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

Date of decision: 03rd FEBRUARY, 2025

IN THE MATTER OF:

+ **O.M.P. (COMM) 146/2023 & I.A. 7374/2023**

AIRPORTS AUTHORITY OF INDIA

.....Petitioner

Through: Mr. Digvijay Rai, Ms. Chetna Rai,
Mr. Archit Mishra and Mr. Raghiv
Ali Khan, Advocates with Mr.Gagan
Kochar-Manager Law

versus

EAST INDIA CONSTRUCTION COMPANY LTD.

.....Respondent

Through: Ms. Anusuya Sadhu Sinha and
Mr.Tavdeep Singh, Advocates

CORAM:

HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

JUDGMENT

1. The Petitioner/Airports Authority of India has filed the present petition under Section 34 of the Arbitration & Conciliation Act, 1996 challenging an Award dated 20.12.2022 passed by the learned Sole Arbitrator.

2. Shorn of unnecessary details, the facts leading to this petition are as under:-

- i. The Petitioner issued a tender for 'resurfacing of existing runway at Biju Patnaik International Airport, Bhubaneswar'. It is stated that the Respondent participated in the tender and submitted its bid. It is stated that the bid of the Respondent was accepted by the Petitioner and the same was communicated to the Respondent on 24.10.2019. By the said communication, the



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Respondent was informed that the amount of earnest money deposit of Rs.46,78,000/- which was submitted along with the tender by the Respondent was treated and converted as a part of security deposit. The Respondent was further directed to deposit a sum of Rs. 71,07,816/- towards the security deposit. The Respondent was also directed to submit a performance bank guarantee for a sum of Rs.1,17,85,816/- as per the tender document.

- ii. Material on record indicates that the Respondent submitted the performance bank guarantee of Rs.1,17,85,816/-. However, the sum of Rs. 71,07,816/- towards security deposit was not paid by the Respondent and the bank guarantee covering the security deposit was never renewed.
- iii. Disputes arose between the parties and a show cause notice dated 25.09.2020 was issued by the Petitioner stating that there is a delay on the part of the Respondent in commencing the execution of the work entrusted under the agreement.
- iv. The show cause notice indicates that even after time had been extended for completion, the work had not commenced. The show cause notice called upon the Respondent to state as to why action under Clause 3 of the GCC should not be initiated against the Respondent. This was followed by a second show cause notice dated 02.11.2020.
- v. In the said show cause notice, the Petitioner stated that under the letter of acceptance, the Respondent had indicated that the Respondent is willing to complete the works by 31.03.2021



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provided that the Respondent is compensated for the increase in the cost of stone aggregates and Petroleum, Oil and Lubricants (POL). The show cause notice also indicated that the Petitioner had communicated to the Respondent *vide* email dated 04.10.2020 and 05.10.2020 that in case of price variation of materials (Bitumen & Cement), it shall be dealt with Clause 10CA of the GCC and if there are further disputes regarding any issues, including the price variation of aggregates and POL, the same can be addressed through dispute resolution procedure as per Clause 25 of the GCC. The Petitioner expressed the difficulties it was facing because of the fact that the runway was not being made available as airlines flight timings are rescheduled as per the slot allocated and that any change in the allotted slot will not be agreed by the airlines since such changes can cause logistic problems and huge losses to the airlines.

- vi. The Respondent was given one more chance of forwarding to the office of the Petitioner, a detailed programme schedule giving the exact date of commencement of resurfacing work. *Vide* letter dated 01.12.2020, the Petitioner exercised its powers under Clause 3 of the GCC. The Engineer-in-Charge determined the contract and directed that the earnest money deposit and the performance guarantee stand forfeited to the AAI. The Respondent therefore filed a petition under Section 9 of the Arbitration & Conciliation Act and *vide* Order dated 04.02.2021, this Court permitted the Respondent to withdraw



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the said petition with liberty to approach the Arbitral Tribunal as and when constituted.

- vii. This Court *vide* Order dated 02.06.2021 passed in ARB.P. No.107/2021 appointed a Sole Arbitrator to adjudicate the disputes between the parties.
- viii. The Respondent herein raised the following Claims before the learned Arbitrator:-

"(I) Claim No.1

Loss on account of fraudulent and illegal encashment of performance bank guarantee (PBG).

(II) Claim No.2

Declaration relief that the termination of the contract by the claimant was illegal

(III) Claim No.3

Loss of account unpaid RA Bills as well as unbilled Non-perishable material purchased by the claimant.

