. For this, he has relied upon CPWD official memo dated 14.12.2007, allowing contractors profit and overheads to the extent of 15%. Out of this 15%, 10% is overhead on cost of material and labour and remaining 5% is profit.

**22.** Since cost of completed Electrical Work was Rs 2,48,38,485/-, so his 5% profit comes to Rs 12,41,924/-. It was for completing the work within 30 months since it prolonged to 39.21 months beyond stipulated period of 30 months, so his profit of Rs. 12,41,924/- stands divided into 69.21 months, so he is entitled for this calculated amount of Rs. 16,23,195/-.

**23.** To resist this Claim of the Complainant, the Respondent pleaded that there is no clause in the contract against which this claim can be raised and also that prolongation did not prevent him for taking any new project.

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ISSUES NO. 4:

This issue pertains to Claim No. 6 of the Claimant for Rs 16,23,195/- for the loss of turnover/profitability.

**68.** Undisputedly, date of start of work was 11.1.2006. Stipulated



date of completion of the work was 10.7.08 but the work was actually completed on 30.11.11. The delay was regularized by the Respondent vide its letter dated 4.7.15 (Ex CW 1/9). As already discussed and found delay was not due to any fault on the part of the Claimant nor on the part of the main contractor, but may be on the part of the Respondent, which is also so admitted by the sole witness of the Respondent. Initially time allowed for completion of work was 30 months which was integral part of the contract, naturally the Claimant would have anticipated his profits on the original set up of that time period, but it prolonged to 69.10 months, therefore, the Claimant is certainly entitled for loss of his turnover/ profitability, due to prolongation of the contract. The claimant had also served his prior notice Ex CW 1/15 upon the Respondent for his this claim, which remained un-replied. The Claimant relying upon CPWD office memo no. DGW/MAN/150 dated 14.12.2007, has rightly assessed his loss of turnover/ profitability to the tune of 15%, which comes to Rs. 16,23,195/-. (5% profit+ 10% overhead on cost of material). It was when costs of completed work was Rs. 2,48,38,485/- and when work was completed in prolonged period of 39.21 months, beyond stipulated period of 30 months. CPWD vide its said Memo dated 14.12.2007 had enhanced the element of contractor's profits and overheads from 10 to 15% w.e.f. 14.12.2007. Therefore, the Claimant has rightly calculated his this loss to the tune of Rs 16,23,195/-.

**69.** I do not find any merit in the case of the Respondent to contest this case that prolongation of contract did not prevent the Claimant for taking any new project, as admittedly he remained with this work till its final completion.

**70.** Resultantly, this issue is hereby decided in favour of the Claimant and against the Respondent to the effect that the Claimant is entitled to Rs. 16,23,195/- from the Respondent for loss of \ turnover /profitability due to prolongation of the completion of the work.”

54. A perusal of the aforesaid findings reveals that the reasoning of the learned Arbitrator proceeds substantially on the premise that since the contract period stood prolonged from 30 months to approximately 69 months, and the delay was not attributable to the Respondent herein, the Respondent would be “*certainly entitled*” to compensation towards loss of turnover and profitability. Proceeding on such premise, the learned Arbitrator accepted the computation of



Rs.16,23,195/- by observing that the Respondent herein, relying upon **CPWD Office Memorandum No. DGW/MAN/150 dated 14.12.2007<sup>18</sup>**, had “*rightly assessed*” such loss at 15%, comprising 10% overheads and 5% profit.

55. At the outset, it must be observed that the entire edifice of the aforesaid finding rests upon a broad presumption that prolongation of a contract, by itself, necessarily results in loss of profitability. However, the Impugned Arbitral Award does not disclose any discussion of evidence establishing that the Respondent herein had, in fact, suffered such loss, nor does it indicate any material demonstrating the actual financial impact occasioned by the delay.

56. The learned Arbitrator has not adverted to any documentary evidence, books of accounts, balance sheets, profit and loss statements, or other financial material substantiating the alleged loss. There is no examination as to whether the Respondent’s resources remained idle during the extended period, whether any alternative contracts or business opportunities were foregone, or whether there was any actual diminution in profitability attributable to the prolongation of the contract. The conclusion that the Respondent herein was “*certainly entitled*” to such damages is, therefore, founded on abstraction and assumption rather than evidentiary analysis.

57. More importantly, the adoption of the CPWD Office Memorandum as the sole basis for quantification is wholly misplaced. The said memorandum, at best, lays down a general normative guideline regarding the percentage of the contractor’s profit and overheads ordinarily factored into public works contracts. It does not,

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<sup>18</sup> CPWD Office Memorandum



by itself, establish that such profit was actually lost in a given factual scenario. The learned Arbitrator, however, has treated the said memorandum as determinative of the Respondent's entitlement, without undertaking any independent inquiry into the actual loss allegedly suffered.

