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

% *Date of Decision: 26th September, 2025*

\+ O.M.P. (COMM) 391/2023

HIMALAYA COMMUNICATIONS PVT. LTD. .....Petitioner
Through: Mr. Sakal Bhushan, Mr. Vasu Bhushan and Mr. Nipun Bhushan, Advocates.

versus

BHARAT SANCHAR NIGAM LIMITED .....Respondent
Through: Ms. Sangeeta Sondhi and Mr. Daksh Jain, Advocates.

\+ O.M.P. (COMM) 466/2023

BHARAT SANCHAR NIGAM LTD .....Petitioner
Through: Ms. Sangeeta Sondhi and Mr. Daksh Jain, Advocates.

versus

HIMALAYA COMMUNICATIONS PVT LTD .....Respondent
Through: Mr. Sakal Bhushan, Mr. Vasu Bhushan and Mr. Nipun Bhushan, Advocates.

CORAM:
HON'BLE MS. JUSTICE JYOTI SINGH

JUDGEMENT

JYOTI SINGH, J.

O.M.P. (COMM) 391/2023

1. This petition is filed on behalf of the Petitioner under Section 34 of Arbitration and Conciliation Act, 1996 ('1996 Act') laying a challenge to Arbitral Award dated 23.06.2023 to the extent it rejects Petitioner's claim for refund of Earnest Money Deposit ('EMD') of Rs.2 crores along with interest and costs. For the sake of convenience, M/s Himalaya Communications Pvt. Ltd. is referred to as the Petitioner while BSNL is

referred to as the Respondent, hereinafter, in both the petitions.

2. Case of the Petitioner is that by way of Notice Inviting Tender ('NIT') dated 24.06.2016, Respondent/BSNL invited sealed tenders from eligible bidders for procurement of *inter alia* 16,000 km of 24F Optical Fiber Cable ('OFC') and 50,000 km of 48F OFC. In terms of Clause 4.1.2(c) of Section-1, Part A, persons who had applied for Technical Specification Evaluation Certificate ('TSEC') for their products in QF-103 form (Registration) were also eligible for participating in the tender. On 03.08.2016, Petitioner applied to the Quality Assurance Circle, Bangalore ('QAC') in specified form QF-101 for obtaining TSEC and the application was registered successfully.

3. It is averred that in August, 2016, Petitioner submitted its techno-commercial and financial bids along with requisite EMD of Rs.2 crores by way of Bank Guarantee to BSNL in terms of Clause 12.1, Section-4, Part A. On 28.09.2016, Petitioner was declared as L-1 bidder for 24F and 48F OFCs. Samples of 24F and 48F OFCs sent by the Petitioner for testing on 07.09.2016, were rejected by the Government Laboratory on 20.10.2016. On 20.10.2016 and 25.10.2016, BSNL Laboratory rejected the samples of two raw materials, i.e. Impregnated Glass Fibre Reinforcement ('IGFR') and Rip Cord bought by the Petitioner from BSNL's approved vendors and sent for testing on 22.09.2016. On 27.10.2016, Respondent resent counter samples of IGFR and Rip Cords for retesting to CACT Laboratory, which were rejected on 29.01.2016.

4. It is stated that on 28.10.2016, BSNL placed two Advance Purchase Orders ('APOs') on the Petitioner for partial quantities of 24F (6,400 kms) and 48F (20,000 kms) OFCs. Petitioner was called upon to accept the APOs

unconditionally and furnish Performance Bank Guarantees ('PBGs'). The APOs incorporated terms which specified: (i) the precise quantities of cables and the rates at which they were to be supplied; and (ii) the lead period of two months for preparation and total delivery period of 6 months, both starting to run from the date of issuance of the APOs. On 10.11.2016, BSNL Laboratory rejected the counter samples of IGFR and Rip Cord.

5. It is averred that vide email dated 16.11.2016, BSNL called upon the Petitioner once again to unconditionally accept the two APOs and submit the PBGs, in response to which vide letter dated 17.11.2016, Petitioner sought 3-4 weeks' extension. By another letter dated 21.11.2016, BSNL advised the Petitioner to submit the application for type-approval after improving the product, i.e., the cables. BSNL accepted Petitioner's request for extension and vide letter dated 29.11.2016 extended the time for accepting the APOs and furnishing PBGs up to 02.12.2016. On the same day, Petitioner requested BSNL to give time till 12.12.2016 to respond BSNL's letter dated 29.11.2016 as its Directors were out of station and this request was accepted by BSNL granting time till 12.12.2016, vide letter dated 09.12.2016.

6. It is stated that on 19.12.2016, pursuant to BSNL's letter dated 21.11.2016 Petitioner re-manufactured the 24F and 48F OFCs by procuring fresh raw materials from other approved vendors of BSNL and after internal testing, samples were offered along with testing reports and demand draft with the prescribed fee within the lead time period of two months from the date of the issue of the APOs i.e. 28.10.2016. However, owing to the failure of the Petitioner to give unconditional acceptance to the APOs and non-submission of PBGs, BSNL withdrew the APOs on 09.01.2017 and on 11.01.2017 refused to further process Petitioner's application for type-

approval. The demand draft was returned back to the Petitioner. Consequently, BSNL addressed a letter to Chief Manager, Corporation Bank on 27.01.2017 and invoked the EMD Bank Guarantee of Rs.2 crores.

7. It is stated that compelled by the forfeiture of EMD, Petitioner preferred W.P. (C) No.2012/2017 before this Court on 06.03.2017, however, the same was withdrawn on 02.08.2018 owing to the objection of the BSNL to the maintainability of the writ petition in light of the arbitration agreement between the parties. Vide notice dated 12.07.2019, Petitioner invoked arbitration and called upon BSNL to consent to the appointment of an Arbitrator. On failure of BSNL to consent, Petitioner approached this Court and filed a petition under Section 11(6) of the 1996 Act being ARB. P. No.701/2019, which was allowed and vide order dated 21.11.2019, Sole Arbitrator was appointed to adjudicate the disputes between the parties.

8. It is further stated that Petitioner filed its Statement of Claim ('SoC') with supporting documents seeking refund of EMD with interest and costs while BSNL filed its reply to the SoC as also counter claims, to which Petitioner filed its reply. The learned Arbitrator pronounced and published the Arbitral Award dated 23.06.2023, rejecting Petitioner's claim for refund of EMD as also rejecting BSNL's counter claims holding that BSNL had failed to prove any loss and even otherwise, the loss claimed in the pleadings was too remote and not a direct result of any act or omission of the Petitioner. Petitioner challenges the award to the extent the Arbitrator has rejected its claims for refund of EMD and interest thereon and costs.

CONTENTIONS ON BEHALF OF THE PETITIONER:

9. Learned Arbitrator has erroneously rejected Petitioner's claim for refund of forfeited EMD of Rs.2 crores with interest and costs and in

essence, has allowed BSNL to retain Petitioner's substantial amount contrary to a categorical finding in favour of the Petitioner that no loss had been proved by BSNL and even otherwise, the loss claimed in the pleadings was too remote and not a direct result of any act or omission of the Petitioner. Thus, the award has resulted in unjust enrichment of BSNL and suffers from '*patent illegality*' going to the root of the matter, being self-contradictory.

10. The impugned award is also against '*fundamental policy of Indian law*' since it disregards the binding dictum of the Supreme Court in the decision in ***Kailash Nath Associates v. Delhi Development Authority and Another, (2015) 4 SCC 136,*** which in turn is based on the judgment of the Supreme Court in ***Fateh Chand v. Balkishan Dass, 1963 SCC OnLine SC 49,*** holding that proof of damage or loss caused is a *sine qua non* for forfeiture of earnest deposit or imposition of penalty. ***Kailash Nath (supra)*** was a decision which involved forfeiture of EMD and the Supreme Court held that Section 74 of the Contract Act, 1872 will apply to cases of forfeiture of earnest money under a contract and the only exception to the rule is EMD deposit in case of public auctions, which is not the case here. Therefore, BSNL's action of forfeiture of the EMD, without any proof of loss is in the teeth of these judgments, which were cited by the Petitioner during hearing and were referred to in the written submissions filed before the Arbitrator. It needs no reiteration that disregarding the binding effect of judgments of superior Courts, has been judicially recognized as violation of '*fundamental policy of Indian law'* **[Ref.: *Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCC 644; Associate Builders v. Delhi Development Authority, (2015) 3 SCC 49;*** and ***Ssangyong Engineering***

and Construction Company Limited v. National Highways Authority of India (NHAI), (2019) 15 SCC 131].

11. This Court has taken a consistent view that proof of loss is necessary before damages can be awarded for breach of contract in light of provisions of Section 74 of the Contract Act. In ***R.B. Enterprises v. Union of India, 2023 SCC OnLine Del 8321***, relying on the decisions in ***Kailash Nath (supra), Fateh Chand (supra)*** and ***Maula Bux v. Union of India, (1969) 2 SCC 554***, this Court concluded that an award which upholds the grant of damages even pertaining to stipulated liquidated damages, without the party claiming damages proving the actual loss caused, warrants interference. In ***Union of India and Another v. Indian Agro Marketing Co-operative Ltd., 2023 SCC OnLine Del 4621***, Court observed that proof of actual damages or loss is a *sine qua non* for grant of damages under Section 74 and Petitioners having failed to produce any material to demonstrate risk purchase or actual loss suffered, could not be allowed to unduly enrich themselves by retaining the amount appropriated by them by encashing the Bank Guarantee.

12. Reliance placed by the Arbitrator on the judgments in ***State of Haryana and Others v. Malik Traders, (2011) 13 SCC 200; National Highway Authority of India v. Ganga Enterprises and Another, (2003) 7 SCC 410; H.U.D.A. and Another v. Kewal Krishan Goel and Others, (1996) 4 SCC 249; Villayati Ram Mittal Private Limited v. Union of India and Another, (2010) 10 SCC 532;*** and ***National Thermal Power Corporation Limited v. Ashok Kumar Singh and Others, (2015) 4 SCC 252,*** is wholly misplaced as these cases are distinguishable on facts. In all these cases, successful bidders had withdrawn or changed their respective

bids before acceptance, resulting in forfeiture of EMD under contractual stipulations and then sought refund, which was rightly declined. Contrary thereto, in the instant case, Petitioner neither withdrew nor altered its bid as a matter of record and instead it was always willing to perform its obligations arising out of the contract and continued to send samples for testing and re-testing.

13. Finding and conclusion of the Arbitrator that no concluded contract was executed between the parties is a perverse finding and renders the award patently illegal. Having come to this erroneous conclusion, the Arbitrator upheld the action of BSNL of withdrawing the APOs and forfeiting the EMD. In fact, the APOs were concluded contracts between the parties and BSNL was not empowered to forfeit the EMD, which could only be forfeited if the bid was withdrawn or any terms of the bid documents were violated, at this stage prior to the conclusion of contracts. Clearly, BSNL's NIT dated 24.06.2016 was an 'invitation to offer' and Petitioner's bid was an 'offer'. Once the BSNL declared the Petitioner as L-1 bidder and issued the APOs on 28.10.2016, it amounted to acceptance of the offer and concluded contracts for supply of cables came into existence.