(IV) Claim No.4

Loss on account of unpaid bills for raw materials and perishable goods like VG-30 Bitumen, Cement and Paint Procured by the claimant for completion of work

(V) Claim No.5

Losses on account of wages and salaries paid by claimant to the employees at the site

(VI) Claim No.6

Losses on account of costs incurred on mobilization, installation and maintenance of plant and machinery; and idling of plant and machinery at site.

(VII) Claim No.7

Loss of Profits and loss of opportunity



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(VIII) Claim No.8

Award of costs and interest "

- ix. The following Counter Claims were raised by the Petitioner herein before the learned Arbitrator:-

"(I) Counter Claim 1:

Rs. 46,78,000.00 amount of EMD

(II) Counter Claim 2:

Rs. 7,34,383.00 - License fee towards land @ Rs.320 Per Sq. Mtr. per annum

(III) Counter Claim 3:

Rs. 54,139.00 On account of electricity consumption charges

(IV) Counter Claim 4:

Rs. 31,52,355.00 - On account of expense incurred by the respondent for deputation of its staff to oversee the project

(V) Counter Claim 5:

Rs. 34,59,108.00 - On account of losses suffered by the respondent on account of Radio Navigational Facility Charges (RNFC) and landing charges

(VI) Counter Claim 6;

Interest on Rs. 1,91,85,801.00 @18% per annum till realization."

- x. Vide its Award dated 20.12.2022, the learned Arbitrator allowed the Claim No.1 of the Respondent herein. The Arbitrator also allowed the Counter Claim No.2 and 3 raised by



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the Petitioner herein and directed the Petitioner herein to pay a sum of Rs.1,09,97,294/- (Rs.1,17,85,816 -(minus) Rs.7,34,383= Rs.1,10,51,433 -(minus) Rs.54,139= Rs.1,09,97,294/-) with interest @ 9% per annum from the date of filing of the statement of claim till the date of the award. The said award is under challenge in this Court.

3. Claim No.1 raised by the Respondent herein before the learned Arbitrator pertains to the illegal encashment of the performance bank guarantee for the sum of Rs.1,17,85,816/-.

4. The relevant Clauses of the Contract which are pertinent read as under:-

CLAUSE 1

	<i>Performance Guarantee</i>	<i>This clause is applicable for the works for which the estimated cost put to tender is more than Rs. 5 crores.</i>
		<i>i. The contractor shall submit an irrevocable Performance Guarantee of 5% (Five percent) of the Tendered amount in addition to other deposits mentioned elsewhere in the contract for his proper performance of the contract agreement, (not withstanding and/or without prejudice to any other provisions in the contract) within period specified in Schedule 'F' from the date of issue of award letter. This guarantee shall be in the form of Fixed Deposit Receipts or Guarantee Bonds of any Scheduled Bank but not Cooperative or Gramine Bank in accordance with the form annexed hereto (Appendix-XI) In case a fixed deposit receipts of any Bank is furnished by the contractor to the AAI as part of the performance guarantee and the Bank is unable to make payment against the said fixed deposit receipts or Guarantee Bonds, the loss caused thereby shall fall on the contractor and the contractor shall forthwith on demand furnish additional security to make good the deficit.</i>
		<i>ii. Performance guarantee should be furnished within 30 days of issue of award letter. In case the contractor fails to deposit performance guarantee within the stipulated</i>



	<p><i>period, no payment will be released to the contractor for the work done in respect of 1st running account bill. Moreover, interest @ 10% per annum on performance guarantee amount would be levied (non-refundable) for delayed period of submission.</i></p>
	<p><i>iii. The Performance Guarantee shall be initially valid upto the stipulated date of completion plus 180 days beyond that. In case the time for completion of work gets enlarged, the contractor shall get the validity of Performance Guarantee extended to cover such enlarged time for completion of work. After receiving of the completion certificate for the work by the competent authority, the performance guarantee shall be returned to the contractor, without interest. However, in case of contracts involving maintenance of buildings and services/any other work thereafter, 50% of Performance Bank Guarantee shall be retained as Security Deposit as per contract conditions. The same shall be returned on successful completion of commitment year wise proportionately.</i></p>
	<p><i>iv. The Engineer-in-Charge shall not make a claim under the performance guarantee except for amounts to which the AAI is entitled under the contract (notwithstanding and/or without prejudice to any other provisions in the contract agreement) in the event of:</i></p> <p><i>a. Failure by the contractor to extend the validity of the Performance Guarantee as described hereinabove, in which event the Engineer-in-Charge may claim the full amount of the Performance Guarantee.</i></p> <p><i>b. Failure by the contractor to pay the Chairman, AAI any amount due, either as agreed by the contractor or determined under any of the Clauses/Conditions of the agreement, within 30 days of the service of notice to this effect by Engineer-in-Charge.</i></p>
	<p><i>v. In the event of the contract being determined or rescinded under provision of any of the Clause/Condition of the agreement, the performance guarantee shall stand forfeited in full and shall be absolutely at the disposal of the Chairman, AAI.</i></p> <p><i>Provided that compensation during the progress of work beyond the justified extended date of completion for delay under this clause shall be for non-achievement of</i></p>



