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

Pronounced on: 12th December, 2023

% O.M.P. (COMM) 311/2021

MBL INFRASTRUCTURES LIMITED ..... Petitioner

Through: Ms. Anusuya Salwan, Ms.Nikita Salwan, Ms. Sonika Singh and Mr. Rachit Wadhwa, Advocates

versus

DELHI METRO RAIL CORPORATION ..... Respondent

Through: Mr. Ankur Chhibber, Mr.Parv Garg, Mr. Pawas Kulshreshtha and Mr. K.S. Rekhi, Advocates

CORAM:
HON'BLE MR. JUSTICE CHANDRA DHARI SINGH

JUDGMENT

1. The instant petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter the Act) has been filed on behalf of the petitioner seeking the following reliefs:

> *"i. Set aside the award passed by the Hon'ble Arbitral Tribunal dated 06.03.2020 with respect to Claim No. 3, 4, 6, 7 & 8.*
> *ii. Any other order or relief as this Hon'ble Court deems fit and proper may be passed in the facts and circumstances of the present case."*

FACTUAL MATRIX

2. The facts of the case in a nutshell are extracted hereinbelow-

(a) The Petitioner is M/s MBL Infrastructure Ltd. is Public Limited Company engaged in the business of Civil Engineering projects and has a Pan India presence. The respondent is Delhi Metro Railway Corporation, a joint venture of Government of NCT of Delhi and Government of India and is a registered company under the Companies Act.

(b) The respondent invited tenders for *'Construction of Sarai Station including architectural finishing, water supply, sanitary installation, external development works etc. and structure works of PD area on Badarpur - Faridabad Corridor of Delhi, MRTS Phase III '* on 9th March, 2012.

(c) On 9th March 2012, the petitioner submitted its tender which was accepted by the respondent on 9th May 2012.

(d) The stipulated dates for commencement and completion of the project were 21st May, 2012 and 20th November, 2013 respectively, spanning over a period of 18 months. The value of the contract was Rs. 41.57 crores.

(e) The petitioner furnished 2 performance bank guarantees amounting to Rs.4,15,71,525/- @ 10 % contract values. The petitioner had also furnished two Bank Guarantees for a total amount of Rs.2,28,64,240/- dated 23rd July 2012 valid upto 20th November 2013 issued by Bank of Baroda in terms of Clause 11.2.1 of the General Conditions of

Contract (hereinafter GCC) towards mobilization advance. In lieu of the same, on 6th September 2012, the respondent released the first instalment of mobilization advance amounting to Rs.1,03,92,881/- vide bankers cheque dated 6th September 2012.

(f) Thereafter, the petitioner was handed over the construction site partially after a delay of more than six months on 20th December, 2012. On 28th January 2013, the petitioner requested for handing over the possession of the remaining plot for Sarai Metro Station which was subsequently denied by the respondent.

(g) On 2nd August, 2013, the respondent issued a Notice under clause 13.1 of GCC for alleged failure of the petitioner to adhere to work programs and non-compliance of other obligations.

(h) The respondent vide letter dated 30th September 2023, denied the facts on record and informed the petitioner that it was liable for action under Clause 13.1 of GCC. The petitioner replied to the said letter on 11th October 2013 stating that there was no delay on the part of the petitioner.

(i) On 1st November, 2013, the respondent terminated the contract and encashed the bank guarantees furnished by the petitioner.

(j) The matter was referred to arbitration *vide* letter dated 1st April, 2015, and accordingly an Arbitral Tribunal was convened on 15th April, 2015.

(k) The Arbitral Tribunal after hearing the parties rendered its award on 6th March, 2020. The learned Tribunal held that the default in terms of

delay of the project was on part of the respondent and accordingly, it allowed Claim No. 1 and partly allowed Claim No.5, however, dismissed Claim Nos. 2,3,4,6,7 & 8. It also dismissed all the Counter claims of the respondent.

(l) The learned Tribunal after examining the evidence on record concluded that as the respondent was in breach of contract, thus, the termination of the contract was illegal. The learned Tribunal also held the encashment of Performance Bank Guarantee to be totally unjustified in view of reach of the agreement on behalf of the respondent and thus disallowed the claims for damages, loss of profits, interest and costs under Claims 3, 4, 6, 7 and 8.

(m) Aggrieved by the rejection of claim nos. 3, 4, 6, 7 and 8 in the impugned Award, the petitioner has filed the present petition on the grounds of patent illegality.

SUBMISSIONS

3. The parties argued the instant matter at length on several dates of listing before this Court on the issue of limitation as well as on merits. A combined consideration of the contentions raised in the pleadings, written submissions as well as the contentions raised during the course of hearing lay out the following broad arguments on behalf of the parties.

(on behalf of the petitioner)

4. Learned Counsel, Ms. Salwan appearing for the petitioner submitted that the instant petition under Section 34 of the Act, 1996 is to raise important issues relating to a limb of "public policy" on the grounds that the

impugned Award is in contravention with the "fundamental policy" of Indian law and that the impugned Award is vitiated by "patent illegality" appearing on the face of the Award on extraneous considerations *de hors* and contrary to the terms of the contract executed between the parties and in complete disregard of the evidence on record, in deciding the controversy between the parties.

5. It is submitted that the learned Tribunal had accepted the expenditure incurred by the petitioner for tools, plant, overheads and the injury that has been caused to the petitioner on account of the actions of the respondent. However, the learned Tribunal still refused to allow petitioner's claim for damages, cost and interest.

6. It is further submitted that as per Para 6.3.3.2 of the impugned Award the learned Tribunal held that the petitioner was not in breach of contract but in fact it was the respondent. However, the denial of damages was inconsistent with the aforesaid conclusion arrived at by the learned Tribunal.

7. It is contended that once the learned Tribunal has concluded that it is the respondent who has committed a fundamental breach and is responsible for delay in completion of work, then the learned Tribunal cannot reject payment of damages as the parties cannot contract out of provisions of Indian Contract Act 1872 and the rights created by Section 73 and 55 of the said Act cannot be contractually waived.

8. It is further contended that findings of the learned Tribunal to the effect that the petitioner is not entitled to overheads towards

mobilization/demobilization are contrary to its own findings at Para 6.3.5.2 of the Impugned Award.

9. It is submitted that the learned Tribunal failed to appreciate the position of law under Section 73 of Indian Contract Act as per which, the petitioner is entitled to compensate for the losses incurred on overheads and reduction in the productivity from machinery and other tools deployed as well as damages on account of breach of contract/illegal termination of conditions by the respondent. Thus, the award rendered by learned Tribunal in respect of Claim 3 and 4 is unsustainable.

10. It is contended that the rejection of Claim 6 is erroneous insofar as there is no clause in the contract providing for damages on account of loss of commercial reputation. However, the learned Tribunal failed to appreciate the illegality on part of respondent has directly impacted financial position of the petitioner. Due to said actions of the respondent, there was initiation of Corporate Insolvency Resolution Process under Insolvency and Bankruptcy Code, 2016 against the petitioner.

11. It is submitted that the learned Tribunal has wrongly placed reliance upon Clause 17.10 of GCC to reject the Claim No. 7 for costs and the same is patently illegal as a bare perusal of Section 31-A of Arbitration and Conciliation Act, 1996 clearly states that absolute discretion is vested with learned Tribunal to determine the said costs.

12. It is further submitted that the rejection of Claim No. 8 is also rebutted by stating that the petitioner was entitled to award of interest and wrongful deprivation of the same is bad in law.

13. Learned counsel appearing on behalf of the petitioner contended that Impugned Award passed by the Arbitral Tribunal is arbitrary and inconsistent, therefore, liable to be partially set-aside in accordance with the provision of Section 34 (2A) of the Act.

14. Hence, in view of the above, it is prayed that the instant petition may be allowed and the Impugned Award may be set aside.

(on behalf of the respondent)

15. *Per Contra*, Mr. Ankur Chhibber learned counsel appearing on behalf of respondent submitted that the instant petition is nothing but an abuse of the process of law. It is submitted that it is a settled law that a Court shall not sit in appeal over the award of an Arbitral Tribunal by re-assessing or re-appreciating evidence of the arbitral proceeding since an arbitrator is the master of the quality and quantity of the evidence.

16. It is further submitted that an award can be challenged only under the grounds mentioned in Section 34 of the Act, 1996. Therefore, in the absence of any such ground, it is not possible to re-examine the facts or evidence on the record.

17. Learned counsel for the respondent submitted that the learned Arbitral Tribunal had adopted a judicial approach by considering all the evidence placed on record by both the parties. It is further submitted that the Arbitral Tribunal has given a detailed award which runs into seventy two pages and the award provides analysis of the detailed facts and the arguments of both the parties.

18. It is contended that the learned Arbitral Tribunal after examining the contentions of both parties and the documents furnished thereof and having heard the parties on several dates passed the award in favour of the respondent in regards to the claims which has been challenged by the petitioner before this Court.

19. It is submitted that the Tribunal has rightly looked into the conduct of the parties and the correspondence exchange between the parties to decide the issues at hand and award the claim. The interpretation of the contract is within the domain of the learned Arbitral Tribunal, and such interpretation ought not to be interfered with in a challenge under Section 34 of the Act, especially in view of the fact that no cogent grounds have been set out by the petitioner that warrants interference.

20. It is submitted that reliance by petitioner on Section 73 of the Indian Contract Act is misplaced since Claim No. 3 is sought on account of delay by respondent and not on any breach of contract. Further in respect of Claim No. 4, it is averred that the petitioner has not been able to point out a single patent illegality in the Impugned Award. It is a well settled principle that any claim before the Arbitrator must be proved and in case of no evidence, the Arbitrator cannot allow the claim merely on the basis of statement of claim.

21. It is further submitted that the learned Tribunal has rightly in accordance with the Clause 2.2 of GCC and Clause 8.3 of GCC has held that there is no provision of only monetary claim in cases there is a delay on the part of the respondent and the petitioner is entitled to only reasonable extension of time.

22. It is submitted in respect of Claim No. 6 that the petitioner has not adduced any evidence to show that it entered into a liquidity crunch due to breach of contract by the respondent herein and in the absence of any direct nexus, the said claim is barred for being remote and indirect.

23. It is submitted in respect of Claim No. 7 that merely because the petitioner is the successful party, it would not entitle it to costs of arbitration. Further, in respect of Claim No. 8, it is submitted that Clause 17.0 of GCC specifically bars payment of any interest for any period, till the date on which award is made. Therefore, in terms of contractual provision, no interest is accrued to the petitioner.

24. Accordingly, there are no grounds available to the petitioner herein for challenging the instant award on the grounds under Section 34 of the Act.

25. In view of the facts and circumstances, the instant petition is *de hors* of any merit and deserves to be rejected outrightly.