14. Arbitrator's finding that the APOs were only Letters of Intent, whereby BSNL expressed its intent to enter into a contract, is perverse and is based on the wrong stand of BSNL that forfeiture of EMD was in accordance with terms and conditions of Tender Inquiry Document/ Agreement since despite many opportunities, Petitioner refused to submit unconditional acceptance to the two APOs and evaded its obligations on one pretext or the other. This stand is contrary to the terms of NIT. Note 1 of Section 1, Part A of NIT provided that issuance of APO was award of

contract. Note 1 reads '*The quantity stated above are estimated and BSNL reserves the right to vary the quantity to the extent of -25% to +25% of specified quantity at the time of* ***award of the contract i.e. APO*** *without any change in unit price or other terms and conditions."* Definition of the term 'Purchase Order' in Section-4, Part A of NIT reads '*…….The Purchase Order shall be* ***deemed*** *as "Contract" appearing in the document'.* Use of word '*deemed'* clearly shows that parties did not intend that the Purchase Order would form the contract and it was understood that issuance of APOs, which were acceptance of the offer made by the Petitioner, would form a concluded contract, in light of the provisions of the Contract Act, dealing with invitation to offer, offer and acceptance of offer. Arguendo, even if APOs are treated as LOIs, as held by the Supreme Court in the decision in ***Dresser Rand S.A. v. Bindal Agro Chem Ltd. and Another, (2006) 1 SCC 751***, an LOI can be construed as a letter of acceptance resulting in a concluding contract between the parties. Ratio of this judgment is squarely applicable in the present case as APOs were actually in the nature of Letter of Acceptance since they clearly specified the precise quantities and firm rates at which the cables were to be supplied as also the lead period of two months for preparation and the total delivery period of six months, both starting from the dates of issuance of the APOs. Even though, the Arbitrator takes note of this judgment cited by the Petitioner, he has not rendered any finding on the existence and effect of the specific clauses in the APOs or the contention of the Petitioner that the judgment covered its case on all fronts.

15. For the sake of arguments, even if it is assumed that no formal contract was executed between the parties because the Petitioner did not accept the APOs, then also one cannot lose sight of the fact that furnishing

of EMD and its receipt/acceptance by BSNL was in itself a limited contract *albeit* a contract not for supply but for enabling the Petitioner to participate in the tender process under Section 2(h) of the Contract Act, which provides '*an agreement enforceable by law is a contract'*. This position of law comes from the decision of the High Court of Calcutta in ***MBL Infrastructure Ltd. v. Rites Limited and Others, 2020 SCC OnLine Cal 478*** and has been overlooked by the Arbitrator.

16. Even otherwise, for application of Section 74 of the Contract Act, which is premised on the principle against unjust enrichment, which is a facet of public policy, formation of a concluded contract is not necessary. It cannot be a proposition of law that a party which invests time and money in a contract at the instance of the other party, can be deprived of its money and the other party can be permitted to retain the EMD only by a mere pleading of violation of terms of bid conditions by the first party.

17. Independent of all other arguments, Petitioner cannot be held liable for breach of the terms of NIT/contract in question. Arbitrator has completely erred in holding that by not accepting the APOs and not furnishing PBGs within 14 days of issuance of APOs, as stipulated in Clause 27.2 of NIT or the extended period, Petitioner is in breach. It is settled law that every failure to accept the APO or furnish PBG cannot qualify as a fundamental breach entailing forfeiture of EMD. **[Ref.:** ***Avdel Tools & Services v. Trufit Fasteners, MANU/MH/1001/2008; Lakhmi Chand v. Reliance General Insurance, (2016) 3 SCC 100;*** and ***Hiedelberg Cement India Ltd. v. Indure Pvt. Ltd., 2020 SCC OnLine Del 2220]***. It is only if the Petitioner had violated one or more of the fundamental conditions going to the root of the contract, EMD could have been forfeited such as: (a) it did

not accept the APO and furnish the PBG even after obtaining TSEC for its products; and (b) it failed in getting TSEC within two months from issuance of the APOs due to its own fault. In the instant case, none of these breaches have occurred and therefore, forfeiture of EMD was completely illegal.

18. Arbitrator has glossed over a very crucial factual aspect of this matter. BSNL was entitled to issue purchase orders for supply of cables only to those bidders who had received TSEC/Type Approval Certificate ('TAC'). Petitioner's application in form QF-103 seeking type-approval was pending with BSNL and it was thus not yet eligible to supply cables at that time and no Purchase Orders could be placed. It was, therefore, completely unwarranted for BSNL to insist on acceptance of APOs or furnish PBGs. As per Clause 6.2.4 of NIT, raw material for the cables had to be obtained from BSNL approved sources/vendors only. Petitioner manufactured first batch of cables using raw materials from approved vendors and submitted the same for testing to BSNL on 07.09.2016 for obtaining TSEC/TAC. On 21.11.2016, BSNL informed the Petitioner that samples had failed and test results reflected that this was owing to quality of raw material supplied by BSNL's approved vendors and not due to any fault by the Petitioner. Without any reason, this important aspect had been sidelined by the Arbitrator by simply observing '*noted only for rejection'*.

19. Learned Arbitrator has committed patent illegality in overlooking that on 21.11.2016 BSNL had instructed the Petitioner to either explain the reason for failure of the sample test or alternatively submit furnish QF-103 after improvement in the product, while intimating about the failure of samples of first batch and acting on these instructions, Petitioner obtained

fresh raw material from other BSNL approved vendors, re-manufactured new cables, got them tested at its own level and as a matter of record, submitted fresh form QF-103 on 19.12.2016 along with demand draft, detailed test report and sample for testing to BSNL to obtain TSEC. Arbitrator overlooked that as per Note-3 and Clause 3 as also Clause 2(i) of NIT, time period of two months was available to the Petitioner to get TSEC from the date of APOs, i.e. from 28.10.2016. Two months period was to expire on 28.12.2016 and well before that on 19.12.2016, fresh form was submitted by the Petitioner. However, instead of re-testing the product and issuing TSEC/TAC, BSNL arbitrarily kept the process pending and belatedly on 11.01.2017 returned the demand draft refusing to test the cables. Significantly, in this letter there was no mention of any breach and the only reason spelt out was that second application for the same product against the same tender cannot be considered. This clearly shows that the stand of BSNL that there was no concluded contract or that the Petitioner was in breach was only an after-thought.

CONTENTIONS ON BEHALF OF THE RESPONDENT:

20. No ground for interference by this Court in the Arbitral Award is made out exercising power under Section 34 of 1996 Act. Petitioner is unable to substantiate any patent illegality in the award that goes to the root of the matter. Petitioner is virtually calling upon the Court to examine the award as an Appellate Court, which is impermissible in law. Arbitrator is the final arbiter of facts and his finding of facts cannot be interfered with or substituted by this Court. Arbitrator has carefully considered the terms of NIT dated 24.06.2016 and APOs dated 28.10.2016 and taken a plausible and possible view that the EMD was rightly forfeited and it is not the domain of

this Court to interpret the provisions of the NIT/APOs and come to a different finding.

21. Arbitrator has rightly held that Petitioner is not entitled to refund of EMD amount of Rs.2 Crore, in light of Clauses 12.3, 12.7, 27, 28 and 29 of '*General Instructions to the Bidders'* ('GIB') and Serial No.3 of Appendix-I to Section 4, Part-A of NIT. Clause 22 of APOs clearly required unequivocal and unconditional acceptance of the APOs by furnishing PBGs within 14 days from the date of issuance of the APOs and Petitioner was under an obligation to communicate its acceptance of the APOs and also furnish PBGs within the stipulated time. Failure of the Petitioner to comply with the mandatory requirements has correctly resulted in forfeiture of the bid security.

22. Petitioner had wrongly set up a case before the Arbitrator that the APOs were concluded contracts and communication of acceptance thereto was a mere formality. This argument is in the teeth of the judgment of the Supreme Court in ***South Eastern Coalfields Limited and Others v. S. Kumar's Associates AKM (JV), (2021) 9 SCC 166***, wherein the Supreme Court *inter alia* held that in order to determine the issue whether there was a concluded contract between the parties or not, the NIT and LOI have to be examined. In light of this position of law, the Arbitrator rightly examined the clauses and concluded that Clauses 27 and 28 of NIT and Clause 22 of APOs categorically provided that the APOs were merely Letters of Intent and Purchase Orders issued after acceptance of APOs by the Petitioner would be the '*contract'*.

23. Respondent granted a number of extensions to the Petitioner to obtain TSEC/TAC for its products and on each occasion, it put the Petitioner to

notice to submit the PBGs and accept the APOs within the extended timelines. This is evident from e-mails dated 16.11.2016 and letters dated 29.11.2016 and 09.12.2016. Despite this, Petitioner kept on seeking extensions without complying with the requisite conditions on frivolous grounds such as 'Banking Turmoil' or the Director being out of Delhi. No fault can be found in the finding of the Arbitrator that acceptance of APOs and furnishing of PBGs was fundamental to the formation of the contract and was independent of two months' period for obtaining TSEC/TAC which was only essential for making supplies under the APOs. Despite multiple extensions, Petitioner did not comply with the terms and Arbitrator rightly observed that Respondent could not have been expected to wait indefinitely for the Petitioner to obtain TSEC/TAC and that too, in the absence of any commitment from the Petitioner towards performance of the contact by accepting APOs.

24. Arbitrator has not committed any patent illegality in insisting that Petitioner ought to have accepted the APOs and furnished the PBGs. It is true that one of the pre-conditions for bidding was having applied/obtained TSEC/TAC. NIT was issued on 24.06.2016 and admittedly, Petitioner had applied for TSEC/TAC prior to bidding and was thus eligible to bid. This had no implication on acceptance of the APOs, as both were parallel procedures. Petitioner's contention that its products failed to meet specifications due to faulty raw materials supplied by approved vendors is misleading. Petitioner had an option of sourcing the raw materials from any other approved vendors of BSNL and also had sufficient time from the date of its first application from TSEC valuation made on 03/04.08.2016. Petitioner was declared L-1 bidder on 28.09.2016 and APOs were placed a

month later only on 28.10.2016. Had the Petitioner accepted the APOs, BSNL would have been assured of its seriousness and may have granted further time for obtaining TSEC/TAC. Therefore, the situation that the Petitioner finds itself in today is its own creation of violating the required procedures. Moreover, the onus to obtain TSEC/TAC within a reasonable time was on the Petitioner and BSNL cannot be held responsible for its failure.

25. Petitioner wrongly contends that it had offered fresh samples for testing on 19.12.2016. Record shows that it had re-applied for TSEC registration with BSNL's QAC Wing, Bangalore, while its previous application submitted at the time of bidding was still pending. In this fact situation, the said office had no option but to return the subsequent application as the first one was not decided. Petitioner ought to have either submitted fresh samples under previous application or in the alternative should have requested to close the chapter in respect of its first application, before submitting fresh samples.

26. Learned Arbitrator has rightly held that acceptance of APOs and obtaining TSEC/TAC were two independent processes and Petitioner was well-aware of this position. Petitioner never intimated the APO issuing authority about the failure of its samples to meet the quality check by the QAC Wing, from the date of issuance of APOs till withdrawal of the same. Significantly, at no point in time, Petitioner communicated BSNL that it was not submitting PBG or not accepting the APOs due to failure of its products to meet the quality specifications. In fact, Petitioner continued to seek extensions for extraneous reasons and erroneously linking the two distinct processes.

ANALYSIS AND FINDINGS:

27. Facts to the extent they are not in dispute are that NIT was issued by the Respondent for procurement of 24F and 48F OFCs. On 04.08.2016, Petitioner applied to QAC Bangalore for issuance of TSEC basis, which it became eligible to participate in the tender process. In August, 2016, Petitioner submitted techno-commercial and financial bid along with EMD of Rs. 2 crores. On 07.09.2016, Petitioner sent the samples of 24F and 48F OFCs for evaluation and validation to a Government laboratory nominated by the Respondent and on 22.09.2016, samples of raw material were sent for TSEC approval by Respondent's QAC. On 28.09.2016, Petitioner was declared as L-1 Bidder. On 20.10.2016, samples of 24F and 48F OFCs were rejected by the third party Government laboratory and on 19.10.2016/ 20.10.2016, Respondent rejected the samples of raw materials. Subsequently, on 25.10.2016, Petitioner's samples for Rip Cord were also rejected. On 27.10.2016, counter samples of IGFR and Rip Cord were re-sent by the Respondent to its own lab for retesting.