58. The reasoning of the learned Arbitrator, therefore, suffers from a fundamental legal infirmity, *namely*, the substitution of a notional formula in place of proof of damages. It is trite that a claim for loss of profits is in the nature of damages under Sections 73 and 74 of the ICA and must necessarily be supported by cogent evidence establishing both the existence and quantum of such loss. Mere prolongation of the contract, even if attributable to the employer, does not automatically entitle a contractor to a fixed percentage of the contract value by way of damages.

59. The principles governing the award of damages under Sections 73 and 74 of the ICA have been authoritatively expounded by the Hon'ble Supreme Court in *Kailash Nath Associates (supra)*, wherein it was held that even where a sum is stipulated in the contract, such stipulation merely represents the upper limit of compensation and does not dispense with the requirement of proving actual loss where such proof is possible. The Hon'ble Supreme Court further clarified that it is only in cases where damages are inherently incapable of precise proof that a genuine pre-estimate may be relied upon. The relevant observations as rendered in the said judgement are reproduced hereinbelow:

“43. On a conspectus of the above authorities, the law on compensation for breach of contract under Section 74 can be stated to be as follows:



43.1. Where a sum is named in a contract as a liquidated amount payable by way of damages, the party complaining of a breach can receive as reasonable compensation such liquidated amount only if it is a genuine pre-estimate of damages fixed by both parties and found to be such by the court. In other cases, where a sum is named in a contract as a liquidated amount payable by way of damages, only reasonable compensation can be awarded not exceeding the amount so stated. Similarly, in cases where the amount fixed is in the nature of penalty, only reasonable compensation can be awarded not exceeding the penalty so stated. In both cases, the liquidated amount or penalty is the upper limit beyond which the court cannot grant reasonable compensation.

43.2. Reasonable compensation will be fixed on well-known principles that are applicable to the law of contract, which are to be found inter alia in Section 73 of the Contract Act.

43.3. Since Section 74 awards reasonable compensation for damage or loss caused by a breach of contract, damage or loss caused is a sine qua non for the applicability of the section.

43.4. The section applies whether a person is a plaintiff or a defendant in a suit.

43.5. The sum spoken of may already be paid or be payable in future.

43.6. The expression “whether or not actual damage or loss is proved to have been caused thereby” means that where it is possible to prove actual damage or loss, such proof is not dispensed with. It is only in cases where damage or loss is difficult or impossible to prove that the liquidated amount named in the contract, if a genuine pre-estimate of damage or loss, can be awarded.

43.7. Section 74 will apply to cases of forfeiture of earnest money under a contract. Where, however, forfeiture takes place under the terms and conditions of a public auction before agreement is reached, Section 74 would have no application.”

*(emphasis supplied)*

60. In the present case, the claim towards loss of profits could not have been sustained in the absence of any evidentiary foundation. Mere reliance on a notional percentage or a generalized assumption of loss, without proof of actual financial detriment or any material demonstrating a reasonable pre-estimate of damages, falls foul of the settled principles governing the award of compensation under the



ICA. The Impugned Arbitral Award, therefore, insofar as it grants such damages without substantiation, becomes legally untenable.

61. Moreover, there is, in the entire reasoning of the learned Arbitrator, no discussion whatsoever of evidence substantiating the quantified claim of Rs.16,23,195/-. The Impugned Arbitral Award merely records that the Respondent herein had “*rightly assessed*” its loss by applying a 15% formula, without disclosing how such assessment was borne out from the evidentiary material placed on record. The absence of any analytical discussion or evidentiary scrutiny renders the finding manifestly unsustainable.

62. The Award, insofar as it relates to Claim No. 6, thus discloses a clear instance where damages have been granted solely on the basis of generalized assumptions and formulaic computation, without proof of actual loss. Such an approach is contrary to the mandate of Section 31(3) of the A&C Act, which obligates an arbitral tribunal to furnish intelligible and reasoned findings supported by analysis of the material on record.

63. The aforesaid position also finds direct support from the judgment of the Hon’ble Supreme Court in *Unibros v. All India Radio*<sup>19</sup>, wherein the Court categorically held that formulae such as Hudson’s Formula may aid in estimating claims towards loss of overheads and profitability, but cannot, by themselves, constitute proof of such loss. The Hon’ble Supreme Court in the said judgement clarified that a claimant seeking damages on account of loss of profitability must adduce credible and cogent evidence demonstrating the actual loss suffered as a consequence of prolongation of the

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<sup>19</sup> 2023 SCC OnLine SC 1366



contract. The relevant observations made in that judgment are reproduced herein below:

“16. To support a claim for loss of profit arising from a delayed contract or missed opportunities from other available contracts that the appellant could have earned elsewhere by taking up any, it becomes imperative for the claimant to substantiate the presence of a viable opportunity through compelling evidence. This evidence should convincingly demonstrate that had the contract been executed promptly, the contractor could have secured supplementary profits utilizing its existing resources elsewhere.