ANALYSIS AND FINDINGS

26. I have heard learned counsel for the parties at length, who have taken me through the award passed by the learned Arbitral Tribunal, provisions of the contract executed between the parties and the correspondence exchanged between them as well as other relevant documents.

27. I may, at this stage, deal with the contention urged on behalf of the respondent that as per the jurisdiction of the Court to set aside an arbitral award is limited to grounds set out in Section 34 of the Act, this Court ought not to interfere with the same. It was contended that none of the grounds on

which a Court is authorized to interfere with an arbitral award are present in the case at hand. Alternatively, it was contended that even if a contrary view is possible on the facts proved before the Arbitral Tribunal, the Court cannot, in the absence of any compelling reason, interfere with the view taken by the arbitrators as if it was setting in appeal over the award made by the Tribunal. Therefore, it is imperative to revisit section 34 of the Act.

30. Section 34 of the Act, 1996 reads as under:-

> *"**34. Application for setting aside arbitral award**.—*
> *(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).*
> *(2) An arbitral award may be set aside by the Court only if—*
> *(a) the party making the application [establishes on the basis of the record of the arbitral tribunal that]—*
> *(i) a party was under some incapacity; or*
> *(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or*
> *(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or*
> *(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:*
> *Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or*
> *(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the*

parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

(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 reappreciation of evidence.]

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under Section 33, from the date on which that request had been disposed of by the arbitral tribunal:

Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.

(4) On receipt of an application under sub-section (1), the Court may, where it is appropriate and it is so requested bya party, adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award.

[(5) An application under this section shall be filed by a party only after issuing a prior notice to the other party and such application shall be accompanied by an affidavit by the applicant endorsing compliance with the said requirement.

(6) An application under this section shall be disposed of expeditiously, and in any event, within a period of one year from the date on which the notice referred to in sub-section (5) is served upon the other party.]"

28. Under Section 34 of the Act it is well-settled position that the Court does not sit in appeal over the arbitral award and may interfere on merits on the limited ground as provided under Section 34(2)(b)(ii) of the Act, i.e., if the award is against the public policy of India. As per the legal position clarified through decisions of this Court prior to the amendments in the 1996 Act in 2015, a violation of India public policy in turn, includes a violation of the fundamental policy of Indian law, a violation of the interest of India, conflict with justice or morality and existence of patent illegality in the

arbitral award. The concept of the fundamental policy of Indian Law would cover the compliance with the statutes under judicial precedents adopting a judicial approach, compliance with the principles of nature justice, and reasonableness.

29. It is only if one of the conditions is met that the Court may interfere with an arbitral award in terms of Section 34(2)(b)(ii) of the Act, but the said interference does not entail a review of the merits of the dispute as it is limited to the situations where the findings of the arbitration are arbitrary, capricious, or perverse, or when the conscience of the Court is shocked, or when the illegality is not trivial but goes to the root of the matter. An arbitral award may not be interfered with, if the view taken by the learned arbitrator is a possible view based on the facts.

30. Hence, there is a limitation on the powers of this Court while examining its jurisdiction under Section 34 of the Act, 1996, however, at the same time, if the interpretation put forward by the Arbitral Tribunal, on the face of it is incorrect and rendering a Clause in the Agreement to be redundant, such interpretation cannot be sustained.

31. This Court relied on the case of ***Reliance Infrastructire Ltd. v. State of Goa*** **2023 SCC OnLine SC 604** wherein the Hon'ble Supreme Court held as under

> *"47. Having regard to the contentions urged and the issues raised, it shall also be apposite to take note of the principles enunciated by this Court in some of the relevant decisions cited by the parties on the scope of challenge to an arbitral award*

under Section 34 and the scope of appeal under Section 37 of the Act of 1996.

48. In MMTC Limited (supra), this Court took note of various decisions including that in the case of Associate Builders (supra) and exposited on the limited scope of interference under Section 34 and further narrower scope of appeal under Section 37 of the Act of 1996, particularly when dealing with the concurrent findings (of the Arbitrator and then of the Court). This Court, inter alia, held as under:—

> *"11. As far as Section 34 is concerned, the position is well-settled by now that the Court does not sit in appeal over the arbitral award and may interfere on merits on the limited ground provided under Section 34(2)(b)(ii) i.e. if the award is against the public policy of India. As per the legal position clarified through decisions of this Court prior to the amendments to the 1996 Act in 2015, a violation of Indian public policy, in turn, includes a violation of the fundamental policy of Indian law, a violation of the interest of India, conflict with justice or morality, and the existence of patent illegality in the arbitral award. Additionally, the concept of the "fundamental policy of Indian law" would cover compliance with statutes and judicial precedents, adopting a judicial approach, compliance with the principles of natural justice, and Wednesbury [Associated Provincial Picture Houses v. Wednesbury Corpn., [1948] 1 K.B. 223 (CA)] reasonableness. Furthermore, "patent illegality" itself has been held to mean contravention of the substantive law of India, contravention of the 1996 Act, and contravention of the terms of the contract.*

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

13. It is relevant to note that after the 2015 Amendment to Section 34, the above position stands somewhat modified. Pursuant to the insertion of Explanation 1 to Section 34(2), the scope of contravention of Indian public policy has been modified to the extent that it now means fraud or corruption in the making of the award, violation of Section 75 or Section 81 of the Act, contravention of the fundamental policy of Indian law, and conflict with the most basic notions of justice or morality. Additionally, sub-section (2-A) has been inserted in Section 34, which provides that in case of domestic arbitrations, violation of Indian public policy also includes patent illegality appearing on the face of the award. The proviso to the same states that an award

shall not be set aside merely on the ground of an erroneous application of the law or by reappreciation of evidence.

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

49. In the case of Ssangyong Engineering (supra), this Court has set out the scope of challenge under Section 34 of the Act of 1996 in further details in the following words:—

"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."

50. The limited scope of challenge under Section 34 of the Act was once again highlighted by this Court in the case of PSA SICAL Terminals (supra) and this Court particularly explained the relevant tests as under:—

"43. It will thus appear to be a more than settled legal position, that in an application under Section 34, the court is not expected to act as an appellate court and reappreciate the evidence. The scope of interference would be limited to grounds provided under Section 34 of the Arbitration Act. The interference would be so warranted when the award is in violation of "public policy of India", which has been held to mean "the fundamental policy of Indian law". A judicial intervention on account of interfering on the merits of the award would not be permissible. However, the principles of natural justice as contained in Section 18 and 34(2)(a)(iii) of the Arbitration Act would continue to be the grounds of challenge of an award. 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". It is only such arbitral awards that shock the conscience of the court, that can be set aside on the said ground. An award would be set aside on the ground of patent illegality appearing on the face of the award and as such, which goes to the roots of the matter. However, an illegality with regard to a mere erroneous application of law would not be a ground for interference. Equally, reappreciation of evidence would not be permissible on the ground of patent illegality appearing on the face of the award.

44. A decision which is perverse, though would not be a ground for challenge under "public policy of India", would certainly amount to a patent illegality appearing on the face of the award. However, 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.

45. To understand the test of perversity, it will also be appropriate to refer to paragraph 31 and 32 from the judgment of this Court in Associate Builders (supra), which read thus:

> *"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.

32. A good working test of perversity is contained in two judgments. In Excise and Taxation Officer-cum-Assessing Authority v. Gopi Nath & Sons [1992 Supp (2) SCC 312], it was held : (SCC p. 317, para 7)

"7. ... It is, no doubt, true that if a finding of fact is arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant material or if the finding so outrageously defies logic as to suffer from the vice of irrationality incurring the blame of being perverse, then, the finding is rendered infirm in law.""

51. In Delhi Airport Metro Express (supra), this Court again surveyed the case-law and explained the contours of the Courts' power to review the arbitral awards. Therein, this Court not only re-affirmed the principles aforesaid but also highlighted an area of serious concern while pointing out "a disturbing tendency" of the Courts in setting aside arbitral awards after dissecting and re-assessing factual aspects. This Court also underscored the pertinent features and scope of the expression "patent illegality" while reiterating that the Courts do not sit in appeal over the arbitral award. The relevant and significant passages of this judgment could be usefully extracted as under:—

"26. A cumulative reading of the UNCITRAL Model Law and Rules, the legislative intent with which the 1996 Act is made, Section 5 and Section 34 of the 1996 Act would make it clear that judicial interference with the arbitral awards is limited to the grounds in Section 34. While deciding

applications filed under Section 34 of the Act, Courts are mandated to strictly act in accordance with and within the confines of Section 34, refraining from appreciation or reappreciation of matters of fact as well as law. (See Uttarakhand Purv Sainik Kalyan Nigam Ltd. v. Northern Coal Field Ltd. [Uttarakhand Purv Sainik Kalyan Nigam Ltd. v. Northern Coal Field Ltd., (2020) 2 SCC 455 : (2020) 1 SCC (Civ) 570], Bhaven Construction v. Sardar Sarovar Narmada Nigam Ltd. [Bhaven Construction v. Sardar Sarovar Narmada Nigam Ltd., (2022) 1 SCC 75] and Rashtriya Ispat Nigam Ltd. v. Dewan Chand Ram Saran [Rashtriya Ispat Nigam Ltd. v. Dewan Chand Ram Saran, (2012) 5 SCC 306].)

****

28. This Court has in several other judgments interpreted Section 34 of the 1996 Act to stress on the restraint to be shown by Courts while examining the validity of the arbitral awards. The limited grounds available to Courts for annulment of arbitral awards are well known to legally trained minds. However, the difficulty arises in applying the well-established principles for interference to the facts of each case that come up before the Courts. There is a disturbing tendency of Courts setting aside arbitral awards, after dissecting and reassessing factual aspects of the cases to come to a conclusion that the award needs intervention and thereafter, dubbing the award to be vitiated by either perversity or patent illegality, apart from the other grounds available for annulment of the award. This approach would lead to corrosion of the object of the 1996 Act and the endeavours made to

preserve this object, which is minimal judicial interference with arbitral awards. That apart, several judicial pronouncements of this Court would become a dead letter if arbitral awards are set aside by categorising them as perverse or patently illegal without appreciating the contours of the said expressions.

29. Patent illegality should be illegality which goes to the root of the matter. In other words, every error of law committed by the Arbitral Tribunal would not fall within the expression "patent illegality". Likewise, erroneous application of law cannot be categorised as patent illegality. In addition, contravention of law not linked to public policy or public interest is beyond the scope of the expression "patent illegality". What is prohibited is for Courts to reappreciate evidence to conclude that the award suffers from patent illegality appearing on the face of the award, as Courts do not sit in appeal against the arbitral award. The permissible grounds for interference with a domestic award under Section 34(2-A) on the ground of patent illegality is when the arbitrator takes a view which is not even a possible one, or interprets a clause in the contract in such a manner which no fair-minded or reasonable person would, or if the arbitrator commits an error of jurisdiction by wandering outside the contract and dealing with matters not allotted to them. An arbitral award stating no reasons for its findings would make itself susceptible to challenge on this account. The conclusions of the arbitrator which are based on no evidence or have been arrived at by ignoring vital evidence are perverse and can be set aside on the ground of patent illegality. Also, consideration of documents which are not supplied

to the other party is a facet of perversity falling within the expression "patent illegality".