28. On 28.10.2016, two APOs for partial quantities of 24F and 48F OFCs were issued by the Respondent in favour of the Petitioner and Petitioner was required to accept the same and furnish PBG in terms of the NIT and APOs. Post this, Respondent rejected the counter samples of IGFR and Rip Cord on 10.11.2016 and time limit of 14 days to furnish performance security also expired. Correspondence was exchanged between the parties, wherein Petitioner sought extension of time for different reasons, which was granted, however, since Petitioner failed to accept the APOs and furnish PBG even during the extended time, Respondent withdrew the APOs vide letter dated 09.01.2017 in terms of Clause 22 of the APOs. Disputes arose between the

parties and recourse was taken to arbitration as the agreed disputes resolution mechanism and the learned Arbitrator passed the Arbitral Award dated 23.06.2023, whereby claims of the Petitioner for refund of EMD of Rs. 2 crores with interest and cost as also counter claims of the Respondent for loss suffered and interest/costs were rejected.

29. Before proceeding to examine the rival contentions on merits, I may allude to the law on the scope of interference in an Arbitral Award under Section 34 of the 1996 Act. It is trite that in a petition under Section 34, the powers of the Court are circumscribed and restricted and there can be no review of the merits of the dispute. ***[Ref: OPG Power Generation Private Limited v. Enexio Power Cooling Solutions India Private Limited and Another, 2024 SCC OnLine SC 2600; MMTC Ltd. v. Vedanta Ltd. (2019) 4 SCC 163; Bharat Coking Coal Limited v. Annapurna Construction, (2023) 8 SCC 154; Ssangyong (supra);*** and ***MD, Army Welfare Housing Organization v. Sumangal Services (P) Ltd., (2004) 9 SCC 619].***

30. Under the unamended Section 34(2) of the 1996 Act, as it stood prior to Amendment Act, 2016, *inter alia* interference in an Arbitral Award was envisaged if it was in conflict with Public Policy of India and the Supreme Court in ***Oil & Natural Gas Corporation Ltd. v. Saw Pipes Ltd., (2003) 5 SCC 705*** and ***Associate Builders (supra)***, held that an award will be contrary to Public Policy of India if it was: (a) contrary to fundamental policy of Indian law; or (b) contrary to interest of India; or (c) contrary to justice or morality; or (d) patently illegal. 'Patent illegality' was recognized as a ground to interfere in Arbitral Award in several judgments of the Supreme Court including ***McDermott International Inc. v. Burn Standard Co. Ltd. and Others, (2006) 11 SCC 181.***

31. Arbitration and Conciliation (Amendment) Act, 2016 was introduced with effect from 23.10.2015 and the expression 'Public Policy of India' was by Explanation I, restricted to cases where the award was: (i) induced or affected by fraud or coercion; (ii) violative of Section 75; (iii) violative of Section 81; (iv) in contravention with Public Policy of Indian Law; or (v) in conflict with most basic notions of morality and justice. This, however, did not entail review of the award on merits of the dispute. In ***Ssangyong (supra),*** the Supreme Court held as follows:-

> ***"34.*** *What is clear, therefore, is that the expression "public policy of India", whether contained in Section 34 or in Section 48, would now mean the "fundamental policy of Indian law" as explained in paras 18 and 27 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] i.e. the fundamental policy of Indian law would be relegated to "Renusagar" understanding of this expression. This would necessarily mean that Western Geco [ONGC v. Western Geco International Ltd., (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12] expansion has been done away with. In short, Western Geco [ONGC v. Western Geco International Ltd., (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12] , as explained in paras 28 and 29 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , would no longer obtain, as under the guise of interfering with an award on the ground that the arbitrator has not adopted a judicial approach, the Court's intervention would be on the merits of the award, which cannot be permitted post amendment. However, insofar as principles of natural justice are concerned, as contained in Sections 18 and 34(2)(a)(iii) of the 1996 Act, these continue to be grounds of challenge of an award, as is contained in para 30 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] .*
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> ***35.*** *It is important to notice that the ground for interference insofar as it concerns "interest of India" has since been deleted, and therefore, no longer obtains. Equally, the ground for interference on the basis that the award is in conflict with justice or morality is now to be understood as a conflict with the "most basic notions of morality or justice". This again would be in line with paras 36 to 39 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , as it is only such arbitral awards that shock the conscience of the court that can be set aside on this ground.*
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> ***36.*** *Thus, it is clear that public policy of India is now constricted to mean firstly, that a domestic award is contrary to the fundamental policy of*

Indian law, as understood in paras 18 and 27 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , or secondly, that such award is against basic notions of justice or morality as understood in paras 36 to 39 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] . Explanation 2 to Section 34(2)(b)(ii) and Explanation 2 to Section 48(2)(b)(ii) was added by the Amendment Act only so that Western Geco [ONGC v. Western Geco International Ltd., (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12] , as understood in Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , and paras 28 and 29 in particular, is now done away with.

37. *Insofar as domestic awards made in India are concerned, an additional ground is now available under sub-section (2-A), added by the Amendment Act, 2015, to Section 34. Here, there must be patent illegality appearing on the face of the award, which refers to such illegality as goes to the root of the matter but which does not amount to mere erroneous application of the law. In short, 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.*

38. *Secondly, it is also made clear that reappreciation of evidence, which is what an appellate court is permitted to do, cannot be permitted under the ground of patent illegality appearing on the face of the award.*

39. *To elucidate, para 42.1 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , namely, a mere contravention of the substantive law of India, by itself, is no longer a ground available to set aside an arbitral award. Para 42.2 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , however, would remain, for if an arbitrator gives no reasons for an award and contravenes Section 31(3) of the 1996 Act, that would certainly amount to a patent illegality on the face of the award.*

40. *The change made in Section 28(3) by the Amendment Act really follows what is stated in paras 42.3 to 45 in Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , namely, that the construction of the terms of a contract is primarily for an arbitrator to decide, unless the arbitrator construes the contract in a manner that no fair-minded or reasonable person would; in short, that the arbitrator's view is not even a possible view to take. Also, if the arbitrator wanders outside the contract and deals with matters not allotted to him, he commits an error of jurisdiction. This ground of challenge will now fall within the new ground added under Section 34(2-A).*

41. *What is important to note is that a decision which is perverse, as understood in paras 31 and 32 of Associate Builders [Associate*

Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , 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. Thus, 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 on the ground of patent illegality. Additionally, 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.

42. *Given the fact that the amended Act will now apply, and that the "patent illegality" ground for setting aside arbitral awards in international commercial arbitrations will not apply, it is necessary to advert to the grounds contained in Sections 34(2)(a)(iii) and (iv) as applicable to the facts of the present case."*

32. In ***PSA SICAL (supra)***, the Supreme Court referring to the earlier judgments on the issue, including in ***Associate Builders (supra), Ssangyong (supra), MMTC Limited (supra),*** etc. held that it is more than settled legal position that in an application under Section 34, Court is not expected to sit as an Appellate Court and re-appreciate evidence. Scope of interference will be limited to grounds provided under the said provision and interference will be warranted if the award is in violation of 'public policy of India', which has been held to be 'fundamental policy of Indian law'. Judicial intervention on account of interfering on merits in the award would not be permissible *albeit* principles of natural justice contained in Sections 18 and 34(2)(a)(iii) of the 1996 Act would continue to be grounds of challenge. A decision which is perverse, though would not be a ground for challenge under public policy of India, would certainly amount to patent illegality and 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 on ground of patent illegality.

33. It would also be useful to refer to the judgment of the Supreme Court

in ***State of Jharkhand and Others v. HSS Integrated SDN and Another, (2019) 9 SCC 798,*** where the Supreme Court held that Arbitral Tribunal is the master of evidence and findings of fact arrived at, based on appreciation of evidence, are not to be scrutinized as if the Court was sitting in appeal. To the same effect is the judgment of the Supreme Court in ***Maharashtra State Electricity Distribution Company Limited v. Datar Switchgear Limited and Others, (2018) 3 SCC 133***. Recently, in ***Hindustan Construction Company Limited v. National Highways Authority of India, (2024) 2 SCC 613***, the Supreme Court re-stated that Courts should not customarily interfere with the Arbitral Award which is well-reasoned and view of the Arbitrator is a plausible view. Relevant passages from the judgment are as follows:-

> ***"26.*** *The prevailing view about the standard of scrutiny — not judicial review, of an award, by persons of the disputants' choice being that of their decisions to stand — and not interfered with, (save a small area where it is established that such a view is premised on patent illegality or their interpretation of the facts or terms, perverse, as to qualify for interference, courts have to necessarily choose the path of least interference, except when absolutely necessary). By training, inclination and experience, Judges tend to adopt a corrective lens; usually, commended for appellate review. However, that lens is unavailable when exercising jurisdiction under Section 34 of the Act. Courts cannot, through process of primary contract interpretation, thus, create pathways to the kind of review which is forbidden under Section 34. So viewed, the Division Bench's approach, of appellate review, twice removed, so to say (under Section 37), and conclusions drawn by it, resulted in displacing the majority view of the tribunal, and in many cases, the unanimous view, of other tribunals, and substitution of another view. As long as the view adopted by the majority was plausible — and this Court finds no reason to hold otherwise (because concededly the work was completed and the finished embankment was made of composite, compacted matter, comprising both soil and fly ash), such a substitution was impermissible.*
>
> *27. For a long time, it is the settled jurisprudence of the courts in the country that awards which contain reasons, especially when they interpret contractual terms, ought not to be interfered with, lightly. The proposition was placed in State of U.P. v. Allied Constructions [State of U.P. v. Allied Constructions, (2003) 7 SCC 396] : (SCC p. 398, para 4)*

> *"4. ... 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. State of Kerala [Sudarsan Trading Co. v. State 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.""*

34. At this stage, it would be useful to allude to the issues framed by the learned Arbitrator for determination, which are as follows:-

> 10 From the pleadings as also the documents and contentions the following questions arise for consideration and determination by this Tribunal.
>
> Q1. Whether acceptance of bid of the claimant and issue of APOs by the Respondent forms the contract as contended by the Claimant or it is only issue of Letter of Intent (LOI) and not the contract as contended by the Respondent?
>
> Q2. Whether acceptance of APOs and submission of PBGs by the Claimant was not a fundamental requirement but only a formality as contended by the Claimant or it was fundamental to the formation and performance of contract by the Claimant?
>
> Q3. Whether the Respondent was or not justified in withdrawing APOs and forfeiture and encashment of EMD?
>
> Q4. If answer to question no. 3 is in favour of the Respondent, was it justified in retendering or it ought to have proceeded by placing APOs on the other bidders?
>
> Questions no. 1, 2 and 3 being interlinked are taken together for discussion.

35. Learned Arbitrator decided Issues 1, 2 and 3 together and answered all the three questions in favour of the Respondent. It was held that the APOs were only Letters of Intent and not concluded contracts. The contract was to come into existence only after Petitioner accepted the APOs and submitted PBGs and Purchase Orders were issued. It was further held that acceptance of APOs and furnishing of PBGs were components of the formation and performance of the contracts and not a mere formality. In respect of the third issue, it was held that Respondent was justified in withdrawing the APOs and forfeiting EMDs of the Petitioner in light of Clause 12.7 and Clause 3 Appendix 1 Section 4 Part A of GIB, which provide for forfeiture of EMD in case of non-acceptance of APOs by the Petitioner within the stipulated period. Relevant paragraphs of the award are as follows:-

> *"21. From the above provisions and other provisions to be noted hereafter it would be seen that the TSEC / TAC was only a pre-condition to be eligible for the supply and not pre-requisite for acceptance of APOs by the bidder and formation of contract. And that APO is placed upon successful bidder, whereas, PO is placed on the one who had met all the criteria including acceptance of APOs, deposit of PBG, obtaining of TSEC/TAC type approval etc. The process of testing and obtaining TSEC / TAC was independent of issuing and acceptance of APOs. Both the conditions had no nexus whatsoever and cannot be intertwined.*
>
> *22. The Ld. Counsel for the Claimant contends that the Respondent in para 6 of SOD had admitted that parties entered into an agreement and also that Note I Section 1 Part A NIT states that issuance of APOs is award of contract, and therefore, APOs is to be taken as contract between the parties. It is noted that, it is neither so admitted by the Respondent in its Statement of Defense nor provided in Note 1 Section I part A NIT. We cannot read the word 'agreement' in isolation of the rest of the averments of SOD. Note 1 Section 1 Part A nowhere stipulates that APO is a contract. This relates to estimated quantity and the Respondent's right to vary the same at the time of award of contract. We have noticed above that APO and PO are specifically defined under clauses 1.0 (e) and 1.0 (f) Section 4 Part A GIB. In any case, the word 'APO' used in this Note 1 cannot be read in isolation of the rest of the provisions of the tender documents.*

xxx xxx xxx

24. There is no quarrel with regard above proposition regarding LOI, but it would be seen that in the present case APOs issued is only LOI and not the contract. It is not the final acceptance of Bid, but was to become contract only on the compliance of condition of acceptance of APOs and submission of PBGs by the Claimant.