17. One might ask, what would be the nature and quality of such evidence? In our opinion, it will be contingent upon the facts and circumstances of each case. However, it may generally include independent contemporaneous evidence such as other potential projects that the contractor had in the pipeline that could have been undertaken if not for the delays, the total number of tendering opportunities that the contractor received and declined owing to the prolongation of the contract, financial statements, or any clauses in the contract related to delays, extensions of time, and compensation for loss of profit. While this list is not exhaustive and may include any other piece of evidence that the court may find relevant, what is cut and dried is that in adjudging a claim towards loss of profits, the court may not make a guess in the dark; the credibility of the evidence, therefore, is the evidence of the credibility of such claim.

18. Hudson's formula, while attained acceptability and is well understood in trade, does not, however, apply in a vacuum. Hudson's formula, as well as other methods used to calculate claims for loss of off-site overheads and profit, do not directly measure the contractor's exact costs. Instead, they provide an estimate of the losses the contractor may have suffered. While these formulae are helpful when needed, they alone cannot prove the contractor's loss of profit. They are useful in assessing losses, but only if the contractor has shown with evidence the loss of profits and opportunities it suffered owing to the prolongation.

19. The law, as it should stand thus, is that for claims related to loss of profit, profitability or opportunities to succeed, one would be required to establish the following conditions : first, there was a delay in the completion of the contract; second, such delay is not attributable to the claimant; third, the claimant's status as an established contractor, handling substantial projects; and fourth, credible evidence to substantiate the claim of loss of profitability. On perusal of the records, we are satisfied that the fourth condition, namely, the evidence to substantiate the claim of loss of profitability remains unfulfilled in the present case.”

*(emphasis supplied)*



64. The judgment in *Unibros (supra)*, therefore, unequivocally clarifies that a claim for loss of profitability cannot succeed merely upon establishing delay attributable to the employer. The claimant must additionally demonstrate, through credible evidence, that it had the capacity and opportunity to undertake other profitable ventures and that such opportunities were in fact lost on account of the prolongation of the contract.

65. In the present case, although the first two conditions identified in *Unibros (supra)*, namely, the existence of delay and absence of fault on the part of the Respondent herein, may *prima facie* stand satisfied, there is not even a semblance of consideration by the learned Arbitrator with respect to the third and fourth requirements. The Impugned Arbitral Award contains no discussion regarding the Respondent's status as an established contractor handling multiple substantial projects, nor does it examine any evidence demonstrating actual loss of business opportunities or profitability during the extended period of the contract.

66. In the considered opinion of this Court, the error committed by the learned Arbitrator is not merely one relating to the appreciation of evidence, but goes to the very root of the matter. A substantial monetary claim has been awarded in favour of the Respondent herein without any examination of the evidentiary foundation necessary to sustain such a claim in law. The Impugned Arbitral Award, therefore, becomes vulnerable to interference within the parameters of Section 34 of the A&C Act.

67. Accordingly, this Court is of the considered view that the finding of the learned Arbitrator allowing Claim No. 6 towards loss of



turnover or profitability amounting to Rs.16,23,195/- cannot be sustained and is liable to be set aside.

**Interest Awarded in Relation to Claim Nos. 3 and 6**

68. Insofar as the award of interest by the learned Arbitrator is concerned, this Court finds that the grant of interest is not an independent or standalone determination, but is intrinsically ancillary and consequential to the principal claims awarded under the Impugned Arbitral Award.

69. The Impugned Arbitral Award, as revised on 07.01.2017, while adjudicating Issue Nos. 6 and 7, computed interest components in respect of all claims allowed by the learned Arbitrator, including the amounts awarded under Claim No. 3 towards escalation and Claim No. 6 towards loss of turnover or profitability. The relevant findings of the learned Arbitrator read as under:

“ISSUES NO. 6 & 7

These issues pertain to claims No. 7 & 8 i.e. pendent lit and future interest.

**76.** In view of the above finding on above issue no. 5, the Claimant is allowed interest @12% p.a. on the amounts due from the date of cause of action till the date of award and @18% p.a. from the date of award till the date of realization.