30. Section 34(2)(b) refers to the other grounds on which a court can set aside an arbitral award. If a dispute which is not capable of settlement by arbitration is the subject-matter of the award or if the award is in conflict with public policy of India, the award is liable to be set aside. Explanation (1), amended by the 2015 Amendment Act, clarified the expression "public policy of India" and its connotations for the purposes of reviewing arbitral awards. It has been made clear that an award would be in conflict with public policy of India only when it is induced or affected by fraud or corruption or is in violation of Section 75 or Section 81 of the 1996 Act, if it is in contravention with the fundamental policy of Indian law or if it is in conflict with the most basic notions of morality or justice.

****

42. The Division Bench referred to various factors leading to the termination notice, to conclude that the award shocks the conscience of the court. The discussion in SCC OnLine Del para 103 of the impugned judgment [DMRC v. Delhi Airport Metro Express (P) Ltd., 2019 SCC OnLine Del 6562] amounts to appreciation or reappreciation of the facts which is not permissible under Section 34 of the 1996 Act. The Division Bench further held [DMRC v. Delhi Airport Metro Express (P) Ltd., 2019 SCC OnLine Del 6562] that the fact of AMEL being operated without any adverse event for a period of more than four years since the date of issuance of the CMRS certificate, was not given due importance by the Arbitral Tribunal. As the arbitrator is the sole Judge of the quality

as well as the quantity of the evidence, the task of being a Judge on the evidence before the Tribunal does not fall upon the Court in exercise of its jurisdiction under Section 34. [State of Rajasthan v. Puri Construction Co. Ltd., (1994) 6 SCC 485] On the basis of the issues submitted by the parties, the Arbitral Tribunal framed issues for consideration and answered the said issues. Subsequent events need not be taken into account."

(emphasis supplied)

52. In the case of Haryana Tourism Ltd. (supra), this Court yet again pointed out the limited scope of interference under Sections 34 and 37 of the Act; and disapproved interference by the High Court under Section 37 of the Act while entering into merits of the claim in the following words:

"8. So far as the impugned judgment and order passed by the High Court quashing and setting aside the award and the order passed by the Additional District Judge under Section 34 of the Arbitration Act are concerned, it is required to be noted that in an appeal under Section 37 of the Arbitration Act, the High Court has entered into the merits of the claim, which is not permissible in exercise of powers under Section 37 of the Arbitration Act.

9. As per settled position of law laid down by this Court in a catena of decisions, an award can be set aside only if the award is against the public policy of India. The award can be set aside under Sections 34/37 of the Arbitration Act, if the award is found to be contrary to : (a) fundamental policy of Indian Law; or (b) the interest of India; or (c) justice or morality; or (d) if it is patently illegal. None of the aforesaid exceptions shall be applicable to the facts of the case on hand. The High Court has entered into the merits of the claim and has decided the appeal under

Section 37 of the Arbitration Act as if the High Court was deciding the appeal against the judgment and decree passed by the learned trial Court. Thus, the High Court has exercised the jurisdiction not vested in it under Section 37 of the Arbitration Act. The impugned judgment and order passed by the High Court is hence not sustainable."

53. As regards the limited scope of interference under Sections 34/37 of the Act, we may also usefully refer to the following observations of a 3-Judge Bench of this Court in the case of UHL Power Company Limited v. State of Himachal Pradesh, (2022) 4 SCC 116:—

"15. This Court also accepts as correct, the view expressed by the appellate court that the learned Single Judge committed a gross error in reappreciating the findings returned by the Arbitral Tribunal and taking an entirely different view in respect of the interpretation of the relevant clauses of the implementation agreement governing the parties inasmuch as it was not open to the said court to do so in proceedings under Section 34 of the Arbitration Act, by virtually acting as a court of appeal.

16. As it is, the jurisdiction conferred on courts under Section 34 of the Arbitration Act is fairly narrow, when it comes to the scope of an appeal under Section 37 of the Arbitration Act, the jurisdiction of an appellate court in examining an order, setting aside or refusing to set aside an award, is all the more circumscribed."

54. The learned Attorney General has referred to another 3-Judge Bench decision of this Court in the case of Sal Udyog Private Limited (supra), wherein this Court indeed interfered with the award in question when the same was found suffering from non-consideration of a relevant contractual clause. In the said decision too, the

principles aforesaid in Delhi Airport Metro Express, Ssangyong Engineering and other cases were referred to and thereafter, this Court applied the principles to the facts of that case. We shall refer to the said decision later at an appropriate juncture.

55. Keeping in view the aforementioned principles enunciated by this Court with regard to the limited scope of interference in an arbitral award by a Court in the exercise of its jurisdiction under Section 34 of the Act, which is all the more circumscribed in an appeal under Section 37, we may examine the rival submissions of the parties in relation to the matters dealt with by the High Court.

32. It is settled law that the ground under Section 34 of the Act gives way to setting aside an Arbitral Award with a very minimal scope of intervention. A party cannot simply raise an objection on the ground of Section 34 if the Award is simply against them. Section 34 of the Act, 1996 requires a distinct transgression of law, the clear lack of which thereof makes the petition simply a pointless effort of objection towards an Award made by a competent Arbitral Tribunal.

33. Keeping these principles in mind, I will now examine the present case.

34. In the instant petition, the petitioner has challenged claim no. 3, 4, 6, 7 and 8. This Court will peruse each and every claim and adjudicate upon whether they merit interference by way of the instant petition.

Claim no. 3- Damages on Account of Idling of Machines and loss of overheads

35. Claim 3 pertains to damages on account of idling of machines and loss of overheads due to inaction and delays by the respondent amounting to Rs. 1,57,84,798/-, the Arbitral Tribunal's analysis is reproduced hereinunder-

> *"iv) As discussed above. Contractual provisions governing delay is covered under Clause 8.3 of GCC and that for Extension of Time under Clause 8.4 of GCC. Clause 8.3 (along with Clause 2.2) clearly indicates that failure or delay by the Employer or the Engineer to hand over site etc. shall not entitle the contractor to damages or compensation, it provides simply for extension of time as, in the opinion of the Engineer are reasonable. Clause 8.4.1 of GOG dealing with Extension of Time not on Contractor's fault also includes:*
>
> > *'a) The Contractor's work held up for not being given possession of or access to site in accordance with the Contract (sub para 'b' of Clause 8.4.1 of GCC);*
> >
> > *b) Any act of prevention or Breach of Contract by the Employer and not mentioned in this Clause (sub para 'e' of Clause 8.4.1. of GCC).' Such a provision encompasses all delays over which the contractor has no control. This will also include any delays for which both the Respondent and the Claimant are responsible. However, as is seen. Clause 8.3 of GCC of the Contract Agreement does not provide for any financial compensation to the Claimant even if the Claimant is not responsible for the delay.*
>
> *v) The Claimant have cited a number of judgments of High Courts and the Supreme Court, as mentioned In Paragraphs 8.1.3 supra, in support of their case and applicability of Section 73 of the Indian Contract Act, 1872, providing for compensation to be paid in case of breach of a contract, to the party who suffers loss due to such breach. The Tribunal have studied the relevant paragraphs of these judgments, as referred to by the Claimant. It is seen that these judgments pertain to cases having different dimensions and different*

provisions of the contracts, which may not be applicable to the situations of the present case. The Tribunal is guided by the Sub-section (3) of Section 28 of the Arbitration and Conciliation Act, 1996 as amended by Arbitration and Conciliation (Amendment) Act, 2015, which provides as under: "(3) While deciding and making an award, the arbitral tribunal shall, in all cases, take into account the terms of the contact and trade usages applicable to the transactions".

The Tribunal has considered the case in the spirit of the above provision of the Act. It has also come out that the Respondent were eager to get the Project completed at the earliest. The Respondent have admitted that there were certain delays, like handing over of the land, on their part and certain other delays including planning and execution issues (amply discussed in Claim-1) on the part of the Claimant.

8.3.4 After careful consideration of the facts and circumstances of the case, written and oral submissions by the Parties and as discussed above, the Tribunal have come to the conclusion that the Respondent is not bound, as per terms and conditions of the Contract, to compensate the Claimant for delayed performance of the Contract.'

36. The learned Tribunal held that the petitioner suffered certain damages on account of idling of machinery and loss of overheads because there was a default on the part of the respondent in fulfilling the obligations under the Contract.

37. Moreover, the Tribunal has referred to the relevant clauses of the Contract i.e., Clause 2.1 of GCC, Clause 2.2 of GCC as well as Clause 8.3 of GCC. The Tribunal has further held that in accordance with these clauses it is explicitly mentioned that the petitioner shall be entitled only to reasonable extension of time and there can be monetary claims payable in this regard.

38. According to Clause 8.3 of GCC, it enunciates that any delay on account of the respondent shall entitle the contractor to a remedy of extension of time which the Engineer deems reasonable. The delay includes in its ambit the handing over of site necessary for execution of work, giving of necessary notice for the purpose of commencement of work, provide necessary drawing or instructions or clarification or clarification or to supply any material, plant or machinery, which as per the terms and conditions of the Contract is the obligation of the employer. Hence, the Tribunal finally held that as per the Clause 8.3 of GCC the Contract does not provide any compensation to the petitioner by way of damages.

39. The learned Tribunal further held that it is acting in accordance with Section 28 of the Act as per which the Tribunal shall take into its consideration the terms of the contract and trade usages which are applicable to the transactions. Accordingly, the Tribunal held that respondent is not bound as per the Contract for any compensation to the Claimant for delayed performance of the Contract.