25. Then, the Ld. Counsel for Claimant contends that in terms of Clause 24.1 Section 4 Part A of tender documents, the Respondent could have placed order on the Claimant for commercial supplies of OFC only once the same were type approved by QAC, and since the product of the Claimant and also raw materials (Rip Cord and IGFR) submitted by it had not been approved, the Claimant did not proceed further by accepting APOs. In this regard it has been noted above that acceptance of APOs was not linked with the Claimant having obtained or not TSEC/TAC for its products.

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27. The letter dated 21.11.2016 of the Respondent on which much reliance is placed by the Claimant was nothing but intimation to the Claimant about its product's failure to meet the standards and seeking explanations as to what improvements have been made by the Claimant. It only suggested to the Claimant to make fresh application as an alternative after making necessary changes. Be that as it may, the fact remains that the Claimant having failed to accept the APOs and furnish PBGs within 14 days that is by 10.11.2016, was reminded to comply these conditions by the Respondent vide its email dated 16.11.2016. And that admittedly the claimant vide its letter dated 17.11.2016 communicated that it was unable to accept the said APOs due to current banking turmoil and sought 3-4 weeks' time. The Respondent vide its letter dated 29.11.2016 while granting extension to the Claimant to do the needful till 02.12.2016, categorically informed that no further time shall be given for the said compliance. However, the Claimant again vide its letter dated 29.11.2016 sought further extension for accepting APOs and furnishing PBG on the ground that one of its directors was out of station and the other was out of country. The Respondent once again vide its letter dated 09.12.2016 granted additional time for compliance till 12.12.2016. It is pertinent to note that while seeking extensions not even once did the Claimant indicate any apprehension or possibility of non-acceptance of APOs because of rejection of its samples by QA department, which fact is admitted by the Claimant in para 3(e) of its reply to Counter Claim.

xxx xxx xxx

29. Before adverting to the above decisions cited by the Ld. Counsel of the Claimant, it will be worth noting that the Ld. Counsel for the Claimant has argued about condition fundamental to the performance of the contract,

whereas in the present case we are considering the fundamental condition requisite to the formation of contract. Submission of bid with security deposit or earnest money as also acceptance of APOs and submission of PBGs are fundamental conditions to the formation of contract and non-compliance of which entailed independent consequences like forfeiture, which is different than the condition of performance of contract, the non-compliance of which may have different consequences. Further, it settled law that no words can be ignored or made redundant or added or substituted in the terms of the agreement or tender documents. Thus the addition of above two conditions in the above provisions (Clauses 27.2, 4.1, 4.3, Section 7 (B), Clause 3 Appendix 1), emphasized by the Ld. Counsel for the Claimant, is not permissible. It is in the light of this proposition that the contention of the Ld. Counsel of the Claimant is to be examined. In this regard reliance is placed on the decision of Supreme Court in ***Afcons Infrastructure Ltd. VS Nagpur Metro Rail Corporation Ltd. and Ors. (2016)16 SCC 818****. In this case it was held as under:*

> *14. "We must reiterate the words of caution that this Court has stated right from the time when Ramana Dayaram Shetty v. International Airport Authority of India MANU /SC/0048/1979 : (1979) 3 SCC 489 was decided almost 40 years ago, namely, the words used in the tender documents cannot be ignored or treated as redundant or superfluous – they must be given meaning and their necessary significance..."*

xxx *xxx* *xxx*

33. It is true that as per section 5 of the Contract Act, a proposal may be revoked at any time before communication of its acceptance is complete against the proposer. In the present case, the Claimant instead of accepting the APOs and furnishing PBGs within the stipulated period of 14 days from issue of APOs sought time twice for compliance, but finally failed to do the needful. In this way, the Claimant failed to comply with the fundamental conditions of tender of acceptance of APOs and furnishing of PBGs. The Claimant had submitted its bid on the condition that bids security could be forfeited in case it did not accept APOs and furnish PBGs within the stipulated period of 14 days of APOs.

34. The provisions of Clause 4 also clarify that the bidders having obtained TSEC / TAC or having applied for the same are eligible to bid, and that in the event of the bidder having not obtained TSEC / TAC till the time of bidding, but only applied for the same, would be entitled to make supplies of their approved OFC products. This requirement of TSEC / TAC and the products being type approved was only a condition for supply, and not for the formation of the contract. Whereas acceptance of APOs and furnishing of PBGs are components of the formation and performance of contract. By any means it cannot be said that compliance of these conditions was a mere formality. The lead period of two months from issue

of APO is provided to enable the bidder to obtain TSEC / TAC for being eligible to give the supplies. It was nowhere linked with the fundamental requirement of acceptance of APOs and furnishing of PBGs by the bidder within the prescribed period of 14 days from the date of issue of APO. Clause 24.1 GIB which provides for placement of order, states that the order for commercial supplies shall be considered by the purchaser (Respondent) only on those eligible bidders whose offers have been found technically, commercially and financially acceptable and whose goods have been type approved / validated by the purchaser. This also clarifies that acceptance bid and type approval of products are two different conditions under the tender documents. Both these requirements are independent and not intertwined or contingent of each other. The statement of Respondent witness RWI to the fact that the acceptance of APOs was independent of TSEC / TAC certificates and both the requirements were to be complied by the Claimant being successful bidder for two packages, has remained un-assailed. Therefore, the contentions of the Ld. Counsel for the Claimant that since the Claimant could not obtain TSEC / TAC for its products and so was not eligible to make supplies, APOs could not have been issued by the Respondent or that the Claimant being not so eligible to supply, was not required to accept APOs and submit the PBGs, are entirely untenable being contrary to the provisions of the tender documents. Also, the contentions that the Claimant never refused to accept APOs or furnish PBGs but only sought time and was always willing to perform its obligation, are also untenable. We have noticed that the Claimant submitted its bid being well aware of the terms of the tender documents, and also sought extension for acceptance of APOs and submission of PBGs twice and also despite reminder and being made cautious that no further extension will be granted, did not come forward to accept APOs and furnish PBGs. On the other hand, the Claimant has taken the pleas that not only the issue of APOs was not warranted and was arbitrary, but the acceptance of the same and furnishing of PBGs by the Claimant was only a formality. This conduct of the Claimant negates its contentions that it never refused to accept APOs end furnish PBGs. The contention of the Ld. Counsel for the Claimant that the failure of the products was not attributable to the Claimant but to Respondent since the products were procured from the approved vendors and tested in the approved laboratories, is noted only for rejection. It was not the responsibility of the Respondent to ensure or provide any assistance to the Claimant with regard to the material etc. It was the Claimant's obligation to obtain TSEC / TAC to be eligible to make supplies of its type approved products.

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37. In the cases of ***Housing Urban Development Authority vs Kewal Krishan Goel & Others AIR (1996) SC 1981 and Villayati Ram Mittal (Pvt.) Ltd. Vs. Union of India (UOI) & Others (2010) 10 SCC 532,*** *the*

Supreme Court reiterated the legal principles relating to Earnest Money, stating that it is a part of the purchase price when the transaction goes forward: it is forfeited when the transaction falls through, by reason of the fault or failure of the giver.

*38. In **National Thermal Power Corporation Ltd. vs. Ashok Kumar Singh and Ors. (2015) 4 SCC 252**, reliance was placed on the cases of **Ganga Enterprises** (supra) and **Malik Traders** (supra) and it was observed in para 9 as under:*

> *"9. On behalf of the appellant-corporation it was contended that the submission of the bid itself was subject to the condition that it shall be accompanied by an earnest money deposit which was liable to be forfeited in the event of the withdrawal of the bid. Opening of the bid or acceptance thereof terms of Section 5 of the Contract Act, 1872 was, in that view, wholly immaterial and irrelevant to the validity of the forfeiture ordered by the appellant-corporation".*

*39. We have noticed that the terms of the tender documents clearly stipulates APOs (LOI) requiring its unconditional acceptance and submission of PBGs by the bidder, and it is only thereafter that the purchase order is to be issued which constitutes the award of contract on the bidder and requires signing of the contract. The conditions of acceptance of APOs and submission of PBGs were part of bid and tender documents and if the same was not complied by the Complainant, there remains nothing for the formation of contract. And in the light of above decisions of Supreme Court as reiterated in **Ganga Enterprises** (supra), earnest money / bid security amount was liable to be forfeited.*

40. Before proceeding further it may be pertinent to note that the Claimant while admitting having sent email dated 17.11.2016 seeking extension of time for 3- 4 weeks, in its rejoinder para 5(e) denied that the extension was sought due to banking turmoil. This was a denial made by the Claimant of the contents of its own letter dated 17.11.2016 which reads "Due to the current banking turmoil, kindly give us 3-4 weeks more on the subject matter." This has been noted only to see the demeanor and conduct of the Claimant. Likewise, the plea that grant of extension of time by the Respondent would illustrate the fact that acceptance of APOs etc. was not a fundamental condition but only a formality or that the Claimant never refused to accept the APOs or submit PBGs, are also contrary to the various provisions of tender documents and the Claimant's own communications.

41. The fact that some extensions were granted by the Respondent to the Claimant for doing the needful in this regard at the request of the Claimant cannot be taken to mean that the compliance in this regard by the Claimant was only a formality. We have noticed above that the terms of tender documents provided for consequential provision for non-acceptance of APOs and furnishing of PBGs by the Claimant within the

prescribed 14 days period from the date of issue of APOs. The Claimant was very well aware about these provisions and sought time for doing the needful without any objections or reservations. The Claimant is not rustic or novice, but a professional company engaged in the business of manufacturing various types of cables used for communications and has been a supplier to various organizations including the Respondent for the past several years. The Claimant witness CWI stated that Mr. Shailesh Choudhary, the Director of Claimant who had 30 years' experience in cable industry was looking after the subject tender and that no objection was raised or any clarification sought by the Claimant regarding terms and conditions of tender. He admitted that after the bidding the second step was acceptance of APO. He stated that this was their first big tender of optical fiber and that as they were not eligible to supply cable, they could not accept APO. The parties entered into commercial transactions being very well aware of the terms thereof including their obligations and consequences etc.

42. We have noticed that the Claimant having failed or refused to accept APOs and furnish PBGs till the extended time of 12.12.2016, and there being no further step taken by the Claimant towards compliance of these conditions, the Respondent vide its letter dated 09.01.2017 withdrew the APOs and invoked Clause 22 of APO as also Clause 3 Appendix I Section 4 Part A GIB and proceeded to forfeit EMD. We have seen above that Clause 12.7 GIB and Clause 3 Appendix I specifically provide for forfeiture of EMD in case of non-acceptance of APO by the Claimant within the stipulated period. The Respondent submits, and to which there is no reason to disagree, that the Respondent could not have been expected to keep waiting and giving opportunities to the Claimant to obtain TSEC for its repeatedly failed products, even without getting any commitment by acceptance of APOs. And that had the Claimant given its acceptance of APOs and deposited PBGs in accordance with tender conditions and then sought further extension of time for obtaining TSEC, the Respondent could have considered giving extension of time beyond the stipulated period of two months from issuance of APOs for it to obtain TSEC. In such fact scenario and conduct of the Claimant, the Respondent had no other option except what it did vide its letter dated 09.01.2017. The Respondent could not be said to be unjustified in forfeiture and encashment of EMD. In such fact situation, the Claimant had no right to claim that its security deposit could not be forfeited and need to be returned to it.

