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

% **Judgment reserved on: 13.01.2026**
Judgment pronounced on: 21.01.2026

\+ O.M.P. (COMM) 337/2023

S AND S CONSTRUCTION CO .....Petitioner

Through: Mr. Kunwar Chandresh & Ms. Poonam Prasad, Advs.

versus

UNION OF INDIA THROUGH E E B F D II .....Respondent

Through: Mr. Vikram Jaitley, CGSC with Ms. Shreya Jaitley, Adv. with Mr. Rakesh Kumar, EE, BFD Bikaner CPWD.

CORAM:
HON'BLE MR. JUSTICE AVNEESH JHINGAN

J U D G M E N T

1. This petition is filed under Section 34 of the Arbitration and Conciliation Act, 1996 (for short 'the Act') challenging the arbitral award dated 18.04.2023 (for short 'the Award').

2. The relevant facts are that the petitioner/claimant was awarded a tender by the Executive Engineer, Border Fencing Division-II, CPWD, New Delhi and the contract was entered on 04.06.2010. The estimated cost of work was Rs.19,43,10,348/-. The petitioner furnished a performance bank guarantee equivalent to five percent of the tender amount. The work was to be completed within eight months. The completion certificate mentioning the defects in the work done was issued on 17.12.2019. Dispute between the parties in

compliance with Clause 25 of the General Conditions of Contract (for short 'the GCC') was referred to arbitration. The arbitrator was appointed on 19.04.2022 and the proceedings culminated in the impugned award. Out of the sixteen claims made by the petitioner, seven were rejected. The counter-claims filed by the respondent beyond the period prescribed under Section 23(4) of the Act were rejected. Hence, the present petition.

3. This petition is filed being aggrieved by the rejection of the following claims.

S.No.	CLAIM NO.	CLAIM DESCRIPTION
1.	Claim No.1	Claim on account of illegally withheld amount for non-sanctioning of deviation items amounting to Rs.13,00,000/-
2.	Claim No.3	The claim of Rs.9,50,285/- for extra interest recovered on Mobilization Advance for the delay in work the beyond the stipulated date of completion.
3.	Claim No.4	Claim of interest on account of amount wrongfully withheld for Milestones amounting to Rs.16,93,470/-
4.	Claim No.5	Claim amounting to Rs.2,84,07,336/- for damages due to rise in price for material other than material covered under Clause 10CA used in the work done during the extended period (Claim amended to Rs.357,93,677 at rejoinder stage).
5.	Claim No.6	Claim of damages amounting to Rs.9,73,66,774/- on account of onsite and off site overhead during prolongation of contract.
6.	Claim No.7	Claim amounting to Rs.7,45,40,000/- on account of work done in R.D. 2.4 km to 27 km in the C/o ITBP Road from Nyu Sobla to Sela Tedang.
7.	Claim No.12	Claim amounting to Rs 1,47,19,500/ on account of non-payment for extra work executed to restore the road connectivity after disaster in June 2013.

4. Learned counsel for the petitioner argued with regard to claim no.1, that the withholding/deduction of Rs. 13,00,000/- was without issuance of notice and further that no deduction could be made under clause 17 of the GCC.

4.1 With regard to claim no.3, the submission is that the delay and prolongation of the work was not attributed to the petitioner and the interest of Rs.9,50,285/- was wrongly charged on the mobilisation advance for the period of delay beyond the stipulated date of completion. The argument is that the mobilisation advance was invested in the project and not utilised by the petitioner.

4.2 Vis-a-vis claim no. 4, the argument is that the amount was wrongly withheld for failure of the petitioner to complete the work upto the stipulated milestones and the petitioner should be compensated with interest. The submission is that once the time to complete the work was extended, the milestone should have been rescheduled. Grievance is that the claim was rejected by a non-speaking award.

4.3 So far as claim no.5 is concerned, the grievance is that the arbitrator erred in considering that the claim was not covered under Clause 10CC of the GCC whereas the claim was made under Section 73 of the Indian Contract Act, 1872 (for short 'the Contract Act'). Submission is that the reasons recorded by the arbitrator for rejection of the claim are not tenable.

4.4 With regard to claim no.6, the contention is that the profit from work done had no nexus with the on-site and off-site overheads damages consequent to the prolongation of the contract. The claim

was made under Section 73 of the Contract Act and was not dependant on existence of clause in GCC.