40. This Court before commenting on the merits of the case deems it fit that the reference shall be made to Award passed by the learned tribunal for Claim no. 1 wherein the Tribunal attributed the delay pertaining to the completion project on the respondent. The relevant paras of the Impugned Award are reproduced herein below:

> *"**6.3.3.2 Conclusion:** Examination of above allegations made by the Respondent indicates that the reasons brought out by the Respondent as above are not the basic reasons why the work did not achieve the desired progress with time. The expected*

date for land availability as also not known to the Claimant to be in readiness for the same. The activities alleged to be delayed by the Claimant would have been critical if the land for the work area as well as construction were made available from the beginning. Even the first set of drawings for pile foundations was issued after more than two months after the result of pile load test was available. Ideally, the pile rig should have been remobilized soon after 21.12.2012, when part land for construction was made available, but then there were no structural drawings for carrying out of execution till 21.02.2012. The pile load test was required for the final drawings, but the land for installation of initial piles for load test could be temporarily made available on 16.10.2012. As time for availability of land was uncertain, there was no tempo for carrying out preparatory works. The Batching plant was not installed till 28.08.2012 (though no further activity was held up on this account) as land for work area became available on 27.06.2012. Thus, one is to consider cause and effect. ***Thus, under facts and circumstances of the case Tribunal finds that the Claimant is not responsible for delay in mobilization and start of the work as alleged by the Respondent;"***

XXX

*"**6.3.5.3 Conclusion:***

(i) In view of above, delays in making available land does not get condoned by the GCC 2.2 as there is a difference between 'no land' and 'making available land progressively'. There is no provision in the Contract for payment for idling rig. Piling rig was demobilized twice-once after execution of test piles in October 2013; second after completing piles in grid 2 and 3 on 29.05 2013 due to obstructions in grid 1. Though advance drawings were available on 18.01.2013, GFC drawings for the pile foundations was issued on 21.02.2013. When the notice under Clause 13.1 alleging failure in meeting obligation under

13.2.1 (g) & (i) was issued on 2.08.2013, there was no agreed programme of work due to various delays. The revised programme was approved on 19.09.2013, yet in the second notice dated 30.09.2013 the Respondent states that according to the revised programme the piling work was to be completed by 30.08.2013 and there is a delay of 45 days. Surely, the slippage of 45 days could not have occurred in just 11 days from 19.09.2019. Thus, provision of GCC Clause 4.13 does not seem to have been followed by the Respondent. The reality of obstructions due to close proximity of existing electric poles or flooding of the site due to poor drainage facility in the area, which became acute due to excavations for the pile caps, cannot be wished away by provisions of Construction Specifications Section 1.2.12, 3.6 Earthwork. Such hindrances do affect the progress and are to be considered while evaluating progress on any date.

(ii) Notice dated 2.08.2013 is under GCC Clause 13.2 for failure to meet Contractor's obligation as specified in Clause 13.2.1 (g) and (i). Clause 13.2 has the heading 'Termination of Contract due to Contractor's Default'. 13.2.1 (g) is about failure to adhere to agreed programme or is unlikely to complete the works. Clause 13.2.1(i) is about failure to employ competent or additional staff or labour. Analysis of sequence of events indicates that till 2.08.2013 (date of first notice) or subsequently also, the delays were beyond the control of the Claimant and as such it cannot be construed that it is due to Contractor's Default. Additional workers were deployed in the key categories of carpenters and fitters according to data provided by the Respondent. Thus, finding of the Tribunal is ***that delays are not due to Claimants default. Considering above findings, the Tribunal has come to the conclusion that under fact and circumstances of the case, termination of the Contract and forfeiture of the performance security by the Respondent is not tenable under the Contract Agreement."***

41. Upon perusal of the abovesaid paras pertaining to the award of Claim no. 1, it is crystal clear that the learned Tribunal has held that the delay in completion of the project is attributable to the respondent. It has further categorically held that as per notice dated 2nd August 2013, under clause 13.2 of the GCC regarding failure to meet contractor's obligations as per the contract has been given wrongly. Since as per the material on record the tribunal held that the delays were beyond the control of the petitioner and the same cannot be construed as its fault.

42. Furthermore, the Tribunal highlighted the fact that there were surplus workers deployed in the key categories of Carpenter and fitters as per the data provided by the respondent. Therefore, the Tribunal held that the termination of the contract and forfeiture of performance security by the respondent is not in accordance with the contract.

43. This Court is of the opinion that the clauses which restricts the right of the party in claiming damages is a restrictive clause. Such a clause will defeat the purpose of the Indian Contract Act, 1872. Under section 55 and 73 of the said Act, the aggrieved party is entitled to claim damages, and there cannot be any restriction or prohibition exercised by the other party. It is the right of the aggrieved party to claim such damages.

44. Under section 23 of the Indian Contract Act, 1872, states that such clause is opposed to public policy since it aims at restraining the aggrieved party from claiming its rightful dues.

45. Such kind of clauses are also not in public interest since they hinder the smooth operation of the commercial transaction. Furthermore, they

create an environment which is not conducive for the purpose of business transactions. Moreover, the said clauses cannot restrain the Tribunal from awarding damages, which are otherwise payable by the employer on account of its breach of contract

46. This Court will now discuss the various judgments passed by the Courts regarding whether the Tribunal can award damages for delay on the part of the employer in completion of the project when the Contract executed between the parties does not provide for any monetary damages to the contractor and entitles the Contractor merely for extension of time.

47. The Hon'ble Supreme Court held in the judgment of ***Asian Techs Ltd. v. Union of India*, (2009) 10 SCC 354** as follows:

> **"*12.*** *The High Court by the impugned order allowed the appeal and revision making the following observations:*
> *"We, therefore, hold that the award passed by the arbitrator in respect of Claims 1 to 3, 5, 9, 17, 19, 21, 23, 24, 26, 30, 33, 35, 37, 38, 40, 41, 44 and 46 is against the conditions agreed to by the contracting parties and in conscious disregard of the terms of the contract and also the arbitration clause from which the arbitrator derives his authority. We are, however, not interfering with the award in respect of Claim 12 alone, which in our view is binding on the appellants. We hold that Arbitration Clause 70 was a conditional one giving finality to the decisions of CWE as per the various provisions, Clauses 62(G) and 11(C) of the contract. The award of the arbitrator and the orders of the court below in arbitration, OPs Nos. 4 and 18 of 1994 to the extent to which they are covered by Clauses 62(G) and 11(C) except Claim 12 are set aside and the arbitration, OP No. 18 of 1994 filed by the Union of India is allowed as above. The appeal and the revision are allowed as*

above. In the facts and circumstances of this case, we are not awarding costs."

It can be seen that the High Court has set aside the arbitrator's award holding that under the finality clause under Clauses 11(C) and 62(G), the decision of the Commander Works Engineer (CWE) is final and binding and has been exempted from the purview of the arbitration clause, which is Clause 70 of the contract. Thus the High Court held that the arbitrator travelled beyond the terms of reference.

13. *In this connection we may refer to Clause 70 of the contract which is the arbitration clause. The said clause reads as follows:*

"70. Arbitration.—All disputes, between the parties to the contract (other than those for which the decision of CWE or any other person is by the contract expressed to be final and binding) shall, after written notice by either party to the contract to the other of them, be referred to the sole arbitration of an Engineer Officer to be appointed by the authority mentioned in the tender documents."

14. *Clause 11 of the contract reads as follows:*

"11. Time, delay and extension.—(A) Time is of the essence of the contract and is specified in contract documents or in each individual works order.

As soon as possible after the contract is let or any substantial works order is placed and before work under it has begun, the GE and the contractor shall agree upon a time progress chart. The chart shall be prepared in direct relation to the time stated in the contract documents or the works order for completion of the individual items thereof, and/or the contract or works order as a whole.

(B) If the works be delayed:

(a) by reason of non-availability of government stores mentioned in Schedule 13; or

(b) by reason of non-availability or breakdown of government tools and plant mentioned in Schedule C then, in any such

event, notwithstanding the provisions hereinbefore contained, the GE may in his discretion, grant such extension of time as may appear reasonable to him and the contractor shall be bound to complete the works within such extended time. In the event of the contractor not agreeing to the extension granted by the Garrison Engineer, the matter shall be referred to the accepting officer (or CWE in case of contract accepted by the Garrison Engineer) whose decision shall be final and binding.

(C) No claim in respect of compensation or otherwise, howsoever arising, as a result of extensions granted under Conditions (A) and (B) above shall be admitted."

15. *Clause 62(G) of the contract states as under:*

"(G) For all contracts—

If any work, the rate for which cannot be obtained by any of the methods referred to in Paras (A) to (E) above, has been ordered on the contractor, the rate shall be decided by the GE on the basis of the cost to the contractor at site of works plus 10% to cover all overheads and profit. Provided that if the contractor is not satisfied with the decision of the GE he shall be entitled to represent the matter to the CWE within seven days of receipt of the GE's decision and the decision of the CWE thereon shall be final and binding.

If any alterations or additions (other than those authorised to be executed by day work or for an agreed sum) have been covered up by the contractor without his having given notice of his intention to do so, the Engineerin-charge shall be entitled to appraise the value thereof and in the event of any dispute the decision of the GE thereon shall be final and binding."

xxx

19. *It is well settled that in the case of non-speaking awards under the Arbitration Act, 1940 the court has very little scope of interference vide State of Rajasthan v. Nav Bharat Construction Co. [(2006) 1 SCC 86] , Raipur Development Authority v. Chokhamal Contractors [(1989) 2 SCC 721] , Arosan Enterprises Ltd. v. Union of India [(1999) 9 SCC 449]*

, Ispat Engg. & Foundry Works v. SAIL [(2001) 6 SCC 347] and D.D. Sharma v. Union of India [(2004) 5 SCC 325] .

xxx

21. *Apart from the above, it has been held by this Court in Port of Calcutta v. Engineers-De-Space-Age [(1996) 1 SCC 516] that a clause like Clause 11 only prohibits the Department from entertaining the claim, but it did not prohibit the arbitrator from entertaining it. This view has been followed by another Bench of this Court in Bharat Drilling & Treatment (P) Ltd. v. State of Jharkhand [(2009) 16 SCC 70*5] ."

48. This Court has extensively dealt with the position of law in the judgment of ***Simplex Concrete Piles (India) Ltd. v. Union of India*, 2010 SCC OnLine Del 821** as follows**:**

"10. In deciding this issue of the disentitlement to damages to the contractor (because of Ramnath International's case) or the entitlement to damages (on account of Asian Techs Limited's case), however, I would prefer to decide this case and base this judgment wholly, independently on my view that clauses which bar and disentitle a contractor to claim its just claims/damages/monetary entitlement, and which a contractor is entitled to by virtue of provisions of Sections 73 and 55 of the Contract Act, are void by virtue of Section 23 of the Contract Act, 1872. I am also taking up this aspect of Section 23 first because the present discussion will help in deciding whether correct law is laid down in Ramnath International's case or in Asian Techs Limited's case. It is therefore necessary, at this stage, to reproduce Section 23 of the Contract Act. The same reads as under:

"23. What considerations and objects are lawful, and what not.— The consideration or object of an agreement is lawful, unless —

it is forbidden by law 1; or

is of such a nature that, if permitted, it would defeat the provisions of any law; or

is fraudulent; or

involves or implies injury to the person or property of another; or the Court regards it as immoral, or opposed to public policy.

In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful, is void."