		<p><i>sectional completion or part handing over of work on stipulated/justified extended date for such part work or if delay affects any other works/services. This is without prejudice to right of action by Engineer-in-charge under Clause 3 for delay in performance and claim of compensation under that clause.</i></p> <p><i>In case action under clause 2 has not been finalized and the work has been determined under clause 3, the right of action under this clause shall remain post determination of contract but levy of compensation shall be for days the progress is behind the schedule on date of determination, as assessed by the authority in schedule 'F', after due consideration of justified extension. The compensation for delay, if not decided before the determination of contract shall be decided after determination of contract.</i></p> <p><i>The amount of compensation may be adjusted or set-off against any sum payable to the Contractor under this or any other contract with AAI. In case, the contractor does not achieve a particular milestone mentioned in schedule F, or the re-scheduled milestone(s) in terms of Clause 5.4, the amount shown against that milestone shall be withheld, to be adjusted against the compensation levied as above. With holding of this amount on failure to achieve a milestone, shall be automatic without any notice to the contractor. However, if the contractor catches up with the progress of work on the subsequent milestone(s), the withheld amount shall be released. In case the contractor fails to make up for the delay subsequent milestone(s), amount mentioned against each milestone missed subsequent also shall be withheld. However, no interest, whatsoever, shall be payable on such withheld amount.</i></p>
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Clause 2B

	<p><i>Release of withheld amount against compensation for delay</i></p>	<p><i>Withheld amount towards compensation for delay over and above Rs.30.00 lacs, can be released against Bank Guarantee (on the format given at Appendix-I) or in the form of fixed deposit receipts or guarantee bonds of any Scheduled Bank but not Cooperative or Gramin Bank pending finalization of case of extension of time by</i></p>
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	<i>competent authority as per delegation of powers. Concerned Executive Director (Engg) will authorize such action on receipt of proposal from the Engineer-in-Charge through proper channel.</i>
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Clause 3

<i>When Contract can be determined</i>	<p><i>Subject to other provisions contained in this clause, the Engineer-in-Charge may, without prejudice to his any other rights or remedy against the contractor in respect of any delay, inferior workmanship, any claims for damages and/or any other provisions of this contract or otherwise, and whether the date of completion or has not elapsed, by notice in writing absolutely determine the contract in any of the following cases:</i></p> <p><i>i. If the contractor having been given a notice by the Engineer-in-Charge in writing to rectify, reconstruct or replace any defective work or that the work is being performed in an inefficient or otherwise improper non-workman like manner shall omit to comply with the requirement of such notice for a period of seven days thereafter.</i></p> <p><i>ii. If the contractor has, without reasonable cause, suspended the progress of the work or has failed to proceed with the work with due diligence and continues to do so after a notice in writing of seven days from the Engineer-in-Charge.</i></p> <p><i>iii. If the contractor fails to complete the work or section of work with individual date of completion on or before the stipulated or justified extended date on or before such date of completion and the Engineer in Charge without any prejudice to any other right or remedy under any other provision in the contract has given further reasonable time in a notice given in writing in that behalf as either mutually agreed or in absence of such mutual agreement by his own assessment making such time essence of contract and in the opinion of Engineer-in-Charge, the contractor will be unable to complete the same or does not complete the same within the period specified.</i></p>
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iv. *If the contractor persistently neglects to carry out his obligations under the contract and/or commits default in complying with any of the terms and conditions of the contract and does not remedy it or take effective steps to remedy it within 7 days after a notice in writing is given to him in that behalf by the Engineer-in-Charge.*

v. *If the contractor shall offer or give or agree to give to any person in AAI service or to any other person on his behalf any gift or consideration of any kind as an inducement or reward for doing or forbearing to do or for having done or forborne to do any act in relation to the obtaining or execution of this or any other contract for AAI.*

vi. *If the contractor shall enter into a contract with Airports Authority of India in connection with which commission has been paid or agreed to be paid by him or to his knowledge, unless the particulars of any such commission and the terms of payment thereof have been previously disclosed in writing to the Engineer-in-Charge.*

vii. *If the contractor shall obtain a contract with AAI as a result of wrong tendering or other non-bonafide methods of competitive tendering or commits any breach of integrity pact.*

viii. *If the contractor being an individual, or if a firm, any partner thereof shall at any time be adjudged insolvent or have a receiving order or order for administration of his estate made against him or shall take any proceedings for liquidation or composition (other than a voluntary liquidation for the purpose of amalgamation or reconstruction) under any Insolvency Act for the time being in force or make any conveyance or assignment of his effects or composition or arrangement for the benefit of his creditors or purport so to do, or if any application be made under any Insolvency Act for the time being in force for the sequestration of his estate or if a trust deed be executed by him for benefit of his creditors.*

ix. *If the contractor being a company shall pass a resolution or the court shall make an order that the company shall be wound up or if a receiver or a manager*



on behalf of a creditor shall be appointed or if circumstances shall arise which entitle the court or the creditor to appoint a receiver or a manager or which entitle the court to make a winding up order.