43. In view of the above discussions these questions are answered accordingly: (i) the issue of APOs was only LOI and not the contract. (ii) Acceptance of APOs and furnishing of PBGs by the Claimant are fundamental requirements for the formation of contract. (iii) The Respondent was not unjustified in withdrawing APOs and forfeiting EMDs of the Claimant."

36. The first question that arises for consideration is whether the APOs were concluded contracts between the parties. To determine this issue, it would be pertinent to refer to the relevant clauses of the NIT and GIB. Clauses 1.0 (e) and 1.0 (f) Section 4 Part A of GIB define '*Advance Purchase Order*' and '*Purchase Order*' as follows:-

> ***"1.0 DEFINITIONS***
>
> *(a)....*
>
> *(b)....*
>
> *(c)....*
>
> *(d)....*
>
> *(e) "**The Advance Purchase Order"** or **"Letter of Intent"** means the intention of Purchaser to place the Purchase Order on the bidder.*
>
> *(f) "**The Purchase Order"** means the order placed by the Purchaser on the Supplier signed by the Purchaser including all attachments and appendices thereto and all documents incorporated by reference therein. The Purchase Order shall be deemed as **"Contract"** appearing in the document."*

37. Clause 27.1 Section 4 Part A of GIB provides that *'the issue of an Advance Purchase Order shall constitute the intention of the purchaser to enter into contract with the bidder'* and Clause 28.1 provides that *'the issue of Purchase Order shall constitute the award of contract on the bidder'*. From the definition of APO and Purchase Order, it is evident that the APOs were only Letters of Intent indicating the intention of the Respondent to place the Purchase Orders, which were to be issued after Petitioner accepted the APOs and furnished the PBGs within 14 days from the date of issue of APOs. As per Clause (f), it was the Purchase Order which was deemed as a contract. This is further clear from Clause 27.1, which in no uncertain terms provided that issue of APO shall constitute the intention of the purchase to enter into a contract with the bidder as also Clause 28.1, which provided that

the issue of Purchase Order shall constitute the award of contract on the bidder. Therefore, it was rightly held by the Arbitrator that APOs did not form concluded contracts between the parties.

38. Petitioner argued that the NIT was an 'invitation to offer' and the bid submitted was an 'offer' under the Contract Act and therefore once the APOs were issued, the offer was accepted and concluded contracts came into existence. This argument overlooks the precise definitions of APO and Purchase Orders in the GIB as also Clauses 4.1 and 4.3 of GCC read with Section 7 (B) of bid document, which mandated the Petitioner to accept the APOs and furnish PBGs as pre-conditions to place the Purchase Orders. It is only after these twin conditions were satisfied that the contracts came into existence and not merely by issue of APOs, which were mere than Letters of Intent to place the Purchase Orders on the bidder.

39. Reliance of the Petitioner on paragraph 6 of the SoD to argue that Respondent had admitted that parties had entered into an agreement and Note 1 of Section 1, Part A of NIT, which allegedly states that issuance of APOs was award of contract, is misplaced. As rightly held by the Arbitrator the Respondent did not admit in the SoD that the parties had entered into an agreement and the Petitioner was reading the word 'agreement' in isolation bereft of the other averments in the paragraph and out of context. Paragraph 6 of SoD/reply to SoC of the Petitioner contains no admission that a concluded contract came into existence between the parties. It is averred by the Respondent that forfeiture of EMD was in accordance with terms and conditions of Tender Enquiry Document and after entering into the agreement, Petitioner, despite various opportunities refused to submit unconditional acceptance of the APOs and evaded its obligations on one

pretext or the other. The use of the term 'agreement' cannot be read to connote a concluded contract in the context it was used. Similarly, Note 1 does not stipulate that APO was a contract and only stipulated that the quantities stated in the table placed above the Note in the NIT, were the estimated quantities and BSNL reserved the right to vary the quantity to the extent of -25% to +25% of specified quantity at the time of award of the contract i.e., APO without any change in the unit price or other terms and conditions. Again, Petitioner is reading the term 'APO' out of context overlooking that the term has been specifically defined in Clause 1.0 (e), as above mentioned. Thus, this Court finds no infirmity in the finding of the Arbitrator that the APOs were not concluded contracts between the parties. This issue will have a bearing on the aspect of forfeiture of EMD, which I shall advert to in the later part of this judgment.

40. Coming to the second question as to whether unconditional acceptance of APOs and submission of PBGs by the Petitioner was a fundamental requirement for concluded contracts to come into existence or was it only a formality. Clause 4.1 read with Clause 4.3 of Section 5 Part A of GIB provided that all suppliers shall furnish performance security to the purchaser for an amount equal to 5% of the value of APO within 14 days from the date of issue of the Order in the form of a Bank Guarantee, issued by a Scheduled Bank and in the proforma provided in Section 7 (B) of the Bid Document. Clause 4.4 provided that Performance Security Bond will be discharged by the purchaser after completion of the supplier's performance obligations, including any warranty obligations under the contract. Further, it was clearly stipulated in the APOs that they were likely to be converted into a detailed Purchase Order after receipt of bidder's unequivocal/

unconditional acceptance of terms and conditions of the APO along with PBG. Clause 22 of the APOs ordained the bidder to unconditionally accept the APOs, failing which the APOs shall be deemed to be withdrawn automatically at the risk and responsibility of the bidder, without any assigning any further reason and in the event of withdrawal, subsequent claim of the supplier for placement of Purchase Order shall not be entertained. Relevant paragraph and Clause 22 of one of the APOs illustratively, are extracted hereunder, for the ease of reference:-

> *"**Subject:-** Advance Purchase Order for the supply of 6400 Km 24F Metal free Optical Fibre Cable with double HDPE Sheath (G.6522D Fiber) under Package-'A'.*
>
> .....
>
> .....
>
> *On behalf of CMD BSNL, an Advance Purchase Order (APO) on the terms and conditions of the above referred tender enquiry is hereby placed for the supply of 6400 Km 24F Metal free Optical Fibre Cable with double HDPE Sheath (G.6522D Fiber) under Package-'A', ie 40% of the total SOR Qty being the L-1 bidder. The APO is likely to be converted into detailed Purchase Order after the receipt of your unequivocal/ unconditional acceptance of all the terms and conditions of this APO along with Performance Bank Guarantee (PBG) for an amount of Rs. 1.025 Crore. The Bank Guarantee to be furnished should be strictly in BSNL format issued by an Indian Nationalized / Scheduled Bank. The Bank Guarantee should be valid for a minimum period of Three (03) years and is to be submitted in duplicate (one original copy + one Photo Copy).*
>
> ***Clause 22***
>
> *22 An unconditional / unequivocal acceptance of the APO along with required PBG must received with in the prescribed period of 14 days from the date of issue of this APO and other documents as desired by BSNL if any. In case if you failed to furnish the PBG and unconditional acceptance of the APO in question shall be deemed to be withdrawn automatically at your risks and responsibilities without assigning any further reason. In the event of withdrawal of the APO, subsequent claim of supplier for placement of Purchase Order shall not be entertained by this."*

41. In light of these provisions of the APOs, no infirmity can be found with the finding of the Arbitrator that unconditional acceptance of APOs and

furnishing of PBGs within 14 days from issuance of APOs was a fundamental condition requisite to formation of a contract and was not a mere formality, with consequences of failure to comply with these conditions detailed in the APOs and the GIB. This also fortifies the stand of the Respondent that *sans* the unconditional acceptance of APO and furnishing of PBGs, there was no concluded contract and APOs were never intended to be a contract but only Letters of Intent.

42. Counsel for the Petitioner placed reliance on the judgment of ***Dresser Rand (supra),*** to contend that even an LoI can be construed as a Letter of Acceptance. This proposition of law is beyond debate but whether or not the LoI was intended to be a contract/Letter of Acceptance or a mere intent to enter into a contract, would depend on the facts of each case and this is what is observed by the Supreme Court and I quote:-

> ***"39.*** *It is now well settled that a letter of intent merely indicates a party's intention to enter into a contract with the other party in future. A letter of intent is not intended to bind either party ultimately to enter into any contract. This Court while considering the nature of a letter of intent, observed thus in Rajasthan Coop. Dairy Federation Ltd. v. Maha Laxmi Mingrate Marketing Service (P) Ltd. [(1996) 10 SCC 405] : (SCC p. 408, para 7)*
>
> > *"The letter of intent merely expressed an intention to enter into a contract. ... There was no binding legal relationship between the appellant and Respondent 1 at this stage and the appellant was entitled to look at the totality of circumstances in deciding whether to enter into a binding contract with Respondent 1 or not."*
>
> ***40.*** *It is no doubt true that a letter of intent may be construed as a letter of acceptance if such intention is evident from its terms. It is not uncommon in contracts involving detailed procedure, in order to save time, to issue a letter of intent communicating the acceptance of the offer and asking the contractor to start the work with a stipulation that the detailed contract would be drawn up later. If such a letter is issued to the contractor, though it may be termed as a letter of intent, it may amount to acceptance of the offer resulting in a concluded contract between the parties. But the question whether the letter of intent is merely an expression of an intention to place an order in future or whether it is a final acceptance of the offer*

thereby leading to a contract, is a matter that has to be decided with reference to the terms of the letter. Chitty on Contracts (para 2.115 in Vol. 1, 28th Edn.) observes that where parties to a transaction exchanged letters of intent, the terms of such letters may, of course, negative contractual intention; but, on the other hand, where the language does not negative contractual intention, it is open to the courts to hold that the parties are bound by the document; and the courts will, in particular, be inclined to do so where the parties have acted on the document for a long period of time or have expended considerable sums of money in reliance on it. Be that as it may."

43. In the instant case, as noted above, reading of the definitions of 'APO' and 'Purchase Order' as also other clauses in NIT/GIB, leaves no doubt that the APOs were not intended to be concluded contracts but were merely an expression of intent to enter into contracts, subject to fulfilment of pre-conditions of acceptance of APOs and furnishing of PBGs and therefore this judgment will not inure to the advantage of the Petitioner.

44. Coming to the next question as to whether the Respondent was justified in withdrawing the APOs and forfeiting the EMD, in my view, even on this score, the finding of the Arbitrator warrants no interference. Clause 12 of GIB mandated that the bidder shall furnish, as part of its bid, a bid security as mentioned in Section 1. Clause 12.3 provided that the bid security was required to protect the purchaser against the risk of bidder's conduct, which would warrant forfeiture of bid security as provided in Clause 12.7. Clause 12.7 provided that a bid security may be forfeited *inter alia* if the bidder did not accept the APOs and/or did not submit PBGs. To the same effect is Clause 3 Appendix 1 Section 4 Part A GIB. Relevant clauses are extracted hereunder:-

"***Clauses 12.1/12.3/12.4/12.6/12.7***

12.0 BID SECURITY/EMD

12.1 The bidder shall furnish, as part of its bid, a bid security as mentioned in Section-1(DNIT).

xxx xxx xxx

12.3 The bid security is required to protect the purchaser against the risk of bidder's conduct, which would warrant the forfeiture of bid security pursuant to Para 12.7.

12.4. A bid not secured in accordance with Para 12.1 & 12.2 shall be rejected by the Purchaser being non-responsive at the bid opening stage and archived unopened on e-tender portal for e-tender and returned to the bidder unopened (for manual bidding process).

xxx xxx xxx

12.6 The successful bidder's bid security will be discharged upon the bidder's acceptance of the advance purchase order satisfactorily in accordance with clause 27 and furnishing the performance security, except in case of L-1 bidder, whose EMBG/EMD shall be released only after the finalization of ordering of complete tendered quantity in pursuance to clause no. 24.4 & 27.3 of this section.

12.7 The bid security may be forfeited:

a) If the bidder withdraws or amends its bid or impairs or derogates from the bid in any respect during the period of bid validity specified by the bidder in the bid form or extended subsequently; or

b) If the bidder does not accept the APO/AWO and/or does not submit PBG & sign the contract/agreement in accordance with clause 28.