A reading of the aforesaid provision of Section 23 shows that where the consideration or object of an agreement is unlawful, the said agreement is void. The consideration or object of an agreement is unlawful if it is forbidden by law or it is of such a nature that if permitted it defeats the provisions of law or the same involves injury to the person or property of another or the Court regards it as immoral or opposed to public policy. Two parts of this Section are relevant for determining the issue in the present case. The first part being that a clause in an agreement is unlawful and void when the same is opposed to public policy. The second part is that such a contractual clause is void if allowing operation of such clause will defeat the provisions of law.

11. The expression "public policy" has been a subject matter of various decisions of the Supreme Court. It has been held that the expression "public policy" has to be interpreted in the context of the statute in which such expression appears. The expression "public policy" as per the requirement and the context of the statute in which the expression is found, has been

accordingly interpreted by the Supreme Court. What is therefore the meaning which should be attributed to this expression as found in Section 23 is the question. Instead of referring to various judgments, I would seek to refer to the observations and the ratio of the Supreme Court in one of its recent judgments reported as Indian Financial Association of Seventh Day Adventists v. M.A. Unneerikutty, (2006) 6 SCC 351 on the meaning of this expression in Section 23. I refer to this judgment because in a few paragraphs the Supreme Court has encapsulated the law with regard to the expression 'public policy' and in the process has also referred to its earlier decisions on the point as also the relevant commentaries of certain authors. Paras 16 to 19 of the said judgment lays down the ratio with regard to the meaning of the expression "public policy", and which I with all humility adopt, for the purpose of the decision in the present case. These paragraphs 16 to 19 read as under:

16. Section 23 of the Contract Act lays down that the object of an agreement becomes unlawful if it was of such a nature that, if permitted, it would defeat the provisions of any law.

17. The term "public policy" has an entirely different and more extensive meaning from the policy of the law. Winfield defined it as a principle of judicial legislation or interpretation founded on the current needs of the community. It does not remain static in any given community and varies from generation to generation. Judges, as trusted interpreters of the law, have to interpret it. While doing so, precedents will also guide them to a substantial extent.

18. The following passage from Maxwell, Interpretation of Statutes, may also be quoted to advantage here:

"Everyone has a right to waive and to agree to waive the advantage of a law or rule made solely for the benefit and protection of the individual in his private capacity which may be dispensed with without infringing any public right or public policy. Where there is no express prohibition against contracting out of it, it is necessary to consider whether the Act is one which is intended to deal with private rights only or whether it is an Act which is intended as a matter of public policy."

19. The doctrine of public policy may be summarised thus 11:

"Public policy or the policy of the law is an illusive concept; it has been described as 'untrustworthy guide', 'variable quality', 'uncertain one', 'unruly horse', etc.; the primary duty of a court of law is to enforce a promise which the parties have made and to uphold the sanctity of contracts which form the basis of society, but in certain cases, the court may relieve them of their duty on a rule founded on what is called the public policy; but the doctrine is extended not only to harmful cases but also to harmful tendencies; this doctrine of public policy is only a branch of common law, and just like any other branch of common law, it is governed by precedents; the principles have been crystallised under different heads and though it is permissible for the courts to expound and apply them to different situations, it should only be invoked in clear and incontestable cases of harm to the public."

(Underlining supplied)

12. The following principles can be culled out from the aforesaid paragraphs:

(i) Public policy is a changing concept, it is not static but dynamic; it changes from time to time and the Courts have been

empowered while interpreting this doctrine to resort to, judicial legislation euphemistically called 'interpretation', to further the public interest, equity, good conscience and justice.

(ii) A law which is made for individual benefit can be waived by an individual/private person, however, when such law includes a public interest/public policy element, such rights arising from the law cannot be waived because the same becomes a matter of public policy/public interest.

14. A Division Bench of this court has also recently considered the legal position under Section 23 of the Contract Act in the judgment reported as Ircon International Ltd. v. NBCC, 155 (2008) DLT 226. The relevant paragraphs of this judgment are paras 15, 20, 21, 27 and 28:

15. The learned Counsel for the appellant has also relied upon (2006) 2 SCC 628 : AIR 2006 SC 963, (2006) 6 SCC 315 : AIR 1965 Pat. 239 : AIR 1996 All. 72 and AIR (37) 1950 Lah. 174 wherein the part of the arbitration agreement, "which makes the arbitrator's determination 'final' and binding between the parties" and declares that the parties have waived the right of an appeal or objection 'in any jurisdiction', has been held to be hit by Section 28 of the Contract Act and also being against public policy.

20. After considering the judgments relied upon by the appellant and discussed by us above, we are of the opinion that a person may waive his rights. Such waiver of rights is permissible even in relation to a benefit conferred under the law. But it is trite that no right can be waived where public policy or public interest is involved. The contract between the parties must be in obedience to law and not in derogation thereof. Contracting out is permissible provided it does not deal with a matter of public policy. An agreement under no

circumstances can violate the public policy [Centrotrade Minerals and Metal Inc. v. Hindustan Copper Ltd., (2006) 11 SCC 245].

21. Section 28 of the Contract Act which provides for agreements in restraint of legal proceedings as void, the parties cannot by a contract seek to exclude the application of a statutory provision as it is not valid Mukul Dutta Gupta v. Indian Airlines Corpn., AIR 1962 Cal. 1311. The most obvious and direct form of contracting out of a statute is where a party agrees not to make a claim for a benefit for which a statute provides. But it may take many other forms, varying with the nature, subject matter and the object or purpose of the statute, and the means selected to escape from its provisions or its operations. Express statutory prohibitions against contracting out renders void an agreement or clause that is inconsistent with it. But when there is no express prohibition in the statute, an agreement; the operation of which defeats or circumvents the purpose or policy of the statute, would also be barred.

27. The object of the rule is, that no party/person should be left remedy less. Necessary corollary to this would be that, if no adequate remedy is provided for by a special statute through the Forum established under it for a particular purpose/situation, civil Courts remedy to administer justice cannot be said to be ousted to deal with even such cases.

28. So far as the part in the arbitration, clause in the said agreement regarding the non-applicability of the Act of 1996 is concerned, we consider that it is void and the parties cannot by themselves exclude the statute itself which is being drafted by the Legislature to look after the arbitration matters. (underlining is mine)

15. The issue therefore boils down to whether rights which are created by Section 73 and 55 of the Contract Act can or cannot be contractually waived. If there is a public policy or public interest element in these Sections, then the rights under these sections cannot be waived. Let us examine the matter. If we look at that portion of the Contract Act, 1872 till Section 73 it broadly comprises of three parts. The first part is the formation and the requirements for the formation of a legal agreement/contract. The second part deals with the performance thereof. The third part deals with the effect of breach of the contract.

Provisions pertaining to the effect of breach of contract, two of which provisions are Sections 73 and 55, in my opinion, are the very heart, foundation and the basis for existence of the Contract Act. This is because a contract which can be broken at will, will destroy the very edifice of the Contract Act. After all, why enter into a contract in the first place when such contracts can be broken by breaches of the other party without any consequential effect upon the guilty party? It therefore is a matter of public policy that the sanctity of the contracts and the bindingness thereof should be given precedence over the entitlement to breach the same by virtue of contractual clauses with no remedy to the aggrieved party. Contracts are entered into because they are sacrosanct. If Sections 73 and 55 are not allowed to prevail, then, in my opinion, parties would in fact not even enter into contracts because commercial contracts are entered into for the purpose of profits and benefits and which elements will be non-existent if deliberate breaches without any consequences on the guilty party are permitted. If there has to be no benefit and commercial gain out of a contract, because, the same can be broken at will without any consequences on the guilty party, the entire sub-stratum of contractual relations will stand imploded and exploded. It is inconceivable that in contracts performance is at the will of a person without any

threat or fear of any consequences of a breach of contract. Putting it differently, the entire commercial world will be in complete turmoil if the effect of Sections 55 and 73 of the Contract Act are taken away.

In view of the observations of the Supreme Court in the case of India Financial (supra) and the Division Bench of this court in Ircon International (supra) and again of the Supreme Court in the case of M.G. Brothers, the expressions "public policy" and "if permitted will defeat the provisions of law" in Section 23 have to be interpreted to further the object of the Contract Act and not defeat the same. That being so, it is clearly a matter public policy and public interest that the sanctity of the contracts are preserved. To permit a contractual clause having the object to defeat the very contract itself, is a matter of grave public interest. If such a Clause is allowed to stand, then, the same will defeat the very basis of existence of the Contract Act. Having thus expounded at some length I thus need not say any further on the intendment of the Contract Act and the public interest/public policy behind Sections 55 and 73 thereof.

16. Provisions of the contract which will set at naught the legislative intendment of the Contract Act, I would hold the same to be void being against public interest and public policy. Such clauses are also void because it would defeat the provisions of law which is surely not in public interest to ensure smooth operation of commercial relations. I therefore hold that the contractual clauses such as Clauses 11A to 11C, on their interpretation to disentitle the aggrieved party to the benefits of Sections 55 and 73, would be void being violative of Section 23 of the Contract Act. The interpretation given by the Supreme Court in the Ram Nath International case is a literal and strict interpretation of clauses whereby the expression "reason beyond the control of the contractor" has been so strictly and literally interpreted to include even those cases which are on

account of the defaults of the employer itself and but for the said judgment I would have preferred to interpret the clauses in the manner which the Arbitrator has done and not strike them down by applying Section 23 of the Contract Act. I have also reproduced above the reasoning given in the Award which in my opinion, would otherwise have been enough to dispose of this case, however, the said findings in the award being totally against a direct opposite interpretation given to such clauses by the Supreme Court, would therefore have to give way.

17. I may finally note that the Supreme Court in its recent judgment reported as G. Ramachandra Reddy v. UOI, (2009) 6 SCC 414 has, though without referring to Section 23 of the Contract Act, held that a clause in a contract cannot prevent the award of damages although the same are otherwise payable in law.

18. The issue which now remains to be addressed however is does Ram Nath International's judgment hold the field or the judgment in Asian Techs Ltd applies? This indeed is a vexed question and ordinarily, as already stated, I would not have ventured to enter into this area of controversy but, since, the learned senior counsel for the petitioner has very strongly pressed for decision on this aspect also, I am accordingly adverting to this aspect. Before doing so, I may note that both the judgments of Asian Techs Ltd. and Ram Nath International are of benches of two Judges. Further, the decision in Asian Techs case does not refer to the judgment of Ram Nath International case although identical clauses have also been dealt with in the Asian Techs case. In terms of the various Full Bench judgments of different High Courts and the Division Bench judgment of this Court, I have the onerous obligation, as the learned senior counsel for the petitioner put, to decide that which of the two judgments should operate. One way in my opinion, would be that the effect of the two cases and the ratio

of the two cases can be said to be distinguishable because the judgment in the Ram Nath International case, does not deal with the position that Arbitrators right to award such damages is unfettered and a contractual clauses which debars payment of damages only prevents the department from doing so. That however, would be an over simplification, because, both the judgments squarely deal with the issue of an arbitration Award entitling or disentitling a contractor for damages.