4.5 The contention for claim no.7 is that the amount of Rs.7,45,40,000/- claimed for the work done on RD 24 Km to 27 Km was erroneously rejected. The submission is that the scope of work of the petitioner was for RD 0 Km to 10 Km but the work in question was undertaken by the petitioner on asking of the respondent and yet in spite of repeated requests joint inspection was not carried out to verify the work done. The submission is that the measurements made by the petitioner were head-wise and ought to have been accepted. It is contended that while making payment of Rs.41,09,530/- the respondent had not considered that the petitioner not only removed debris from the road but also the material which later slid from the slope of the hills.

4.6 Lastly, the rejection of the claim no.12 is challenged stating that the payment of Rs.10,74,000/- directly made by the district administration was for different work undertaken by the petitioner. The grievance is that the unproved stand of the respondent that the work was not done by the petitioner but got completed from another agency was accepted.

5. *Per contra,* there cannot be re-appreciation of evidence to interfere with the findings recorded.

5.1 For claim no.1, the submission is that before making deductions notice dated 11.12.2019 and reminder dated 17.01.2020 were issued and vide communication dated 02.11.2020, the petitioner was asked to deposit the expenditure incurred for removing the defects.

5.2 It is argued that the mobilisation advance was not a matter of right but a loan taken by the petitioner at an agreed rate of interest between the two parties and the interest was recovered for the period the amount was utilised by the petitioner.

5.3 As per the respondent, no interest on the amount withheld on account of non-completion of work upto the stipulated milestone could be claimed as per clause 2 of the GCC. Moreover, the petitioner never applied for rescheduling of the milestone. The delay in completion of work was attributed to both parties and the extension of time for completion of work was granted without any compensation.

5.4 The rejection of claim no.5 is defended.

5.5 The submission is that the petitioner failed to prove the actual damages suffered due to prolongation of the contract, which is a *sine qua non* for claiming damages under Section 73 of the Contract Act.

5.6 Learned counsel for the respondent submits that owing to the failure of the petitioner to substantiate the actual work done, claim no.7 was rejected.

5.7 Lastly, claim no.12 is refuted on the ground that the claim was false and no work was done by the petitioner except for which the consideration was paid by the district administration. Rather the rest of the work was executed by another agency for which the counter-claim was filed, albeit rejected on technical ground.

6. Heard the learned counsel for the parties at length and perused the record. No other contention than those as noted above has been pressed.

7. The petitioner submitted that an amount of Rs.13,00,000/- was

wrongly withheld without issuing notice but the respondent proved that after issuance of a notice dated 11.12.2019 and that the action was taken under clause 17 of the GCC. It would be appropriate to reproduce the said clause:-

> **"CLAUSE17 Contractor Liable for Damages, defects during maintenance period**
>
> If the contractor or his working people or servants shall break, deface, injure or destory any part of building in which they may be working, or any building, road, road kerb, fence, enclosure, water pipe, cables, drains, electric or telephone post or wires, trees, grass or grassland, or cultivated ground contiguous to the premises on which the work or any part is being executed, or if any damage shall happen to the work while in progress, from any cause whatever or if any defect, shrinkage or other faults appear in the work within twelve months (six months in the case of work costing Rs. Ten lacs and below except road work) after a certificate final or otherwise of its completion shall have been given by the Engineer-in-Charge as aforesaid arising out of defect or improper materials or workmanship the contractor shall upon receipt of a notice in writing on that behalf make the same good at his own expense or in default the Engineer-in-Charge cause the same to be made good by other workmen and deduct the expense from any sums that may be due or at any time thereafter may become due to the contractor, or from his security deposit or the proceeds of sale thereof or of a sufficient portion thereof. The security deposit of the contractor shall not be refunded before the expiry of twelve months (six months in the case of work costing Rs. Ten lacs and below except road work) after the issue of the certificate final or otherwise, of completion of work, or till the final bill has been prepared and passed whichever is later.
>
> Provided that in the case of road work, if in the opinion of the Engineer-in-Charge, half of the security deposit is sufficient, to meet all liabilities of the contractor under this contract, half of the security deposit will be refundable after six months and the remaining half after twelve months of the issue of the said certificate of completion or till the final bill has been prepared and passed whichever is later.
>
> In case of Maintenance and Operation works of E&M services, the security deposit deducted from contractors shall be refunded within one month from the date of final payment or within one

month from the date of completion of the maintenance contract which ever is earlier."