x. If the contractor shall suffer an execution being levied on his goods and allow it to be continued for a period of 21 days.

xi. If the contractor assigns (excluding part(s) of work assigned to other agency(s) by the contractor as per terms of contract), transfers, sublets (engagement of labour on a piece-work basis or of labour with materials not to be incorporated in the work shall not be deemed to be subletting) or otherwise parts with or attempts to assign, transfer, sublet or otherwise part with the entire works or an portion thereof without the prior written approval of the Engineer-in-Charge. When the contractor has made himself liable for action under any of the cases aforesaid, the Engineer-in-Charge on behalf of the Chairman, AAI shall have powers:

a. To determine the contract as aforesaid so far as performance of work by the Contractor of work is concerned (of which determination notice in writing to the contractor under the hand of the Engineer-in-Charge shall be conclusive evidence). Upon such determination, the Earnest Money Deposit, Security Deposit already recovered and Performance Guarantee under the contract shall be liable to be forfeited and shall be absolutely at the disposal of the AAI.

b. After giving notice to the contractor to measure up the work of the contractor and to take such whole, or the balance or part thereof, as shall be un-executed out of his hands and to give it to another contractor or any other means to complete the work. The contractor, whose contract is determined as above, shall not be allowed to participate in the tendering process for the balance work. In the event of above courses being adopted by the Engineer-in-Charge, the contractor shall have no claim to compensation for any loss sustained by him by reasons of his having purchased or procured any



	<p><i>materials or entered into any engagements or made any advanced on account or with a view to the execution of the work or the performance of the contract. And in case action is taken under any of the provision aforesaid, the contractor shall not be entitled to recover or be paid any sum for any work thereof or actually performed under this contract unless and until the Engineer-in-Charge has certified in writing the performance of such work and the value payable in respect thereof and he shall be entitled to be paid the value so certified.</i></p>
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Clause 3A

	<p><i>In case, the work cannot be started due to reasons not within the control of the contractor within 1/8th of the stipulated time for completion of work or one month whichever is higher, either party may close the contract by giving notice to the other party stating the reasons. In such eventuality, the Earnest Money Deposit and the Performance Guarantee of the contractor shall be refunded within 30 days. However, no interest shall be payable in such case.</i></p> <p><i>Neither party shall claim any compensation for such eventuality. This clause is not applicable for any breach of the contract by either party.</i></p>
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14	<p><i>i. The bidder, whose tender is accepted will be required to furnish performance guarantee of 5% (Five Percent) of the tendered amount within the period specified in Schedule F. This guarantee shall be in the form of Fixed Deposit Receipts or Guarantee Bonds of any Scheduled Bank but not co-operative or Gramin Bank, in accordance with the prescribed form, provided confirmatory advice is enclosed.</i></p> <p><i>ii. This bidder, whose tender is accepted, will also be required to furnish by way of security Deposit for the fulfillment of his contract, an amount equal to 5% of the contract amount of the work.</i></p>
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		<p>iii. In works where condition of submission of Performance Guarantee is not applicable, the security deposit @ 10% of the tendered value shall be deducted.</p> <p>iv. The Security deposit (under ii & iii above) will be collected by deductions from the running bills of the contractor at the rates mentioned above and the earnest money deposited at the time of tenders, will be treated as a part of the Security Deposit.</p> <p>v. Security deposit will also be accepted in form of Fixed Deposit Receipts/ Guarantee Bonds of any Scheduled Bank but not co-operative or Gramin Bank in accordance with the prescribed form, provided confirmatory advice is enclosed.</p>
15.		<p>On acceptance of the tender, the name of the accredited representative(s) of the contractor who would be responsible for taking instructions from the Engineer-in-Charge shall be communicated in writing to the Engineer-in-Charge.</p>
16.		<p>1. Rates to be quoted by the parties should be inclusive of all taxes, duties, CESS, fee, royalty charges etc. levied under any statute but exclusive of GST for all the items.</p> <p>2. However GST, as applicable, shall be paid to the contractor, for any taxable supply/services/construction rendered by the agency to AAI, against a valid GST invoice as per terms and conditions of the contract.</p> <p>3. In case supplies/services/works involve imports; the same should be identified separately. Basic Custom Duty & IGST will be paid directly by AAI by utilizing EPCG license/Duty Credit Scrip under Service Export from India Scheme (SEIS) of Govt. of India.</p>
17.		<p>The contractor/bidder shall give a list of AAI employees related to him.</p>
18.		<p>The tender for the work shall not be witnessed by a contractor or contractor/bidder who himself/themselves has/have tendered or he may and has/have tendered for the same work. Failure to observe this condition would render tender of the contractor tendering as well as witnessing the tender, liable to summary rejection.</p>
19.		<p>The tender for composite work includes, in addition to building work, all other works such as sanitary and water supply installation drainage installation, electrical work,</p>