19. In my opinion, if I look at the issue from both the micro and macro positions, keeping in focus the intendment of legislation called the Contract Act, then, the judgment in the case of Asian Techs Ltd. can be said to laying down a law which would further the object and purpose of the Contract Act. I must hasten to add that I am still doubtful whether I am entitled to decide the aspect that out of two decisions of Supreme Court, which one is to prevail, therefore, my observations are strictly in terms of the limited parameters of the facts of the present case required to decide the aspect of the entitlement or the disentitlement to damages in view of the provisions of Section 55 and 73 of the Contract Act. I would with all due respect to the learned senior counsel for the petitioner, would not venture further and would leave it finally for a larger Bench of this court or the Supreme Court itself to consider whether at all there is any conflict between the judgments of Ram Nath International and Asian Techs Ltd and if there is a conflict, the ratio of which of the two judgments ought to prevail. I am therefore, deciding this case, to make things very clear, only on the basis of the decision that contractual clauses which prohibit the entitlement to rightful damages of a person is clearly hit and are void by virtue of Section 23 of the Contract Act.

49. This court has extensively dealt with the aforesaid principal of law in the judgment of ***Ircon International Ltd. v. GPT-Rahee JV*, 2022 SCC OnLine Del 839** as follows:

> *"32. The contention that the Arbitral Tribunal has failed to appreciate that only a small fraction of the total admitted amount was payable by Ircon at the material time, is unpersuasive.*
> *33. It is clear that Arbitral Tribunal had examined various facets of the disputes and has taken an informed decision. The scope of interference on the ground of patent illegality under Section 34(2A) of the A&C Act does not extend to re-appreciating the material before the Arbitral Tribunal and re-adjudicating the disputes.*
> *34. The contention that the impugned award is vitiated by patent illegality as it is based on no evidence is also unmerited. It is necessary to bear in mind that the Indian Evidence Act, 1872 and the strict rules of evidence are inapplicable to arbitral proceedings. The Arbitral Tribunal is required to render a decision after evaluating the material placed before it.*
> *XXX*
> *39. The Arbitral Tribunal accepted that there was certain delay on the part of the respondent as well. However, the Arbitral Tribunal concluded that the delays on the part of Ircon were in respect of "critical aspects" and the said delays were dominant in prolongation of the works. The conclusion of the Arbitral Tribunal in this regard is set out below:*
> *"10.160. The Respondent has committed fundamental breaches in not providing site for construction of workshop etc. in time. Further there has been abnormal delay I providing good GFC for construction drawings. Delay was also caused because of change in drawings from time to time. Like-wise, absence of incorporation of strengthening provisions in the drawings too caused the delay. The timeless, as specified in the contract, were not adhered to. There were some other delays caused by*

the Respondent. It is also recorded that there were initial delays on the part of the Claimant as well as insofar as preparatory work is concerned as the signing of the contract itself was delayed due to non-submission of Performance Security, Bank Guarantee for mobilization advance, etc. An overall picture which emerges is that for significant part of the contract, there is contributory/concurrent delay on the part of Claimant as well which happened parallel during the project. However, certain delays occurred solely because of the non-fulfilment of obligations by the Respondent."

40. The Arbitral Tribunal is of the view that given that the parties had contributed to certain delays, it was essential to apply the principle of apportionment. After evaluating the reasons for the delay, the Arbitral Tribunal concluded that half of the delay could be apportioned to both Ircon and the respondent. However, for the remaining half, Ircon was solely responsible for the same. Therefore, only half of the claim made by the respondent on account of idling costs was allowed by the Arbitral Tribunal. The relevant paragraph of the impugned award embodying the said conclusion is set out below:

"10.171 Keeping in view all the aforesaid considerations, I am of the view that the Claimant would be entitled to the losses suffered by it because of certain fundamental delays on the part of the Respondent, but at the same time, the claim preferred by the Claimant to be reduced by applying the principle of apportionment because of the reason that to some extent, delays are caused due to the factors attributable to the Claimant itself. After considering the overall circumstances, the period of delay solely attributable to the Respondent is reduced to half, as for the other period, the Claimant is also liable and therefore, cannot take advantage. The Claims for compensation on the ground of delay are adjudicated on this yardstick."

50. This court will now refer to the judgments wherein the same clauses of the GCC of the respondent has been considered by the tribunal and given

finding that apart from Extension of time the contractor can also claim damages due to the delay on the part of the employer.

51. The Coordinate Bench of this court in the judgment of **Ircon International Ltd. v. DMRC, 2023 SCC OnLine Del 6368** held as follows:

> "*15. Contractor's entire challenge to the impugned Award is premised on the ground of 'patent illegality' which has been explained in plethora of decisions lastly being Delhi Airport Metro Express (P) Ltd. v. DMRC*[1]*, wherein it was stated that:—*
> *"29. Patent illegality should be illegality which goes to the root of the matter. In other words, every error of law committed by the Arbitral Tribunal would not fall within the expression "patent illegality". Likewise, erroneous application of law cannot be categorised as patent illegality. In addition, contravention of law not linked to public policy or public interest is beyond the scope of the expression "patent illegality". What is prohibited is for courts to reappreciate evidence to conclude that the award suffers from patent illegality appearing on the face of the award, as Courts do not sit in appeal against the arbitral award. The permissible grounds for interference with a domestic award under Section 34(2-A) on the ground of patent illegality is when the arbitrator takes a view which is not even a possible one, or interprets a clause in the contract in such a manner which no fair-minded or reasonable person would, or if the arbitrator commits an error of jurisdiction by wandering outside the contract and dealing with matters not allotted to them. An arbitral award stating no reasons for its findings would make itself susceptible to challenge on this account. The conclusions of the arbitrator which are based on no evidence or have been arrived at by ignoring vital evidence are perverse and can be set aside on the ground of patent illegality. Also, consideration of documents*

which are not supplied to the other party is a facet of perversity falling within the expression "patent illegality"."

16. Through Claim No. 2, Contractor had claimed extra cost incurred due to prolongation of the project. As noted above, the Contract was delayed by 18 months for which, Contractor had sought four EOTs by way of four letters namely 17.02.2017, 12.10.2017, 26.12.2017 and 23.08.2018, which were granted by the DMRC.

17. Pertinently, DMRC granted EOT on all the four occasions without imposing any liquidated damages. Indisputably, the Contractor reserved its right to seek compensation only at the time of seeking third EOT vide its letter dated 26.12.2017, and in the earlier requests it did not claim any monetary compensation due to the extensions.

18. AT declined to compensate the Contractor for the remaining 12-month period holding that the Contractor had accepted EOT granted by DMRC without compensation and no right to claim the same was reserved by the Contractor, unlike the third EOT sought for the period 01.01.2018 to 30.06.2018. According to the Contractor, the AT committed a judicial error amounting to patent illegality in denying compensation on the ground that the Contractor had forgone its right to claim compensation for the extension sought on the other three occasions.

19. Contractor has referred to judgments in K.N. Sathyapalan v. State of Kerala[2], Asian Techs Ltd. v. Union of India[3], Bharat Drilling v. State of Jharkhand[4] and Simplex Concrete Piles (India) Pvt. Ltd. v. Union of India[5] to contend that even though Clause 4.4 of the Contract and Clauses 2.2 and 8.3 of GCC prohibit the payment of monetary compensation in the cases of EOT however, the Contractor could still claim compensation under Section 73 of the Contract Act, in the event of breach of contract-which the DMRC did by not handing over the sites to the Contractor by the promised time.

20. According to this Court, the Contractor is not required to go as far as to invoke Section 73 of the Contract Act and the aforesaid judgments to assail the award, since the AT has rather recognised the Contractor's right to claim compensation regardless of prohibitive nature of Clause 4.4 of the Contract and Clauses 2.2 and 8.3 of GCC by referring to the judgment in Simplex Concrete Piles (Supra). AT's reluctance to award compensation stems from the Contractor's own waiver of the right to claim compensation, that happened in the first, second and fourth EOT sought by the Contractor, as opined by the AT. AT read the four extension letters sent by the Contractor and interpreted them to conclude that it was only the third one dated 26.12.2017, where the right to claim compensation was reserved. Therefore, according to the AT, out of 18 months of extension, only 6 months were eligible for compensation. The AT does return a finding of fact and interpretation of the contract clauses, in favour of the Contractor, to conclude that DMRC was responsible for delaying the progressive handing over of the sites to the Contractor.

21. The interpretation of the extension letters by AT, is very well within its judicial prerogative. It will be judicially inappropriate for this court sitting in this jurisdiction, to re-examine the evidence and re-interpret the same as per its own understanding. The interpretation adopted by the AT of the evidence is a plausible view and certainly not the kind that will call for any interference from this court."

52. Furthermore in the judgment of ***Delhi Metro Rail Corporation Ltd. v. J. Kumar-Crtg JV*** **2022 SCC OnLine Del 1210 held as foloows:**

"30. The next question to be examined is whether the Arbitral Tribunal's decision to award sum of Rs. 7,68,46,375/- as compensation on account of idling/under-utilization of resources deployed at Ashram station during the initial period of twenty-nine months due to delay in finalizing the revised

layout of the station and the delay in handing over of the land, is patently illegal.

31. The Arbitral Tribunal evaluated the evidence led by the parties and found that there was an inordinate delay on the part of DMRC in handing over the land at Ashram Station. The said land was required to be handed over by August, 2012. The works were to commence on 16.07.2012 and the stipulated period for completion of the Contract was agreed at three years six months. Admittedly, there was a delay of more than twenty-eight months in handing over the site. Further, the length of the station was also reduced. The delay was largely for various reasons including certain litigation in respect of "Marble House" area. Admittedly, the Architectural Designs Drawings had to be revised to restrict the length of the station within the available area and to add another floor for creating additional space. DMRC opposed the claim by referring to the contractual provisions. It relied on Clause 2.2 of GCC and Clause 8.3 of GCC, which are set out below:

"2.2. The Employer shall grant the Contractor right of access to, and/or possession of, the Site progressively for the completion of Works. Such right and possession may not be exclusive to the Contractor. The Contractor will draw/modify the schedule for completion of Works according to progressive possession/light of such sites.

If the Contractor suffers delay from failure on the part of the Employer to grant right of access to, or possession of the Site, the Contractor shall give notice to the Engineer in a period of 28 days of such occurrence. After receipt of such notice the Engineer shall proceed to determine any extension of time to which the Contractor is entitled and shall notify the Contractor accordingly.

For any such delay in handing over of site, Contractors will be entitled to only reasonable extension of time and no monetary claims whatsoever shall be paid.

*** *** *** ***

8.3. In case of delay on the part of the Contractor, the Contractor shall be liable to pay liquidated damages and any other compensation for the damages suffered by the Employer as per clause 8.5. This is without prejudice to the right of the Employer to rescind the Contract.