From a reading of clause 17 of the GCC it is clear that in the event of defect, shrinkage or other fault in the work within twelve months after the issuance of final certificate the contractor had to make good the defects upon receipt of a notice. In case of failure to do the needful the Engineer in-charge shall get the defects rectified by other workmen and deduct the expenses from the amount due to the contractor or from the security deposit. The completion certificate dated 17.12.2019 was issued to the petitioner and the defects were mentioned therein. The notice issued to the petitioner under clause 17 of the GCC and the reminder was produced as Exhibit R-104 and Exhibit R-105 respectively. The communication to the petitioner to deposit the expenditure incurred for removing the defects is Exhibit R-107. The contention that the deduction was made without issuance of notice and no deduction could be made under clause 17 of the GCC is ill-founded.

8. Under clause 10B (ii) and (iv) of the GCC the petitioner had an option to get a mobilisation advance from the respondent, bearing an interest rate of ten per cent per annum. The petitioner partially availed this option. Interest was charged for the period the amount of mobilisation advance was utilised. The arbitrator rightly rejected the argument that interest should not have been charged for the period of delay. It was noted that in the eventuality of not taking the mobilisation advance petitioner would have made own investment. Further the petitioner was well aware that the mobilisation advance

shall bear interest at a particular rate and was meant for mobilisation of resources for the project only. Interest was charged only for the period for which the mobilisation advance was utilized and not thereafter.

9. Claim no. 4, seeking interest on the amount withheld for not achieving the milestone was rejected on two grounds. Firstly, that the petitioner made no request for rescheduling of milestones and secondly, that the claim of interest on the payment withheld is barred under Clause 2 of the GCC. The contention that once the time for completion was extended the milestone should have been rescheduled need not be dilated upon in view of clause 2 of the GCC stipulating that no interest is payable on the withheld amount. It is not the case put forth that clause 2 was not applicable. So far as the submission that claim was rejected by a non-speaking award, suffice to say that the claim for interest was barred by clause 2 the GCC. The absence of detailed reasons caused no prejudice to the petitioner and the conclusion arrived at remains unaffected. The award calls for no interference.

10. Claim no.5, seeking damages under Section 73 of the Contract Act due to rise in prices of material not covered under clause 10CA was rejected for the failure of the petitioner to adduce evidence of the actual damages suffered. The arbitrator considered the admission of the petitioner that the claim was neither covered under clause 10CA nor 10CC. The challenge to the other reasons recorded for rejecting the claim need not be gone into, as one reason upheld for rejecting the claim shall be sufficient. It would be apposite to note that actual

damage suffered was not proved for raising claim under Section 73 of the Contract Act and only the head-wise calculation given by the petitioner were relied upon which remained unsubstantiated. A person making a claim under Section 73 of the Contract Act has to prove that actual damage was caused. Reference in this regard be made to the following judgment:-

10.1 The Supreme Court in **Unibros vs. All India Radio 2023 SCC OnLine SC 1366** held:-

> "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)

11. Claim no.6, for damages on account of on-site and off-site overheads due to the prolongation of the contract also remained unsubstantiated, the petitioner failed to submit proof of the actual damages suffered. Another aspect to be considered is that the petitioner was awarded a contract of approximately Rs.17 crores and ultimately executed work of approximately Rs.30 crores. It was not demonstrated that damage was suffered in spite of escalated price of revised work, in this backdrop the arbitrator recorded that the

petitioner executed 1.78 times of the tendered value of the work and earned profit therefrom. The argument that the claim was under Section 73 of the Contract Act and that the arbitrator erred in holding that there was no clause in the contract for compensating overhead expenditure is of no avail, in view of failure of the petitioner to prove the actual damages suffered. The head-wise calculation submitted by the petitioner for making the claim by itself shall not be sufficient for discharging onus of proving actual damage suffered.