		<i>horticulture work, roads and paths etc. The tenderer apart from being a registered contractor (B & R) of appropriate class, must associate himself with agencies of appropriate class which are eligible in tender for sanitary and water supply drainage, electrical and horticulture works in the composite tender.</i>
20.		<i>The contractor bidder shall submit list of works completed in last 5 years as well as which are in hand (in progress) in the following format for assessing bidding capacity of the bidders.</i>

(emphasis supplied)

5. The learned Arbitrator was of the opinion that the Petitioner has not claimed any amount for loss having been caused to them and after coming to such conclusion, the learned Arbitrator has observed as under:-

"25. In view of the above judgments, the respondent, when it claim no loss, could not encash the performance bank guarantee and hence, I decide the issue in favour of the claimant and against the respondent. The respondent is thus liable to refund an amount of Rs. 1,17,85,816 (Rupees One Crore Seventeen Lakhs Eighty Five Thousand Eight Hundred and Sixteen only) towards performance bank guarantee encashed by them.

26. It may be stated that the claimant have used the word fraudulently in this issue. When I asked for the particulars of the fraudulent. I had two things in my mind. Firstly- the fraud has been defined in criminal code and again Secondly- if particulars of the fraud are given, the matter would not be arbitrable. The counsel for the claimant frankly admitted that the frequently being used in this issue being omitted and hence, I take that the same has been omitted."

6. On the second issue as to whether the termination was illegal or not, the learned Arbitrator came to the conclusion that the contract has been



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validly terminated. It is also pertinent to mention that the counter claim for the sum of Rs.46,78,000/-, the bank guarantee which has lapsed and the balance of security deposit for Rs. 71,07,816/- has also not been granted by the learned Arbitrator by holding that since the Petitioner had not claimed any damages, the Petitioner is not entitled to encashment of bank guarantee.

Paragraph 50 of the impugned Award reads as under:-

"50. As stated in the decision of Claim No.1, the respondent has not claimed any damages and therefore they were not entitled to encashed the bank guarantee. All those arguments which have been taken into consideration in deciding the claim no.1 would hold good in so far as this counter claim is concerned and as the respondent has not claimed any damages they were not entitled to the security deposit in the form of bank guarantee. I decide this counter claim accordingly. "

7. Learned Counsel for the Petitioner places reliance on Clause 1(v) of the clauses of contract which clearly provides that in the event of contract being determined and rescinded under any of the provisions of the clause/condition of the agreement, the performance bank guarantee shall stand forfeited in full and shall be at the absolute disposal of the Chairman, AAI.

8. Learned Counsel for the Petitioner contends that the Arbitrator being a creature of contract, is bound to act in terms of the contract. It is stated that the award has to be within the parameters of the contract and if the Arbitrator has ignored the specific terms of the contract, the award is hit under the term 'patent illegality'. He contends that the reasoning that loss is the *sine qua non* of the encashment of bank guarantee is not provided under



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the contract. He states that the learned Arbitrator has not placed reliance on any of the clauses in the contract under which the bank guarantee could be invoked on showing any loss. Reliance has been placed by the learned Counsel for the Petitioner on Indian Oil Corporation Limited v. Shree Ganesh Petroleum Rajgurunagar, (2022) 4 SCC 463; Steel Authority of India Ltd. v. J.C. Budharaja, Government and Mining Contractor, (1999) 8 SCC 122; Airports Authority of India v. Bentwood Seating System (P) Ltd., 2021 SCC OnLine Del 2853 and Rajasthan State Industrial Development and Investment Corporation & Anr. v. Diamond & Gem Development Corporation Limited & Anr., (2013) 5 SCC 470.

9. Learned Counsel for the Petitioner also states that the Arbitrator has erred in dismissing the Counter Claim filed by the Petitioner regarding loss on account of earnest money deposit on the ground that the Petitioner has not claimed any damages.