Failure or delay by the Employer or the Engineer, to hand over to the Contractor the Site necessary for execution of Works or any part of the Works, or to give necessary notice to commence the Works For to provide necessary Drawings or instructions or classifications or to supply any material, plant or machinery, which under the Contract the responsibility of the Employer, shall in no way affect or vitiate the Contract or alter the character thereof; or entitle the Contractor to damages or compensation thereof but in any such casa, the Engineer shall extent the time period for the completion of the Contract, as in his opinion is/are reasonable."

32. The Arbitral Tribunal examined the said clauses and found that the same were violative of Section 23 of the Contract Act. The Arbitral Tribunal had also relied upon the following passage from the decision dated 23.02.2010 of this Court in Simplex Concrete Piles v. Union of India, (2010) 115 DRJ 616:

"Provisions of the contract which will set at naught the legislative intendment of the Contract Act, I would hold the same to be void being against public• interest and public policy. Such clauses are also void because it would defeat the provisions of law which is surely not in public interest to ensure Smooth operation of commercial relations. I therefore hold that the contractual clauses such as Clauses 11A to 11C, on their interpretation to disentitle the aggrieved party to the benefits of Sections 55 and 73, would be void being violative of Section 23 of the Contract Act."

33. The Arbitral Tribunal found that DMRC was in breach of its obligation. It had the option to order suspension of work as per the Contract clause at Ashram Station, however, it had

failed to do so. In the circumstances, DMRC was required to compensate CRTG for its breaches. In the circumstances, the Arbitral Tribunal held that Clauses 2.2 and 8.3 of GCC would not absolve DMRC of its liability to pay compensation.

34. The Arbitral Tribunal has jurisdiction to decide the question of fact as well as of law. Clearly, the decision of the Arbitral Tribunal that by virtue of Section 23 of the Contract Act, Clauses 2.2 and 8.3 of GCC which proscribe CRTG from claiming compensation due under Sections 55 and 73 of the Contract Act are unenforceable, is a plausible view [See : Simplex Concrete Piles v. Union of India (Supra)].

*35. In view of the above, DMRC's petition is unmerited and is liable to be dismissed.***"**

53. In view of the aforesaid judgement, it is settled law that the learned Arbitral Tribunal can award damages when the clause of the contract contemplates that only extension of time can be given as remedy when there is a delay on the part of the employer. Hence, the act of awarding the damages to the aggrieved party does not amount to transgression from the terms of the contract.

54. Furthermore, as per Section 23 of the Indian Contract Act when there is a Contract which contains clauses that are against the public policy then such consideration or object of an agreement is considered unlawful and void.

55. In the instant facts, the impugned award merits interference since the award has shocked the conscience of the court due to the fact that despite holding that there is a delay on the part of the respondent and there has been wrongful termination of the contract by the respondent. The learned Tribunal

has not awarded any damages to the petitioner. Learned Arbitral Tribunal has wrongly not awarded any damages to the petitioner.

56. The learned Tribunal failed to appreciate the fact that such a clause which restricts the right of the party to claim damages is a prohibitionary clause and is wrongly disentitles the aggrieved party to claim damages. Such clause is against the public policy since it is contrary to the fundamental policy of Indian law.

57. The learned Tribunal has failed to appreciate the issue at hand that the contract has already been terminated and the petitioner could not take recourse to Extension of time. Hence, the situation is unprecedented for and no clause in the contract which deals with the situation wherein the contract is terminated at the end of the respondent due to the default on its part. Therefore, in such a situation, the arbitrator has to travel beyond the terms of the contract since there is no provision dealing with the same in the contract.

58. It has wrongly relied upon the Clause 2.2 and Clause 8.3 of GCC to hold that despite the delay on the part of the respondent, the petitioner is entitled to extension of time. Since, the petitioner's contract is terminated and there is no extension of time which the petitioner could have availed of.

59. In such a situation, this court is of the opinion that the party aggrieved must be compensated in terms of unliquidated damages. Unliquidated damages are awarded to restore the aggrieved party to the same position as deems reasonable, which it would have been in if there was no breach of contract. It has been held by the various courts in a catena of judgements,

that when there is a breach of contract, the party which has been the contract is liable to pay damages to the party aggrieved.

60. This Court is of the opinion that, the learned Tribunal has erred in not awarding the damages to the petitioner despite holding that the delay is attributable to the respondent. Hence, rendering the petitioner remediless.

61. The learned Tribunal should have taken looked into the situation at hand, there is no extension of time which could have been granted to the petitioner since the contract had terminated. Moreover, the petitioner never committed any such delay in execution of the contract as held by the Tribunal itself.

62. In the instant petition, the petitioner has placed on record various damages suffered by him due to the delay caused by the respondent in execution of the contract. Such as the delay in handing over of hindrance free site, delay in delay in issuing goods for construction drawings, delay in providing decisions and instructions, act or omissions of other contractor on whose performance, the performance of the petitioner was dependent, etc.

63. In light of the aforesaid findings, this Court is of the view that rejection of Claim No. 3 in the Impugned Award by relying upon Clause 8.3 is erroneous as the said clause pertains to power of engineer and the nature of claim that can be made before the engineer. Thus, the same cannot be interpreted to exclude Arbitrator from its ambit from granting an award of damages or compensating the petitioner for breach of contract as contemplated by Section 73 of Indian Contract Act.

64. The Hon'ble Supreme Court in ***Asian (Supra)*** and this Court in ***Simplex Concrete (Supra)*** has cogently enumerated that keeping the sanctity of contracts and its bindingness is a matter of public policy and the same must be given precedence over the entitlement to breach of the said contract vide clauses rendering no remedy of damages to the aggrieved party.

65. Thus, the rejection of Claim No. 3 in Impugned Award is liable to be set aside and the petitioner is entitled for damages due to inaction and delays by the respondent.

Claim no. 4- Loss of profit

66. With respect to Claim No. 4, which underscores the loss of profit to the tune of 20% of total contract value of Rs. 41,57,15,242/- less than work done of Rs. 7,47,06,820/-, the Arbitral Tribunal's analysis is reproduced hereinunder-

> *"9.3.3 i) Issues related to the delay in start and execution have been analysed and discussed in detail in the case of Claim 1.*
> *ii) Clause 8.3 of the GCC is very specific which says that in case of failure or delay by the Employer in handing over the site or to provide necessary drawings, which under the Contract is the responsibility of the Employer, in no way entitle the Contractor to damages or compensation thereof. The relevant extract of Clause 8.3 is already reproduced in para 8.3.3 supra.*
> *iii) As brought out in para 6.3.4.2 supra the Tribunal is guided by the Subsection (3) of Section 28 of the Arbitration and Conciliation Act, 1996 as*

amended by Arbitration and Conciliation (Amendment) Act, 2015, which
provides as under:
"(3) While deciding and making an award, the arbitral tribunal shall, In all cases, take into account the terms of the contact and trade usages applicable to the transactions".
iv) In view of position brought out above, and provision of GCC Clause 8.3, the claim for loss of profit preferred by the Claimant is not tenable.
9.3.4 Decision of the Tribunal: As discussed in para 9.3.3, the Claim 4 for loss of profit on unexecuted portion of the work is rejected by the Tribunal."

67. The learned Tribunal has relied upon the Clause 8.3 of GCC and accordingly held that any delay on account of the respondent shall entitle the Contractor to a remedy of extension of time which the Engineer deems reasonable. Moreover, the Contract does not provide any compensation to the petitioner by way of damages.

68. Therefore, the learned Tribunal acting in accordance with the terms and conditions of the Contract cannot award damages despite there being a delay on part of the petitioner.

69. The Hon'ble Supreme Court in the judgment of ***Unibros v. All India Radio*** **2023 SCC OnLine SC 1366,** enunciated the scope of claiming loss of profit in an arbitral proceedings. The relevant portion of the said judgment is reproduced herein below:

"*8. The appeal is directed towards dismissal of the appellant's claim for compensation relating to loss of profits (Claim No. 12). It is undeniably established that the appellant's claim for loss of profit stems from the delay attributed to the respondent in completing the*

project. It is further evident that the loss of profit sought in the present case is primarily based on the grounds that the appellant, having been retained longer than the period stipulated in the contract and its resources being blocked for execution of the work relatable to the contract in question, it could have taken up any other work order and earned profit elsewhere.

9. *The contentions advanced on behalf of the appellant tasks us to resolve a recurring issue which, while not unprecedented, has consistently confronted the courts leading it to navigate various circumstances under which a claim for loss of profit may be allowed in cases of delay simpliciter in the execution of a contract.*

10. *However, the contentions so raised, need not detain us for too long. Quite apart from the appeal raising the question as to whether a claim on account of loss of profit is liable to succeed merely on the ground that there has been delay in the execution of the construction contract, attributable to the employer, the question that first needs to be answered on facts and in the circumstances is whether the Second Award is in conflict with the public policy of India (as held by the learned Single Judge, since affirmed by the Division Bench).*

11. *What would constitute "public policy of India" has been lucidly explained by this Court in ONGC Ltd. v. Saw Pipes Ltd.*[6]*:*

"31…, the phrase 'public policy of India' used in Section 34 in context is required to be given a wider meaning. It can be stated that the concept of public policy connotes some matter which concerns public good and the public interest. What is for public good or in public interest or what would be injurious or harmful to the public good or public interest has varied from time to time. However, the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice."

12. *Subsequent decisions of this Court have interpreted "public policy of India" to include, among others, compliance with fundamental policy of Indian law, statutes and judicial precedents, need for judicial approach, compliance with natural justice, Wednesbury unreasonableness and patent illegality. We may refer to the decision in Associated Builders (supra) in this behalf.*

15. *Considering the aforesaid reasons, even though little else remains to be decided, we would like to briefly address the appellant's claim of loss of profit. In Bharat Cooking Coal (supra), this Court reaffirmed the principle that a claim for such loss of profit will only be considered when supported by adequate evidence. It was observed:*

"24. ... It is not unusual for the contractors to claim loss of profit arising out of diminution in turnover on account of delay in the matter of completion of the work. What he should establish in such a situation is that had he received the amount due under the contract, he could have utilised the same for some other business in which he could have earned profit. Unless such a plea is raised and established, claim for loss of profits could not have been granted. In this case, no such material is available on record. In the absence of any evidence, the arbitrator could not have awarded the same."

(emphasis ours)

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

17. *One might ask, what would be the nature and quality of such evidence? In our opinion, it will be contingent upon the facts and circumstances of each case. However, it may generally include*

independent contemporaneous evidence such as other potential projects that the contractor had in the pipeline that could have been undertaken if not for the delays, the total number of tendering opportunities that the contractor received and declined owing to the prolongation of the contract, financial statements, or any clauses in the contract related to delays, extensions of time, and compensation for loss of profit. While this list is not exhaustive and may include any other piece of evidence that the court may find relevant, what is cut and dried is that in adjudging a claim towards loss of profits, the court may not make a guess in the dark; the credibility of the evidence, therefore, is the evidence of the credibility of such claim.