***NOTE:-** The bidder shall mean individual company/firm or the front bidder and its technology/consortium partner, as applicable.*

Clause 3 Appendix 1 Section 4 Part A GIB

S. No.	Defaults of bidder / vendor.	Action to be taken
3.	Non-receipt of acceptance of APO/AWO and SD/PG by L-1 bidder within time period specified in APO/AWO	Forfeiture of EMD.

45. Learned Arbitrator has rendered a finding that Petitioner failed to accept the APOs and furnish PBGs even during the extended time till 12.12.2016 and the Respondent acted rightly in withdrawing the APOs invoking Clause 22 of the APO and forfeiting EMD in terms of Clause 3 Appendix 1 Section 4 Part A of GIB as also Clause 12.7 of GIB, which enabled forfeiture of EMD in case of non-acceptance of APOs within the

stipulated period. Clause 29 of GIB enforces the mandate of furnishing bid security and resultant forfeiture due to non-compliance. Clause 3 Appendix 1 Section 4 Part A GIB, categorically provides that non-receipt of acceptance of APOs/furnishing of PBGs by L-1 Bidder within the specified time, will result in EMD forfeiture.

46. This finding of the Arbitrator is based on provisions of GIB and finds strength from the law laid down by the Supreme Court that forfeiture of earnest money, when it is on account of breach of auction/tender conditions at the pre-contractual stage, when no contract has yet come into existence, does not infringe any statutory right under the Contract Act, since earnest/ security is given and taken in such cases to ensure that a contract comes into existence. In ***Villayati Ram (supra)***, the Supreme Court observed that if the transaction or the contract does not come through due to fault or failure of tenderer, party inviting the tender is entitled to forfeit earnest money furnished by the tenderer. Relevant paragraphs of the judgment are as follows:-

> ***"10.*** *The legal principles relating to "earnest money" are well settled. In Chiranjit Singh v. Har Swarup [AIR 1926 PC 1] the Judicial Committee of the Privy Council held: (AIR p. 2)*
>
> > *"Earnest money is part of the purchase price when the transaction goes forward: it is forfeited when the transaction falls through, by reason of the fault or failure of the vendee."*
>
> *These observations of the Judicial Committee have been quoted (at SCC p. 531, para 20) in the judgment of this Court in Shri Hanuman Cotton Mills v. Tata Air Craft Ltd. [(1969) 3 SCC 522] in which the principles relating to earnest money have been laid down.*
>
> ***11.*** *Similarly, in HUDA v. Kewal Krishan Goel [(1996) 4 SCC 249] this Court quoted the following observations of Hamilton, J. in Sumner and Leivesley v. John Brown & Co. [(1909) 25 TLR 745] with regard to the meaning of "earnest": (HUDA case [(1996) 4 SCC 249] , SCC p. 254, para 10)*
>
> > *"10. ... ' "Earnest" ... meant something given for the purpose of*

binding a contract, something to be used to put pressure on the defaulter if he failed to carry out his part. If the contract went through, the thing given in earnest was returned to the giver, or, if money, was deducted from the price. If the contract went off through the giver's fault the thing given in earnest was forfeited.' "

12. *It is thus clear that when earnest money is furnished by a tenderer it forms part of the price if the offer of the tenderer is accepted or it is refunded to the tenderer if someone else's offer is accepted, but if for some fault or failure on the part of the tenderer the transaction or the contract does not come through, the party inviting the tender is entitled to forfeit the earnest money furnished by that tenderer."*

47. In ***Ganga Enterprises (supra),*** the Supreme Court observed as follows:-

"……..By invoking the bank guarantee and/or enforcing the bid security, there is no statutory right, exercise of which was being fettered. There is no term in the contract which is contrary to the provisions of the Indian Contract Act. The Indian Contract Act merely provides that a person can withdraw his offer before its acceptance. But withdrawal of an offer, before it is accepted, is a completely different aspect from forfeiture of earnest/security money which has been given for a particular purpose. A person may have a right to withdraw his offer but if he has made his offer on a condition that some earnest money will be forfeited for not entering into contract or if some act is not performed, then even though he may have a right to withdraw his offer, he has no right to claim that the earnest/security be returned to him. Forfeiture of such earnest/security, in no way, affects any statutory right under the Indian Contract Act. Such earnest/security is given and taken to ensure that a contract comes into existence. It would be an anomalous situation that a person who, by his own conduct, precludes the coming into existence of the contract is then given advantage or benefit of his own wrong by not allowing forfeiture. It must be remembered that, particularly in government contracts, such a term is always included in order to ensure that only a genuine party makes a bid. If such a term was not there even a person who does not have the capacity or a person who has no intention of entering into the contract will make a bid. The whole purpose of such a clause i.e. to see that only genuine bids are received would be lost if forfeiture was not permitted."

48. It is thus clear that the objective of EMD being to safeguard the purchaser from unnecessary withdrawal or revocation of bids etc. and no right can be asserted by a bidder to claim that EMD will not be forfeited

once it does not fulfil the bid conditions resulting in the tender process being stalled. As held by the Supreme Court in ***NHAI (supra)***, it would be an anomalous situation that a person who, by his own conduct, precludes the coming into existence of the contract is given advantage of his own wrong by not allowing forfeiture. Government contracts and the like often include these provisions to ensure that only genuine party makes a bid and if such a term was not there even a person who does not have the capacity or intent to enter into a contract, will make a bid resulting in sometimes genuine bidders being excluded and those not serious being included but resulting in the tender process not culminating into a contract. This would not be in public interest. In ***National Thermal Power Corporation (supra),*** the Supreme Court observed that forfeiture of earnest money, does not infringe statutory rights under a contract as it is given and taken to ensure that contract comes into existence. The Supreme Court referred to the judgment in ***Ganga Enterprises (supra),*** wherein it was observed that absence of any term stipulating forfeiture of earnest money may lead to situations where those not intending to enter into contracts will venture into bidding sometimes for extraneous reasons and therefore, a clause in the NIT providing for forfeiture of earnest money will ensure that only genuine bids are received.

49. Much was argued by the petitioner that BSNL while informing the Petitioner of failure of the samples of first batch on 21.11.2016 had instructed it to either explain the reason for failure or alternatively submit fresh QF-103 after improvement in the product and acting on these instructions, Petitioner had obtained fresh raw material from other BSNL approved vendors, re-manufactured new cables, got them tested at its own level and on 19.12.2016 furnished fresh form QF-103 with demand draft,

detailed test reports and samples for testing by BSNL to obtain TSEC/TAC and since the two months time provided in Note 3 and Clause 2 (i) of NIT was expiring on 28.12.2016, the Arbitrator erred in overlooking that Petitioner having submitted the requisite form on 19.12.2016, was not at fault and hence, the withdrawal of APOs and forfeiture of EMD was erroneous. This submission of the Petitioner, was rightly rejected by the Arbitrator. This argument of the Petitioner is in turn based on its misunderstanding and misreading of Clause 24.1 of Section 4 Part A of GIB that Respondent could have placed order on the Petitioner for commercial supplies of OFCs only once the same were type-approved by QAC and since product of the Petitioner as also raw materials were not approved and had been resubmitted for retesting, the Petitioner did not rightly proceed further. In a nutshell, Petitioner links acceptance of APOs with obtaining TSEC/TAC for its products, which was not the scheme of the instant tender process.

50. Arbitrator has rendered a finding and rightly so, that letter dated 21.11.2016 issued by the Respondent, on which much emphasis is placed by the Petitioner, was only an intimation about its products failing to meet the standards and seeking explanation, if any improvements have been made. Only a suggestion was made to the Petitioner to make a fresh application as an alternative after making necessary changes. This letter in no way waived the pre-conditions of accepting the APOs within 14 days and furnishing PBGs. Significantly, the Arbitrator also correctly notes that at no point in time Petitioner in its extension letters indicated that non-acceptance of the APOs was due to rejection of its samples by the QAC Department. In the first letter dated 17.11.2016, Petitioner communicated that it was unable to

accept the APOs due to current '*banking turmoil*' and sought 3 to 4 weeks to do so. Respondent vide letter dated 29.11.2016 granted extension to do the needful till 02.12.2016. However, Petitioner again sought extension vide letter dated 29.11.2016 and this time on the ground that one of its Directors was out of station and other was out of country. Respondent once again granted extension vide letter dated 09.12.2016 upto 12.12.2016 to comply with the mandatory conditions.

51. It is pertinent to note that the Arbitrator has correctly found that Clause 4 of GIB clarified that bidders having obtained TSEC/TAC or having applied for the same were eligible to bid and those who had not obtained the certificates till the time of bidding and had only applied, would thus be entitled to make supplies of their approved OFC products. Hence, requirement of TSEC/TAC and the products being type-approved was only a condition for supply and not for conclusion of the contract in contrast to acceptance of APOs and furnishing of PBGs. The lead period of two months from issue of APOs was provided to enable the bidder to obtain TSEC/TAC only to be eligible to make the supplies and there was no linkage with acceptance of APOs. Arbitrator also referred to deposition of Respondent's witness RW-1, who stated that acceptance of APOs was independent of TSEC/TAC and both requirements were to be complied by the Petitioner being the successful bidder. This testimony could not be dented by the Petitioner. Therefore, the contention of the Petitioner that since it could not obtain TSEC/TAC for its products and time was granted by the Respondent for retesting before expiry of which it erroneously withdrew the APOs, only deserves to be rejected.

52. Learned counsel for the Petitioner laboured hard to argue that in the

absence of the Respondent proving loss by leading evidence, it was not entitled to forfeit the EMD and in this context relied on the judgments of the Supreme Court in ***Fateh Chand (supra), Maula Bux (supra)*** and ***Kailash Nath (supra)***. Reliance was also placed on the judgments of this Court in ***R.B. Enterprises (supra)*** and ***Indian Agro (supra)*** to contend that proof of actual damages or loss is a *sine quo non* to claim damages under Section 74 of the Contract Act. In my view, this contention also merits rejection. In a recent judgment delivered by the Supreme Court in ***K.R. Suresh v. R. Poornima and Others, 2025 SCC OnLine SC 104***, the issue for consideration before the Supreme Court was refund of earnest money. It was observed by the Supreme Court that the word 'earnest' stands for a sum of money given for the purpose of binding a contract, which is forfeited if the contract does not go off and adjusted in price if the contract goes through. In the context of Section 74 of the Contract Act, it was held that in ***Fateh Chand (supra)***, the Supreme Court, while setting 'earnest money' apart from 'penalty', held that insofar as forfeiture of earnest money is concerned, Section 74 of the Contract Act will not apply. Relevant paragraphs of the judgment are as follows:-

> *"F. **ANALYSIS***
>
> *26. In view of the order dated 20.03.2023 passed by this Court, we are limiting our consideration in this matter solely to the issue of refund of earnest money.*
>
> *27. Having heard the learned counsel appearing for the parties and having gone through the materials on record, the only question that falls for our consideration is whether the appellant (original plaintiff) is entitled to the refund of the amount of Rs. 20,00,000/- purportedly paid as "advance money"?*
>
> *xxx xxx xxx*
>
> *31. Here, we consider it apposite to refer to the meanings of the said terms. The word "advance" means money in whole or in part, forming the consideration of an agreement paid before the same is completely payable.*

On the other hand, the word "earnest" stands for a sum of money given for the purpose of binding a contract, which is forfeited if the contract does not go off and adjusted in price if the contract goes through. [See: P Ramanatha Aiyar in "Advanced Law Lexicon", 7th Edn.]

xxx xxx xxx

33. In the case of Videocon Properties Ltd. v. Bhalchandra Laboratories, (2004) 3 SCC 711, while assessing the difference between "advance" and "earnest", this Court took the view that the words used in the agreement alone cannot be determinative of the true nature of the amount advanced. Instead, the intention of the parties and the surrounding circumstances serve as more apt indicators. Further, the Court observed that earnest money fulfils a dual purpose : first, it operates as part-payment of the purchase price and; secondly, as security for the performance of the contractual obligations. Thus, its true character and purpose can only be canvassed on a close reading of the agreement, and the relevant contextual factors. The relevant observations are reproduced hereinbelow:

> *"14. […] Further, it is not the description by words used in the agreement only that would be determinative of the character of the sum but really the intention of parties and surrounding circumstances as well, that have to be looked into and what may be called an advance may really be a deposit or earnest money and what is termed as 'a deposit or earnest money' may ultimately turn out to be really an advance or part of purchase price. Earnest money or deposit also, thus, serves two purposes of being part-payment of the purchase money and security for the performances of the contract by the party concerned, who paid it."*
>
> *(Emphasis supplied)*

34. In Satish Batra v. Sudhir Rawal, (2013) 1 SCC 345, this Court emphatically held that it is only the "earnest money", paid as a pledge for the due performance of the contract, that can be forfeited by the seller on account of the buyer's default. In the same vein, earnest money can also be doubled and paid back to the buyer if the contract falls through due to the seller's default. An amount which is in nature of an "advance" or serves as part-payment of the purchase price cannot be forfeited unless it is a guarantee for the due performance of the contract. The Court further held that despite the existence of an outright forfeiture clause, it shall not apply if the amount stipulated in the contract is found to be only in the nature of part-payment of the purchase price. Consequently, the forfeiture of "advance money" as part of earnest money can only be justified if the terms of the contract are clear and explicit to that effect. The relevant observations are reproduced hereinbelow:

> *"6. […] In Chiranjit Singh v. Har Swarup, [(1926) 23 LW 172 : AIR 1926 PC 1] it has been held that (LW p. 174) the earnest money is*

part of the purchase price when the transaction goes forward and it is forfeited when the transaction falls through, by reason of the fault or failure of the purchaser. […]

xx xx xx

10. In DDA v. Grihsthapana Coop. Group Housing Society Ltd., [1995 Supp (1) SCC 751], this Court following the judgment of the Privy Council in Har Swarup [(1926) 23 LW 172 : AIR 1926 PC 1] and Shree Hanuman Cotton Mills, [(1969) 3 SCC 522], held that the forfeiture of the earnest money was legal. In V. Lakshmanan v. B.R. Mangalagiri, [1995 Supp (2) SCC 33] this Court held as follows : (SCC p. 36, para 5)

> *"5. The question then is whether the respondents are entitled to forfeit the entire amount. It is seen that a specific covenant under the contract was that the respondents are entitled to forfeit the money paid under the contract. So when the contract fell through by the default committed by the appellant, as part of the contract, they are entitled to forfeit the entire amount."*

xx xx xx

15. The law is, therefore, clear that to justify the forfeiture of advance money being part of "earnest money" the terms of the contract should be clear and explicit. Earnest money is paid or given at the time when the contract is entered into and, as a pledge for its due performance by the depositor to be forfeited in case of non-performance by the depositor. There can be converse situation also that if the seller fails to perform the contract the purchaser can also get double the amount, if it is so stipulated. It is also the law that part-payment of purchase price cannot be forfeited unless it is a guarantee for the due performance of the contract. In other words, if the payment is made only towards part-payment of consideration and not intended as earnest money then the forfeiture clause will not apply."

(Emphasis supplied)

35. A forfeiture clause identical to the one in the present ATS was found in the case of Satish Batra (supra). It provided for the forfeiture of earnest money in case of the purchaser's default, as well as the payment of double the amount of earnest money in case of the vendor's default. This Court allowed the forfeiture of the earnest money, which was held to be security for the due performance of the contract, by the seller when the transaction fell through on account of the purchaser's fault. The relevant forfeiture clause and observations are reproduced hereinbelow:

> *"5. […] The question whether the seller can retain the entire amount of earnest money depends upon the terms of the agreement. The relevant clause of the agreement for sale dated 29-11-2005 is extracted hereunder for easy reference:*

"(e) If the prospective purchaser fails to fulfil the above condition, the transaction shall stand cancelled and earnest money will be forfeited. In case I fail to complete the transaction as stipulated above, the purchaser will get DOUBLE the amount of the earnest money. In both conditions, the DEALER will get 4% commission from the faulting party."

The clause, therefore, stipulates that if the purchaser fails to fulfil the conditions mentioned in the agreement, the transaction shall stand cancelled and earnest money will be forfeited. On the other hand, if the seller fails to complete the transaction, the purchaser would get double the amount of earnest money. Undisputedly, the purchaser failed to perform his part of the contract, then the question is whether the seller can forfeit the entire earnest money.

xx xx xx

17. We are, therefore, of the view that the seller was justified in forfeiting the amount of Rs. 7,00,000 as per the relevant clause, since the earnest money was primarily a security for the due performance of the agreement and, consequently, the seller is entitled to forfeit the entire deposit.[...]"

(Emphasis supplied)

xxx xxx xxx

40. Having regard to the aforesaid authorities, the intention of the parties and the surrounding circumstances in the present case, it can be sufficiently inferred that the inclusion of the forfeiture clause in the ATS was intended to bind the contracting parties and ensure the due performance of the contract. This is particularly significant given the stipulated four-month period for completing the sale transaction and the primary object of executing the ATS, being the urgency of the respondent nos. 1-4 regarding the OTS, which was known to the appellant, as recorded by the Trial Court. The findings of the Trial Court, along with the impugned judgment affirming that time was of the essence, further substantiate the said intent.

xxx xxx xxx

43. At this juncture, we deem it appropriate to take note of Section 74 of the Indian Contract Act, 1872 (for short, "the 1872 Act"). Section 74 of the 1872 Act deals with the compensation for loss or damage caused by a breach of the contract when a particular sum of liquidated damages or penalty is already set forth under the terms of the contract. It further provides that such compensation must be reasonable and it cannot, in any circumstance, exceed the amount stipulated in the contract. The same is extracted below:

> *"74.* ***Compensation for breach of contract where penalty stipulated for.****—When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.*
>
> *[…]"*

44. A conjoint reading of Section 74 of the 1872 Act and the principles underlying forfeiture clauses was undertaken in the case of Fateh Chand v. Balkishan Dass, 1963 SCC OnLine SC 49. This Court held that Section 74 of the 1872 Act will apply to every covenant involving a penalty, whether it is for a future payment on breach of the contract or the forfeiture of a sum already paid. Ergo, a forfeiture clause in a contract would ordinarily fall within the ambit of the words "any other stipulation by way of penalty". Further, it was held that supplying evidence of a loss incurred by the vendor on account of the breach of contract by the buyer would be mandatory to justify forfeiture, and only a reasonable amount, commensurate with such loss, can be forfeited. The relevant observations are extracted hereinbelow:

> *"14. […] The words "to be paid" which appear in the first condition do not qualify the second condition relating to stipulation by way of penalty. The expression "if the contract contains any other stipulation by way of penalty" widens the operation of the section so as to make it applicable to all stipulations by way of penalty, whether the stipulation is to pay an amount of money, or is of another character, as, for example, providing for forfeiture of money already paid. There is nothing in the expression which implies that the stipulation must be one for rendering something after the contract is broken. There is no ground for holding that the expression 'contract contains any other stipulation by way of penalty' is limited to cases of stipulation in the nature of an agreement to pay money or deliver property on breach and does not comprehend covenants under which amounts paid or property delivered under the contract, which by the terms of the contract expressly or by clear implication are liable to be forfeited.*
>
> *xx xx xx*
>
> *16. There is no evidence that any loss was suffered by the plaintiff in consequence of the default by the defendant, save as to the loss suffered by him by being kept out of possession of the property. There is no evidence that the property had depreciated in value since the date of the contract provided; nor was there evidence that any other*

special damage had resulted. The contact provided for forfeiture of Rs. 25,000 consisting of Rs. 1039 paid as earnest money and Rs. 24,000 paid as part of the purchase price. The defendant has conceded that the plaintiff was entitled to forfeit the amount of Rs. 1000 which was paid as earnest money. We cannot however agree with the High Court that 13 percent of the price may be regarded as reasonable compensation in relation to the value of the contract as a whole, as that in our opinion is assessed on an arbitrary assumption. The plaintiff failed to prove the loss suffered by him in consequence of the breach of the contract committed by the defendant and we are unable to find any principle on which compensation equal to ten percent of the agreed price could be awarded to the plaintiff. […]"

(Emphasis supplied)

45. It is imperative to mention herein that in Fateh Chand (supra), this Court, while setting "earnest money" apart from a "penalty", held that insofar as forfeiture of earnest money is concerned, Section 74 of the 1872 Act will not apply. The relevant observations are reproduced hereinbelow:

"7. The Attorney General appearing on behalf of the defendant has not challenged the plaintiff's right to forfeit Rs. 1000 which were expressly named and paid as earnest money. He has, however, contended that the covenant which gave to the plaintiff the right to forfeit Rs. 24,000 out of the amount paid by the defendant was a stipulation in the nature of penalty, and the plaintiff can retain that amount or part thereof only if he establishes that in consequence of the breach by the defendant, he suffered loss, and in the view of the Court the amount or part thereof is reasonable compensation for that loss. We agree with the Attorney General that the amount of Rs. 24,000 was not of the nature of earnest money. The agreement expressly provided for payment of Rs. 1000 as earnest money, and that amount was paid by the defendant. The amount of Rs. 24,000 was to be paid when vacant possession of the land and building was delivered, and it was expressly referred to as "out of the sale price." If this amount was also to be regarded as earnest money, there was no reason why the parties would not have so named it in the agreement of sale. […]"

(Emphasis supplied)

46. To the same effect is the decision of this Court in Maula Bux v. Union of India, (1969) 2 SCC 554, wherein it was held that forfeiture of earnest money is not deemed as penal and that Section 74 of the 1872 Act will only apply where the forfeiture is in the nature of a penalty. The relevant observations are extracted hereunder:

> *"5. Forfeiture of earnest money under a contract for sale of property — movable or immovable — If the amount is reasonable, it does not fall within Section 74. That has been decided in several cases : Chiranjit Singh v. Har Swarup [Chiranjit Singh v. Har Swarup, 1925 SCC OnLine PC 63 : (1926) 23 LW 172] ; Roshan Lal v. Delhi Cloth & General Mills Co. Ltd. [Roshan Lal v. Delhi Cloth & General Mills Co. Ltd., 1910 SCC OnLine All 98 : ILR (1911) 33 All 166] ; Mohd. Habib-Ullah v. Mohd. Shafi [Mohd. Habib-Ullah v. Mohd. Shafi, 1919 SCC OnLine All 87 : ILR (1919) 41 All 324] ; Bishan Chand v. Radha Kishan Das [Bishan Chand v. Radha Kishan Das, 1897 SCC OnLine All 52 : ILR (1897) 19 All 489 : 1897 AWN 123]. These cases are easily explained, for forfeiture of reasonable amount paid as earnest money does not amount to imposing a penalty. But if forfeiture is of the nature of penalty, Section 74 applies. Where under the terms of the contract the party in breach has undertaken to pay a sum of money or to forfeit a sum of money which he has already paid to the party complaining of a breach of contract, the undertaking is of the nature of a penalty."*
>
> *(Emphasis supplied)*
>
> *xxx xxx xxx*
>
> *51. On a conspectus of the aforementioned authorities, it is evident that a clause for the forfeiture of earnest money is not penal in the ordinary sense, rendering Section 74 of the 1872 Act, inapplicable. In the present case, the stipulated amount under the ATS was in the nature of an earnest money deposit and thus, Section 74 of the 1872 Act cannot apply to the same. Further, the forfeiture clause was fair and equitable rather than one-sided and unconscionable, as it imposed liabilities on both the appellant-purchaser and respondent-sellers, wherein the seller was obligated to pay twice the advance amount paid by the buyer in case of his default."*

53. In light of this judgment of the Supreme Court, the argument that Section 74 would apply for forfeiture of EMD in the given facts of this case, where there was a clear contractual stipulation for forfeiture in case of non-acceptance of the APOs and non-furnishing of the PBGs, cannot be accepted and the Respondent was not required to prove the loss, as rightly held by the Arbitrator. Accordingly, the objections raised by the Petitioner assailing the Arbitral Award are bereft of merit and are rejected.