12. The claim of the petitioner for the work done on RD 24 Km to 27 Km was opposed by the respondent stating that no work was actually done. The arbitrator recorded that in spite of sufficient opportunities granted to the petitioner no document or evidence was produced for proving the work done. There was no material on record except the self-serving version of the petitioner. It was also taken into account that no assessment of the ground level at the time of taking over the work by the petitioner was carried out for enabling to verify the work done on the spot. The contract provided that joint measurement shall be undertaken by both the parties to verify the work done but no such joint measurement was conducted. The work was started by the petitioner in June, 2010. A letter informing stoppage of work and requesting for joint inspection was issued on 17.06.2013 but by letter dated 22.06.2013, the petitioner informed the respondent that due to natural calamity the petitioner suffered heavy losses and site had become inaccessible. The clause for joint measurement is reproduced below:-

"CLAUSE 6 – Measurements of work done

> Engineer-in-Charge shall, except as otherwise provided, ascertain and determine by measurement, the value in accordance with the contract of work done.
>
> All measurement of all items having financial value shall be entered in Measurement Book and/or level field book so that a complete record is obtained of all works performed under the contract. All measurements and levels shall be taken jointly by the Engineer-in-Charge or his authorised representative and by the contractor or his authorised representative from time to time during the progress of the work and such measurements shall be signed and dated by the Engineer-in-Charge and the contractor or their representatives in token of their acceptance. If the contractor objects to any of the measurements recorded, a note shall be made to that effect with reason and signed by both the parties.
>
> If for any reason the contractor or his authorised representative is not available and the work of recording measurements is suspended by the Engineer-in-Charge or his representative, the Engineer-in-Charge and the Department shall not entertain any claim from contractor for any loss or damages on this account. If the contractor or his authorised representative does not remain present at the time of such measurements after the contractor or his authorized representative has been given a notice in writing three (3) days in advance or fails to countersign or to record objection within a week from the date of the measurement, then such measurements recorded in his absence by the Engineer-in-Charge or his representative shall be deemed to be accepted by the Contractor."

13. The finding recorded by the arbitrator that actually the work done was not proved by the petitioner needs no interference. Even at this stage it is argued that the head-wise calculation given by the petitioner should have been accepted. It cannot be lost sight of that the district administration made payment to the petitioner but it was claimed that more work was done than the amount paid but no evidence to this effect was produced.

14. The petitioner claimed that work was executed to restore the road connectivity after the disaster in June, 2013 in Uttarakhand. For

the work done by the petitioner the district administration verified the work by joint measurement of the State Government and the CPWD and directly paid Rs. 10,74,000/- for the work executed. The claim that the payment received directly was for a different work remained a bald statement. On the other hand, the respondent withdrew the work assigned to the petitioner and got it executed through another agency. The counter-claim for recovery of expenses incurred for execution of the work through another agency was rejected having been filed beyond the limitation prescribed under the Arbitration Act. The submission that the respondent failed to prove the execution of the work through another agency does not enhance the case of the petitioner. The petitioner claimed to have executed the work and had to discharge the onus and the claimant has to stand on its own legs. Negative onus cannot be cast upon the respondent to prove that the work was not done by the petitioner.

15. Learned counsel for the petitioner submits that the measurements furnished by the petitioner were not considered by the arbitrator and the award is perverse, lack merits. The head-wise measurement produced by the petitioner was not supported by evidence or documentary proof and claim by itself is not an evidence and its non-consideration shall not vitiate the award with perversity.

16. The law is well settled that the scope of interference under Section 34 is extremely limited. Every legal or factual error in the award does not call for interference under Section 34 of the Act. There cannot be re-appreciation of evidence. The challenge to the arbitral award can only be on the grounds mentioned in Section 34 of the Act.

The award should not be interfered with until the conclusion arrived at is perverse. Proceedings under Section 34 cannot be equated with appellate jurisdiction and there can be no re-appreciation of evidence. Interference is limited to the grounds specified under the Act, including violation of public policy, fundamental principles of Indian law or patent illegality going to the root of the matter. Errors of law or fact revealed upon reassessment of the evidence shall not justify setting aside an arbitral award unless it falls within the ambit of the grounds mentioned under Section 34 of the Act. Reference be made to the following judgements of the Supreme Court:

16.1 The apex court in **Sepco Electric Power Construction Corporation Vs. GMR Kamalanga Energy Ltd. 2025 INSC 1171** recently emphasized held:

> "97……..Therefore, it appears that even if the arbitrator's legal or factual reasoning is faulty, the courts ought to ideally refrain from interfering with an award until an error of law is evident from the award itself or in a document that forms an integral component thereof."