10. *Per contra*, learned Counsel for the Respondent draws attention of this Court to Clause 1(iv) of the clauses of the contract which states that Engineer-in-Charge shall not make any claim under the performance bank guarantee except for the amounts to which the AAI is entitled to under the contract notwithstanding and/or without prejudice to any other provisions in the contract on the failure of the contractor to extend the validity of the performance bank guarantee or failure by the contractor to pay the Chairman, AAI any amount due either as agreed by the contractor or determined under any of the clauses/conditions of the agreement. She states that none of the conditions mentioned in Clause 1(iv) has been satisfied as it is not the case that the Respondent had failed to extend the validity of the performance bank guarantee or that the Respondent has failed after agreeing



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to an amount for payment which, according to the Respondent was due under any of the clauses/conditions of the agreement. She also states that the invocation is against the clause of the bank guarantee and more particularly paragraph 2 of the bank guarantee. She also states that the court exercising jurisdiction under Section 34 of the Arbitration & Conciliation Act does not exercise appellate jurisdiction. She states that the impugned Award cannot be said to be patently illegal or against the public policy of India.

11. Reliance has been placed by the learned Counsel for the Respondent to the judgment of the Apex Court in Associate Builders v. Delhi Development Authority, (2015) 3 SCC 49; MMTC Limited v. Vedanta Limited, (2019) 4 SCC 163 and other judgments to contend that unless an award is shown to be in breach of the public policy of India or is bad because of patent illegality, or suffering from any patent illegality, an award cannot be set aside only because another view is possible.

12. Heard learned Counsel for the parties and perused the material on record.

13. The facts of the case indicate that the Respondent was awarded the tender for resurfacing of existing runway at Biju Patnaik International Airport, Bhubaneswar. The amount quoted by the Respondent in the tender was Rs.23,57,16,315/-.The letter of acceptance was issued by the Petitioner on 24.10.2019. Under the tender document, the Petitioner had to deposit a total of Rs. 71,07,816/- towards security deposit.

14. Material on record indicates that out of the said amount, earnest money deposit of Rs.46,78,000/- has been deposited by the Respondent and the remaining had to be deposited by the Respondent which he did not deposit. The letter of acceptance dated 24.10.2019 directed the Respondent



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to submit a sum of Rs.1,17,85,816/- towards performance bank guarantee. Material on record indicates that the layout plan was finalized by February, 2020 and mobilisation of machinery was completed. However, COVID-19 pandemic struck and the work could not be started. A show cause notice was issued on 25.09.2020 indicating the fact that the Respondent has not started the work. A second show cause notice was issued on 02.11.2020 and thereafter the contract was terminated on 01.12.2020.

15. A perusal of Clause 1 of the contract indicates that in the event of contract being determined or rescinded under the provision of any clause/condition of the agreement, the performance bank guarantee shall stand forfeited in full. Clause 1(iv) indicates that the Engineer-in-Charge shall not make a claim under the performance guarantee except for the amounts to which the AAI is entitled under the contract and this is notwithstanding and/or without prejudice to any other provisions of the contract.

16. The learned Arbitrator in Paragraph 25 of the Award, which has been extracted in the earlier paragraphs of the order, only states that since the Petitioner had not suffered any losses, the performance bank guarantee cannot be invoked. It is pertinent to note that while deciding the issue as to whether the contract has been properly terminated or not, the finding has been rendered in favour of the Petitioner herein.

17. It is evident that the learned Arbitrator has not evaluated Clause 1(iv) and Clause 1(v) of the clauses of contract. The Arbitrator has also not evaluated Clause 3 of the contract which gives the power to the Engineer-in-Charge to determine the contract and the effect of such determination is that the earnest money deposit, security deposit and the performance bank



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guarantee is liable to be forfeited and shall be at the absolute disposal of the AAI.

18. The learned Arbitrator has not even considered the fact that the Respondent has not adhered to the clauses of the contract by not giving bank guarantee of Rs. 71,07,816/- which was to be given towards security deposit which was in addition to a sum of Rs.46,78,000/- which was given by the Respondent as earnest money deposit. The Arbitrator has also not considered the effect of non-renewal of the bank guarantee which can be forfeited under Clause 3 of the contract.

19. It is well settled that the learned Arbitrator cannot add or delete a term in the contract. The learned Arbitrator has actually added the clause that the performance bank guarantee can be invoked only if there was a loss caused to the Claimant. The learned Arbitrator has not pointed out as to which clause are they referring to while arriving at this conclusion and in the opinion of this Court, there is no such clause in the contract.