**77.** Thus, under these issues, the claimant is further entitled for the following.

- a) Interest @12% p.a. on the amount of Rs. 1,33,146.33 for the period from the date of cause of action till the date of award i.e. 28.11.2013 to 26.10.2016 which comes to Rs.46,575.71/-.
- b) Interest @12 p.a. on an amount of Rs. 20,948.71/- for the period from the date of cause of action till the date of award i.e. 29.07.2015 to 26.10.2016 which comes to Rs.3,140.58.
- c) Interest @12% p.a. on an amount of Rs. 30,003.92/- for the period from the date of cause of action till the date of award i.e. 25.05.2015 to 26.10.2016 which comes to Rs. 5,139.30.
- d) Interest @12% p.a. on final escalation bill of Rs.38,96,175/- for the period from the date of cause of action till the date of award i.e. 30.05.2011 to 26.10.2016 which comes to Rs.25,32,407.00/-



- e) Interest @ 12% p.a. on the amount of damages due to deployment of watch and ward staff of Rs. 11,14,924/- for the period from the date of cause of action till the date of award i.e. 30.05.2011 to 26.10.2016 which comes to Rs. 7,24,670.00/-
- f) Interest @ 12% p.a. on account of loss of turnover/profitability amounting to Rs. 16,23,195/- for the period from the date of cause of action till the date of award i.e. 30.05.2011 to 26.10.2016 which comes to Rs. 10,55,0532.28
- TOTAL..... Rs.43,66,965.84 (Rounded to Rs.43,66,966/-)

**78.** It is pertinent to mention here that under issue No.-5, the claimant is already found entitled for Rs. 1,84,098.96 on account of interest up to the date of payments.

Now, the total amount of interest up to the date of award comes to Rs.45,51.065/ (Rs.43,66,966/- + Rs. 1,84,099/-).

Therefore, these issues are hereby decided accordingly.”

70. This Court has, in the preceding discussion, arrived at a categorical finding that the awards under Claim No. 3, amounting to Rs. 38,96,175/- towards escalation, and Claim No. 6, amounting to Rs. 16,23,195/- towards loss of turnover or profitability, are unsustainable in law, being vitiated by absence of evidentiary foundation, disregard of express contractual stipulations, and lack of reasoned adjudication as mandated under Section 31(3) of the A&C Act.

71. It necessarily follows, as a matter of legal consequence, that the award of interest on the aforesaid amounts, as reflected in Paragraph Nos. 77(d) and 77(f) of the Impugned Arbitral Award cannot survive independently. The grant of interest is merely consequential to the principal monetary claims and cannot stand once the substantive claims themselves have been set aside. In other words, once the substratum of the principal amount awarded in respect of Claim Nos. 3 and 6 are found to be legally unsustainable; the superstructure of interest founded thereupon must also necessarily collapse.



72. Accordingly, this Court is of the considered opinion that the award of interest, insofar as it pertains to Claim Nos. 3 and 6 are equally liable to be interfered with under Section 34 of the A&C Act.

**CONCLUSION:**

73. In view of the foregoing discussion, and for the reasons recorded hereinabove, this Court is of the considered opinion that the Arbitral Award dated 26.10.2016, as revised on 07.01.2017, rendered by the learned Arbitrator in respect of Claim No. 3 relating to escalation and Claim No. 6 relating to loss of turnover or profitability, along with the corresponding award of interest thereon, suffers from patent illegality apparent on the face of the record and is liable to be interfered with within the limited jurisdiction contemplated under Section 34 of the Arbitration and Conciliation Act, 1996. Consequently, the necessary legal consequences shall follow both in relation to the Objection Petition as well as the Enforcement Petition.

**I. O.M.P.(COMM.) 207/2017**

74. Accordingly, the Objection Petition being *O.M.P. (COMM.) 207/2017* is allowed. The Impugned Arbitral Award dated 26.10.2016, as revised on 07.01.2017, is set aside insofar as it relates to:

- (i) Claim No. 3 concerning escalation amounting to Rs.38,96,175/-;
- (ii) Claim No. 6 concerning loss of turnover or profitability amounting to Rs.16,23,195/-; and
- (iii) the corresponding award of interest thereon as reflected in Paragraph Nos. 77(d) and 77(f) of the Impugned Arbitral Award.

75. The remaining portions of the Impugned Arbitral Award, not having been assailed before this Court, shall remain undisturbed and shall continue to operate in accordance with law.



76. The Objection Petition, along with pending application(s), if any, stands disposed of in the aforesaid terms.

77. No order as to costs

**II. O.M.P.(ENF.)(COMM.) 46/2018**

78. Insofar as the Enforcement Petition being *O.M.P.(ENF.)(COMM.) 46/2018*, filed by the Award Holder (*Respondent in the Objection Petition*), is concerned, this Court, having set aside the Impugned Arbitral Award to the extent it relates to Claim Nos. 3 and 6, along with the corresponding award of interest contained in Paragraph Nos. 77(d) and 77(f), the Award shall not remain enforceable to that extent.

79. However, insofar as the remaining portions of the Award are concerned, the Enforcement Petition shall proceed in accordance with law and in terms of the surviving portions of the Award.

80. The parties are directed to place on record their respective calculations, in light of the surviving portion of the Award, on the next date of hearing.

81. List on 11.08.2026.

**HARISH VAIDYANATHAN SHANKAR, J.**  
**MAY 21, 2026/sm/kr/ma**