16.2 The Supreme Court in **Ramesh Kumar Jain vs. Bharat Aluminium Company Limited 2025 SCC OnLine SC 2857** held as under:

> "28. The bare perusal of section 34 mandates a narrow lens of supervisory jurisdiction to set aside the arbitral award strictly on the grounds and parameters enumerated in sub-section (2) & (3) thereof. The interference is permitted where the award is found to be in contravention to public policy of India; is contrary to the fundamental policy of Indian Law; or offends the most basic notions of morality or justice. Hence, a plain and purposive reading

of the section 34 makes it abundantly clear that the scope of interference by a judicial body is extremely narrow. It is a settled proposition of law as has been constantly observed by this court and we reiterate, the courts exercising jurisdiction under section 34 do not sit in appeal over the arbitral award hence they are not expected to examine the legality, reasonableness or correctness of findings on facts or law unless they come under any of grounds mandated in the said provision. In ONGC Limited. v. Saw Pipes Limited[14], this court held that an award can be set aside under Section 34 on the following grounds:"(a) contravention of fundamental policy of Indian law; or (b) the interest of India; or (c) justice or morality, or (d) in addition, if it is patently illegal."

16.3 In **Consolidated Construction Consortium Limited Vs. Software Technology Parks of India (2025) 7 SCC 757** it was held as under:

"46. Scope of Section 34 of the 1996 Act is now well crystallized by a plethora of judgments of this Court. Section 34 is not in the nature of an appellate provision. It provides for setting aside an arbitral award that too only on very limited grounds i.e. as those contained in Sub-sections (2) and (2-A) of Section 34. It is the only remedy for setting aside an arbitral award. An arbitral award is not liable to be interfered with only on the ground that the award is illegal or is erroneous in law which would require re-appraisal of the evidence adduced before the arbitral tribunal. If two views are possible, there is no scope for the court to re-appraise the evidence and to take the view other than the one taken by the arbitrator. The view taken by the arbitral tribunal is ordinarily to be accepted and allowed to prevail. Thus, the scope of interference in arbitral matters is only confined to the extent envisaged Under Section 34 of the Act. The court exercising powers Under Section 34 has perforce to limit

its jurisdiction within the four corners of Section 34. It cannot travel beyond Section 34. Thus, proceedings Under Section 34 are summary in nature and not like a full-fledged civil suit or a civil appeal. The award as such cannot be touched unless it is contrary to the substantive provisions of law or Section 34 of the 1996 Act or the terms of the agreement."

16.4 In **PSA Sical Terminals Pvt Ltd. vs. The Board of Trustees of V.O. Chidambranar Port Trust Tuticorin And Others (2023) 15 SCC 781** it was held:

"38. Before that, it will be apposite to refer to the judgment of this Court in MMTC Ltd. [MMTC Ltd. v. Vedanta Ltd., (2019) 4 SCC 163 : (2019) 2 SCC (Civ) 293] , wherein this Court has revisited the position of law with regard to scope of interference with an arbitral award in India. It will be relevant to refer to the following observations of this Court in MMTC Ltd. [MMTC Ltd. v. Vedanta Ltd., (2019) 4 SCC 163 : (2019) 2 SCC (Civ) 293] : (SCC pp. 166-67, paras 11-14)

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

Wednesbury Corpn., (1948) 1 KB 223 (CA)] reasonableness. Furthermore, "patent illegality" itself has been held to mean contravention of the substantive law of India, contravention of the 1996 Act, and contravention of the terms of the contract.

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

14. As far as interference with an order made under Section 34, as per Section 37, is concerned, it cannot be disputed that such interference under Section 37 cannot travel beyond the restrictions laid down under Section 34. In other words, the court cannot undertake an independent assessment of the merits of the award, and must only ascertain that the exercise of power by the court under Section 34 has not exceeded the scope of the provision. Thus, it is evident that in case an arbitral award has been confirmed by the court under Section 34 and by the court in an appeal under Section 37, this Court must be extremely cautious and slow to disturb such concurrent findings.""

(Emphasis Supplied)

17. The view taken by the arbitrator is plausible, not vitiated by patent legality, perversity or conflict in public policy of India and no case is made out for interference by this Court under Section 34 of the Act.

18. The petition is dismissed. All pending applications stand dismissed.

AVNEESH JHINGAN, J.

JANUARY 21, 2026
Ch

Reportable:- Yes