20. The contours of scope of interference of courts in arbitral awards has been dealt with in the latest judgment of the Apex Court in Delhi Metro Rail Corporation Limited v. Delhi Airport Metro Express Private Limited, (2024) 6 SCC 357 in Curative Petitions (C) Nos. 108-109/2022 in Review Petitions (C) Nos.1158-59/2021 in Civil Appeals Nos.5627-28/2021. The facts in the said judgments are that an award was passed in the dispute between in Delhi Metro Rail Corporation Limited (DMRC) and the Delhi Airport Metro Express Private Limited. The award was upheld by the learned Single Judge of this Court. However, the Division Bench of this Court partly set aside the award the holding that the award is perverse and patently illegal. The said judgment passed by the Division Bench of the High Court was set aside by



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the Apex Court in *Delhi Airport Metro Express Private Limited v. DMRC*, 2022 (1) SCC 131. The review against the same was dismissed. However, the curative petition was allowed by the Apex Court in *Delhi Metro Rail Corporation Limited v. Delhi Airport Metro Express Private Limited*, (2024) 6 SCC 357.

21. The Apex Court in the *Delhi Metro Rail Corporation Limited v. Delhi Airport Metro Express Private Limited*, (supra) analysed the reasons by which the Division Bench had partly set aside the award, which reads as under:-

"21. The Division Bench of the High Court ("the Division Bench") partly set aside [DMRC v. Delhi Airport Metro Express (P) Ltd., 2019 SCC OnLine Del 6562 (Division Bench)] the award as perverse and patently illegal, for the following reasons:

21.1. On the validity of the termination, ex facie, the termination which was effective immediately from the date of termination was invalid. There was some ambiguity on the relevant date of termination. The award did not interpret Clause 29.5.1(i) of the concession agreement regarding the duration of the cure period;

21.2. The speed restrictions were not stated as the reason for termination in the cure or termination notices and there was no deliberation on this being a justification for termination before the Tribunal. Thus, the award was silent and unreasoned on this issue; and

21.3. Underlining the significance of CMRS sanction under the 2002 Act, the findings of the Tribunal on this issue were incorrect because:

(i) the award overlooked the legal effect of CMRS



certificate which was binding on the Tribunal; and

(ii) the award erroneously treated CMRS certificate as irrelevant to the issue of the validity of the termination by wrongly separating the issue of defects and material adverse effects from the issue of the certificate."

22. After analysing the said judgments, the Apex Court while determining the scope of interference by courts in the arbitral awards has observed as under:-

"33. Section 34 of the Arbitration Act delineates the grounds for setting aside an arbitral award. The provision, as amended by the Arbitration and Conciliation (Amendment) Act, 2015 reads as follows:

*"34. Application for setting aside arbitral award.—(1) * * **

(2) An arbitral award may be set aside by the Court only if—

*(a)****

(b) the Court finds that—

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii) the arbitral award is in conflict with the public policy of India.

Explanation 1.—For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if—



(i) the making of the award was induced or affected by fraud or corruption or was in violation of Section 75 or Section 81; or

(ii) it is in contravention with the fundamental policy of Indian law; or

(iii) it is in conflict with the most basic notions of morality or justice.

Explanation 2.—For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.

(2-A) An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the Court, if the Court finds that the award is vitiated by patent illegality appearing on the face of the award:

Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by reappraisal of evidence.”

(emphasis supplied)

34. *The contours of the power of the competent court to set aside an award under Section 34 has been explored in several decisions of this Court. In addition to the grounds on which an arbitral award can be assailed laid down in Section 34(2), there is another ground for challenge against domestic awards, such as the award in the present case. Under Section 34(2-A) of the Arbitration Act, a domestic award may be set aside if the Court finds that it is vitiated by “patent illegality” appearing on the face of the award.*



35. *In Associate Builders v. DDA [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , a two-Judge Bench of this Court held that although the interpretation of a contract is exclusively within the domain of the arbitrator, construction of a contract in a manner that no fair-minded or reasonable person would take, is impermissible. A patent illegality arises where the arbitrator adopts a view which is not a possible view. A view can be regarded as not even a possible view where no reasonable body of persons could possibly have taken it. This Court held with reference to Sections 28(1)(a) and 28(3), that the arbitrator must take into account the terms of the contract and the usages of trade applicable to the transaction. The decision or award should not be perverse or irrational. An award is rendered perverse or irrational where the findings are:*

(i) based on no evidence;

(ii) based on irrelevant material; or

(iii) ignores vital evidence.