O.M.P. (COMM) 466/2023

54. This petition is filed by BSNL challenging the arbitral award dated 26.03.2023 to the extent the Arbitrator has rejected its counter claim of Rs.33,58,80,000/- towards loss of opportunity and profits along with interest @ 18% per annum from 09.01.2017 till actual payment with cost of arbitration.

55. Counsel for the Respondent contends that Petitioner was well aware that cables in question were to be used *inter alia* for leasing to other telecom providers, thereby earning revenue and calculation/quantification of actual loss of opportunity/profits was merely impossible. Reliance was placed on the judgment of the Supreme Court in ***Construction and Design Services v. Delhi Development Authority, (2015) 14 SCC 263,*** to contend that where it is impossible to quantify the loss suffered, it would be sufficient if genuine estimate is given.

56. Counsel for Petitioner contends that the counter claim was rightly rejected as Respondent was unable to prove actual loss suffered by it in terms of Section 73 of the Contract Act. It is urged that the Purchase Order placed by the Respondent during re-tendering was unrelated to the present NIT. Further, loss if any owing to scrapping of the present tender was self-inflicted and opposed to principle of mitigation of loss. If the Respondent was of the view that Petitioner was not interested in supplying the cables, it ought to have placed the Purchase Order on L-2 and L-3 Bidders in consonance with Clause 7 (i) of Section 2 which provided that in the event of successful bidder not agreeing to deliver the cables or BSNL not placing an order, *inter se* ranking of the bidders will be re-cast.

57. Learned Arbitrator examined the counter claim and observed that Respondent's counter claim is precisely premised on re-tendering of OFCs of the subject tender on the ground that due to the Petitioner not accepting the APOs and committing breach, it had to take recourse to re-tendering at higher rates and in terms of the CVO Circular dated 25.10.2005, it had no option but to re-tender. Arbitrator agreed with the Petitioner that reliance by the Respondent on the CVO Circular was misplaced as this was neither part of the tender documents nor it was brought to the notice of the bidder. Reliance was placed by the Arbitrator on the judgment of this Court in ***Mohan Steels Limited v. Steel Authority of India (Sail), 2020 SCC OnLine Del 2171***, where the Court held that circulars, which are not part of the tender conditions or the contract and/or not within the knowledge of the contracting parties, cannot be relied upon. The Arbitrator also negated the contention of the Respondent that had the Petitioner refused to accept the APOs in the first instance, it could have made alternate arrangements immediately and held that it is not understandable how the refusal by the Petitioner at the early stage of tender process would have enabled the Respondent to make immediate arrangement for the supplies, which position suddenly changed after some gap of time. The Arbitrator also observed that it was the Respondent who extended time twice for acceptance of the APOs and if the Respondent was of the view that after some time, it will not be able to make immediate arrangement for supplies, it should have declined the extensions. It was also observed that if the project was that important and immediate supplies were needed, re-casting of remaining bidders as L-1, L-2 etc., would have been a more economic option than re-tendering. Relevant paragraphs from the award are as under:-

58 I am in agreement with the Ld. Counsel for the Respondent that the Claimant could not seek any advantage from the terms of subsequent tender of August 2020. However, as regards the Respondent's departmental CVO circular of 25.10.2005, I am in complete agreement with the Ld. Counsel for the Claimant that reliance by the Respondent on this document to go for retendering is highly misplaced. Admittedly this document was neither a part of the tender documents nor even to the knowledge or information of the Claimant or other bidders. It is a settled proposition of law and which has also been laid by our High Court in the case of ***Mohan Steels Ltd. vs. Steel Authority of India 268 (2020) DLT 539*** in these words:

> *"The said Circulars were never a part of the tender conditions, or the Contract dated 05.02.2009. The petitioner has taken a categorical stand in its pleadings before this Court that the Circulars were never a part of the Contract. Once the circulars are beyond the terms of the Contract and were not within the knowledge of the contracting parties, it is not open for the respondent to rely upon them for interpreting the clauses of the contract. It is pertinent to note that if the respondent had intended that the Master Circulars or the guidelines were to form the basis of revision/fixation of conversion charges then the same should have been mentioned in the Contract or at least the tender documents and the bidder should have been put to notice that the revision of conversion charges will be as given in the Master circulars. In my opinion, it was not open for the Arbitrator or the respondent to even place reliance on the Master Circulars."*

59 The Respondent has contended that had the Claimant refused to accept APOs in the first instance, it would have made alternate arrangements by immediately taking the required steps for procuring the supplies, which it could not because of ultimate refusal by Claimant to accept APOs and as a result of which it had to withdraw APOs and go for retendering. This contention apparently does not appeal to my reason. It is not understandable that the Claimant's refusal at the first instance would have enabled the Respondent to make immediate alternate arrangements for supplies, which would disappear and be not available after a gap of some time. It is recalled that on the asking of Claimant, the Respondent extended the time twice for acceptance of APOs by the Claimant. If the Respondent knew that after the stipulated period it would not be able to make arrangements for supplies, it could have declined the extensions and moved forward. The fact that the Respondent gave extensions on the mere asking of the Claimant would simply evidence that same were given after due consideration regarding all aspects including the time factor. It is not revealed as to how and what type of alternative arrangements would have been made by the Respondent on the refusal of the acceptance of APOs by the Claimant at the

first instance and which were not to be available after some time. In the absence of anything divulged by the Respondent in this regard, the only inference that is drawn is that it was of *inter se* recasting of the remaining bidders. There can be no dispute that if the project was that important and urgent supplies were needed, recasting of the remaining bidders as L1, L2 etc. would have been more time economic than the retendering. The submission of the Respondent that recasting of L1, L2 from remaining bidders could not be done as the rates quoted by the Claimant could not be established due to its failure to accept APOs, is without any merit. The Claimant having given its rates and there being no modification or change, the rates quoted by it cannot be said to be not established. The same could be taken as the basis for proceeding to deal with the remaining bidders as per the procedure of tendering, recasting and acceptance of Bid.

60 The Respondent justifies calling for new Bids by retendering contending that it has the discretion in terms of Clause 29 of NIT to do so. On the other hand, The Claimant relies upon Clause 7 (iii) Section 2 NIT to contend that the Respondent could have placed orders on L2, L3. In response, the Respondent submits that Clause 3 (ii) Section 4 Part B Special Instructions to Bidder (**SIB**) will override Clause 7 (iii) Section 2 NIT which is part of general information to tenderer. For appreciating contentions on the above provisions of tender documents, these are extracted as under:

> *29. Annulment of Award*
>
> *"Failure of the successful bidder to comply with the requirement of clauses 27 & 28 shall constitute sufficient ground for the annulment of the award and the forfeiture of the bid security in which event the Purchaser may make the award to any other bidder at the discretion of the purchaser or call for new bids."*
>
> *7. Number of Bidders to be Awarded*
>
> *(iii) "In the event of any eligible bidder(s) not agreeing to supply the material or not being considered by BSNL for ordering the material, inter se ranking of the bidder(s) below the aforesaid bidder(s) will be recast to fill up the vacated slots. This will be done to ensure that the number of bidders on which order for supply of material to be placed remains same as specified in the tender."*

3. *Distribution of quantity*

"In the event of any of the eligible bidder(s) other than L1 not agreeing to supply the equipment or not being considered by BSNL for ordering the equipment, inter se ranking of the bidder(s) will be recast to fill up the vacated slot(s). This will be done to ensure that the number of bidders on which order for supply of equipment to be placed remains the same as specified in the tender".

61 Reading the above clauses conjointly, it would be seen that Clause 3, Section 4, Part B SIB provides that in the event of any eligible bidder (other than L1) not agreeing to supply or being considered by BSNL, *inter se* ranking of the remaining bidders will be recast. This Clause is not applicable to the present case. Clause 29 Section 4 Part A GIB provides that in the event of the successful bidder failing to comply with the requirement of Clause 27 and 28 of GIB, the Respondent in addition to annul the contract and forfeit its security also had the discretion to award the contract to any other bidder or to call for the new bids. We have seen above that Clause 27.2 stipulated acceptance of APOs and submission of PBGs within 14 days of issue of APOs. And Clause 28 provides for signing of contract on compliance of conditions of Clause 27.2 by the successful bidder. No doubt under this Clause 29, the Respondent also had the discretion to call for new bids in the event of Claimant having failed to accept APOs and furnish PBGs within the stipulated 14 days or extended times, but this will make Clause 7 (iii) Section 2 Tender Information redundant. Reading both these provisions harmoniously, and to give effect to both in the backdrop of importance of time, the interpretation comes to that in the event of the successful bidder not complying the conditions of Clause 27 and Clause 28 of GIB, the Respondent may exercise the discretion of recasting amongst *inter se* ranking of the remaining bidders, or to call for new bids.

62 I am of the view that the exercise of discretion of recalling new bids by retendering has to be demonstrated as in the interest of the project and to mitigate the losses. The Respondent who had been issuing tenders, was well aware that the retendering process was not only more time-consuming and complex than exploring recasting amongst the remaining bidders, but was also likely to be expensive and uncertain. The Respondent itself has stated that it

took an extra 5 - 6 months in doing retendering for the subject OFCs. Since it was at the initial stage that the Claimant declined to accept APOs and resultantly the contract could not be formed, the Respondent could have dealt with the other bidders in exercise of its discretion and in the interest of project. The circumstances encountered by the Respondent did not warrant for retendering as against recasting of L1, L2 and thereby to mitigate the losses. The conclusion of the above discussion comes to that the Respondent was not justified in retendering instead of recasting amongst inter se remaining bidders and dealing with them as per the tender documents. Therefore, this contention of the Respondent being without any substance and merit is rejected.

63 In addition to the reasons recorded above against the Respondent under this question, it is also worth noting that the reliance by the Respondent on two other PO's, one of 96F and other of 24F for comparable purposes and on the office circular of 29.11.2013, is misplaced. I am in agreement with the Ld. Counsel for the Claimant that these are of no relevance for the purpose these are relied upon by the Respondent. Even otherwise the reliance on these documents by itself is not enough to prove the loss as allegedly suffered by the Respondent. I am also in agreement with the Ld. Counsel for the Claimant that the loss claimed by the Respondent is too remote and not a direct result of non-acceptance of APOs by the Claimant at the initial stage of transaction. The plea of the Respondent that the Claimant being supplier of cables and would know the purpose of procuring and use of cables by the Respondent is imaginary and so not tenable. The plea of the Respondent that the Claimant deprived it from awarding the contract to other specific bidders is also not tenable. The non-acceptance of APOs by the Claimant had its consequence of entailing forfeiture of security amount, and which the Respondent did as per terms of tender documents. The Respondent was free to deal with the remaining bidders and place orders and thereby mitigate its losses. In the given circumstances, the loss if any, suffered by the Respondent as alleged was self-inflicted and not attributable to the Claimant. The Claimant could not be faulted on this extensively stretched ground. The question is accordingly answered against the Respondent.

58. It is clear from the reading of the aforesaid paragraphs of the award that the Arbitrator did not agree with the Respondent that re-tendering was a

better option as also that the same was against the terms of the NIT. It was also held that circumstances encountered by the Respondent did not warrant re-tendering as against re-casting L-1, L-2 Bidders to mitigate the losses. Significantly, the Arbitrator also noted that reliance of the Respondent on two other Purchase Orders, one of 96F and other of 24F to compare, was misplaced as neither of them had any relevance to the tender in question and moreover, Respondent was not able to prove the loss suffered by it and the loss claimed was too remote and not a direct result of non-acceptance of the APOs by the Petitioner. In the scope of jurisdiction under Section 34 of 1996 Act, I am unable to interfere with these findings of fact, based on the documents on record as also stipulations in the NIT and substitute them. No case is made out warranting interference with this part of the award, whereby counter claims have been rejected.

59. Before drawing the curtains, I may pen down my appreciation for Mr. Sakal Bhushan, counsel for the Petitioner and Mr. Daksh Jain, counsel for the Respondent for the able assistance rendered by them. Both counsels were well prepared and their arguments were flawless.

60. For all the aforesaid reasons, both the petitions are dismissed.

JYOTI SINGH, J

SEPTEMBER 26, 2025/*S.Sharma*