36. *Patent illegality may also arise where the award is in breach of the provisions of the arbitration statute, as when for instance the award contains no reasons at all, so as to be described as unreasoned.*

37. *A fundamental breach of the principles of natural justice will result in a patent illegality, where for instance the arbitrator has let in evidence behind the back of a party. In the above decision, this Court in Associate Builders v. DDA [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] observed : (SCC pp. 75 & 81, paras 31 & 42)*



“31. The third juristic principle is that a decision which is perverse or so irrational that no reasonable person would have arrived at the same is important and requires some degree of explanation. It is settled law that where:

(i) a finding is based on no evidence, or

(ii) an Arbitral Tribunal takes into account something irrelevant to the decision which it arrives at; or

(iii) ignores vital evidence in arriving at its decision,

such decision would necessarily be perverse.

42.1. ... 42.2. (b) A contravention of the Arbitration Act itself would be regarded as a patent illegality — for example if an arbitrator gives no reasons for an award in contravention of Section 31(3) of the Act, such award will be liable to be set aside.”

(emphasis supplied)

38. In *Ssangyong Engg. & Construction Co. Ltd. v. NHAI* [*Ssangyong Engg. & Construction Co. Ltd. v. NHAI*, (2019) 15 SCC 131 : (2020) 2 SCC (Civ) 213], a two-Judge Bench of this Court endorsed the position in *Associate Builders* [*Associate Builders v. DDA*, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204], on the scope for interference with domestic awards, even after the 2015 Amendment : (*Ssangyong Engg. & Construction Co. case* [*Ssangyong Engg. & Construction Co. Ltd. v. NHAI*, (2019) 15 SCC 131 : (2020) 2 SCC (Civ) 213], SCC p. 171, paras 40-41)



“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. ... 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.”

(emphasis supplied)

39. In essence, the ground of patent illegality is available for setting aside a domestic award, if the decision of the arbitrator is found to be perverse, or so irrational that no reasonable person would have arrived at it; or the construction of the contract is such that no fair or reasonable person would take; or, that the view of the arbitrator is not even a possible view.



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[Patel Engg. Ltd. v. North Eastern Electric Power Corpn. Ltd., (2020) 7 SCC 167 : (2020) 4 SCC (Civ) 149.] A “finding” based on no evidence at all or an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside under the head of “patent illegality”. An award without reasons would suffer from patent illegality. The arbitrator commits a patent illegality by deciding a matter not within his jurisdiction or violating a fundamental principle of natural justice.

40. *A judgment setting aside or refusing to set aside an arbitral award under Section 34 is appealable in the exercise of the jurisdiction of the court under Section 37 of the Arbitration Act. It has been clarified by this Court, in a line of precedent, that the jurisdiction under Section 37 of the Arbitration Act is akin to the jurisdiction of the Court under Section 34 and restricted to the same grounds of challenge as Section 34. [MMTC Ltd. v. Vedanta Ltd., (2019) 4 SCC 163, para 14 : (2019) 2 SCC (Civ) 293; Konkan Railway Corpn. Ltd. v. Chenab Bridge Project Undertaking, (2023) 9 SCC 85, para 18 : (2023) 4 SCC (Civ) 458 : 2023 INSC 742, para 14.]*

41. *In the statutory scheme of the Arbitration Act, a recourse to Section 37 is the only appellate remedy available against a decision under Section 34. The Constitution, however, provides the parties with a remedy under Article 136 against a decision rendered in appeal under Section 37. This is the discretionary and exceptional jurisdiction of this Court to grant special leave to appeal. In fact, Section 37(3) of the Arbitration Act expressly clarifies that no second appeal shall lie from an order passed under Section 37, but nothing in the section takes away the constitutional right under Article 136. Therefore, in a sense, there is a third stage at which this Court tests the exercise of jurisdiction by the courts acting under*



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Section 34 and Section 37 of the Arbitration Act."

(emphasis supplied)

23. Applying the said principles, this Court is of the opinion that the contentions of the learned Counsel for the Petitioner that the learned Arbitrator has taken into account something completely irrelevant while allowing Claim No.1 of the Respondent herein and rejecting the Counter Claim No.1 of the Petitioner herein and that the learned Arbitrator has failed to consider Clause 1(iv), 1(iv)(a) and (b) and Clause 1(v), of the Contract. In the opinion of this Court, since the learned Arbitrator has overlooked the terms of the contract and has given the conclusion based on considerations which are alien to the contract, the impugned award would suffer from the defect of patent illegality.

24. In view of the above, this Court is therefore inclined to set aside the award partially, which is, findings regarding Claim No.1 of the Respondent and the Counter Claim No.1 of the Petitioner herein. Therefore, the matter is remanded back to the learned Arbitrator to consider the issue once again in light of the various provisions/clauses of the contract.

25. With these observations, the petition is disposed of along with pending application(s), if any.

SUBRAMONIUM PRASAD, J

FEBRUARY 03, 2025

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