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

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

70. The Hon'ble Supreme Court in the aforesaid judgment has enunciated on the aspect that in cases where there is a loss of profit alleged by the party

claiming such loss and has produced material on record for the same. Moreover, the party claiming such loss of profit shall establish that a situation is that had he received the amount due under the contract, he could have utilised the same for some other business in which he could have earned profit from it.

71. In the instant petition, the petitioner has placed on record certain proofs to substantiate its claim for loss of profit and the Tribunal has the jurisdiction to transgress the boundary of the GCC and award loss of profit to the petitioner.

72. The Tribunal's cannot in accordance with the clauses of the Contract restrict the party from getting the loss of profit which it otherwise is duly entitled for. Since, there has been a delay on the part of the respondent and the petitioner has suffered loss of profit due to the same.

73. In view of the discussion as well as the reasoning of this Court in allowing the Claim no. 3 of the petitioner, this Court is of the view that reliance placed by the Tribunal upon Clause 8.3 is misconceived as it only pertains to the case of delay and not the eventuality of wrongful termination which is the basis of the aforesaid Claim. Moreover, such Claim was made for loss of profits in view of illegal termination of contract and hence, the same cannot be rejected by relying on Clause 8.3.

74. Thus, rejection of Claim 4 by Impugned Award is liable to be set aside and the petitioner is entitled to the loss of profit.

75. Accordingly, the claim no. 4 has been set aside by this Court.

Claim 6- <u>Financial loss to the claimant due to loss of commercial reputation</u>

76. In respect of Claim no. 6, which pertains to financial loss to the petitioner due to loss of commercial reputation to the tune of Rs. 3,48,75,000/-, the Tribunal's analysis is reproduced hereinbelow-

> "*The Claimant have based their claim on impairment of financial standing with financial institutions. This is quantified by a statement that cash margins in issue of bank guarantees has been increased from 0.5% per annum to 1.25% per annum resulting in annual financial loss of Rs 3,48,75,000/-. This would translate to a requirement of Bank Guarantee to the tune of 465 Cr in a year. No supporting evidence for the same has been furnished. The Tribunal considers that whether it is a case of liquidated financial loss or unliquidated, financial loss has to be proved in accordance with the established principle of law and evidence. Merely alleging the loss is not sufficient to claim damages. 11.3.2 The Claimant have alleged that due to wrongful termination of the Contract, the Claimant entered into a vicious circle of liquidity crisis ultimately leading to Corporate Insolvency Resolution Process under IBC 2016. Considering the position indicated in the 'Resolution Plan' furnished by the Claimant in CD VII, Contract CC-16 does not seem to be the cause of the insolvency resolution process 2016. Accordingly, basing CC-16 as the sole reason for financial loss leading to CIRP is not tenable.*
>
> *11.3.3 There is no clause in the Contract which entitles the Claimant to claim any amount on account of loss of commercial reputation.*
>
> *11.3.4 The Arbitral Tribunal finds that the claim is unsubstantiated by the Claimant and not due under any Clauses of the Contract.*

11.4 Decision of the Tribunal: Finding that the claim of Rs 3,48,75,000.00 on account of loss of commercial reputation is unsubstantiated and not covered by any Contract provision, as discussed above, the Tribunal rejects the same."

77. The Tribunal has held that the petitioner has merely alleged that there is a loss of commercial reputation however, there is no proof produced in this regard by the petitioner. Moreover, the Tribunal is of the view that the petitioner's contention due to the alleged wrongful termination of the Contract and the petitioner had to undergo through a liquidity crisis which led to the Corporate Insolvency Resolution Process under Insolvency Bankruptcy Code, 2016 is not the sole reason for financial losses incurred by the petitioner. Hence, due to no evidence/ material on record, the learned Tribunal held that the claim for financial reputation is not substantiated by the petitioner.

78. In light of the aforesaid findings, this Court is of the view that it is a matter of record that the petitioner was subjected to proceedings under the Insolvency and Bankruptcy Code, 2016. However, the inference of alleged liquidity crunch resulting from actions of respondent and leading the petitioner into Corporate Insolvency Resolution Process is erroneous since, there is no evidence placed on record in this regard. Moreover, there is no clause in the Contract pertaining to damages which can be claimed on account of loss of financial reputation.

79. This Court is of the view that the petitioner, in accordance with the Indian Contract Act have to prove that there is an actual loss to its financial reputation which the it has failed to produce on record. Further, the Claim

herein is narrowly restricted to the extent of the loss which is a direct consequence of breach of contract.

80. Thus, the rejection of Claim no. 6 by the Impugned Award by the Tribunal merits no interference and the petitioner is not entitled to compensation insofar as loss of commercial reputation to the tune of Rs. 3,48,75,000/- is concerned.

Claim no. 7- Cost of the Arbitration

81. In respect of Claim no. 7, which underscores cost of Arbitration Proceedings, the Tribunal's analysis is reproduced hereinbelow-

> *"12.3.1 The Claimant have argued that they have to incur cost of the arbitration as the Respondent have denied their due and genuine payments. It is further stated that the Tribunal has powers to award cost in terms of Section 31 of the Arbitration and Conciliation Act.*
> *12.3.2 The Respondent have argued that the Claimant have dragged the Respondent into arbitration and as such the Claimant is not entitled for their claim. It is added by the Respondent that it is the Respondent who are entitled for Rs 50,00,000/- toward cost of arbitration and not the Claimant. [This is not withstanding the fact that under counterclaim 4, the Respondent have claim of only Rs 25,00,000/- towards cost of arbitration].*
> *12.3.3 Section 31 of the Arbitration and Conciliation Act does not bind the Tribunal to award cost in all cases. Section 31(8) of 1996 Act starts with "Unless otherwise agreed by the parties,-(a) the cost of the arbitration shall be fixed by the arbitral Tribunal; b) the amount of such costs; and when such costs are to be paid."*
> *12.3.4 Clause 17.11 of the GOG stipulates as under-*

"17.11: Cost of Arbitration - The cost of arbitration shall be borne by the respective parties. The cost shall, Inter alia, include the fees of the Arbitrator(s) as per rates fixed by the Employer from time to time".
12.3.5 Both the parties to the Contract have agreed to the above stipulation while entering into the Agreement.
12.3.6 Decision of the Tribunal: In view of above discussions and specific provision of Clause 17.11 of the GOG in the Contract the Tribunal rejects the demand of the Claimant for the cost of present Arbitration. The claim of the Respondent towards cost of the arbitration has been decided by the Tribunal in para 17.3.2 infra. Whereas the Section 31-A of the Amendment Act 2015 Act reads "...shall have the discretion to determine whether costs are payable by one party to another'

82. The learned Tribunal has relied upon Clause 17.11 of GCC which states that cost of arbitration shall be borne by the parties and accordingly, the Tribunal held that both the parties were to bear their respective cost of arbitration.

83. After looking into the reasons given above by the learned Arbitrator, it is crystal clear that the learned Arbitrator has considered the submissions made by the parties as well as the documents which were referred by them, and after considering them, has reached to the right conclusion that as per the terms of the GCC the cost of arbitration shall be borne by the parties. Accordingly, the Tribunal directed that both the parties shall bear their respective cost of arbitration.

84. Thus, the rejection of Claim no. 7 of the petitioner in the Impugned Award by the Tribunal merits no interference.

Claim no. 8- Payment of Interest

85. In respect of Claim no. 8, which underscores payment of interest, the Tribunal's analysis is reproduced hereinbelow-

> "*13.3.1 The Claimant have Claimed pre-suit, pendent-lite and future interest @ 18% per annum on all the claims preferred under this arbitration on following grounds;*
> *i) Their dues have not been paid on time and as such they have to be compensated for the deprivation of the same;*
> *ii) The Tribunal have powers to grant pre-suit, pendent-lite and future interest as per Section 31(7) (a) & (b) of the Arbitration and Conciliation Act;*
> *iii) The case laws mentioned in para 13.1.5 support such a claim of the Claimant.*
> *13.3.2 The Respondent have argued that the Claimant is neither entitled for any loss under the contract nor the interest thereon, whether anti-lite, pendente-lite and post-lite interest, as alleged by the Claimant.*
> *13.3.3 The Tribunal observes that there has been difference of opinion between the Parties regarding certain payments. These have manifested in the shape of claims and counterclaims which are under adjudication by this Tribunal. In all such disputes, the Claimant/Counterclaimant always allege that they have been deprived of their rightful dues and as such need to be compensated for the same. The present arbitration case is in no way different, to seek and merit any specific and special relief.*
> *13.3.4 The Claimant have sought relief quoting Section 31(7) (a) & (b) of the Arbitration and Reconciliation Act 1996, which reads;*
> *"7(a) Unless otherwise agreed by the parties, where and insofar as an arbitral award is for payment of money,*
> *7(b) A sum directed to be paid by an arbitral award shall, unless the award*

otherwise directs, carry interest at the rate of eighteen per centum per annum from the date of award to the date of payment."

13.3.5 Clause 17.10 of the GCC in this regard, stipulates as under:

"Where the Arbitral Award is for the payment of money, no interest shall be payable on whole or any part of the money for any period, till the date on which the award is made".

Both the parties have agreed to the GCC clause 17.10 while entering into this Agreement. As such the Tribunal holds that with both the parties agreeing that there shall be no payment of interest till date of award, question of payment of interest as per provisions of Section 31 (7)(a) of the Act 1996 does not arise.

13.3.6 The Claimant have cited case laws as in para 13.1.5 in support of their claim. The Tribunal finds that these are not applicable to the facts, circumstances and contract provisions of the present case. It is well established, through these judgements also, that where the Contract Agreement does not prohibit grant of interest and where a party claims interest and that dispute (along with principal amount or independently) is referred to the arbitrator, he shall have powers to award interest pendente lite. In the present case Clause 17.10 of the Contract between the Parties is very specific when it stipulates that no interest shall be payable on whole or any part of the money for any period, till the date on which the award is made".

13.3.7 Decision of the Tribunal: Considering the above analysis and findings, the Tribunal awards NIL interest anti lite as well as pendente lite. As regards interest from the date of award, provisions of para 18.2.1 infra shall be applicable."

86. The learned Tribunal has referred to Clause 17.10 of GCC which stipulates that there shall be no payment of interest till date of award.

Accordingly, the Tribunal did not award any anti- lite and pendente lite interest.

87. This Court is of the view that the Arbitral Tribunal being a creature of the Contract and has to act according to the clauses of the Contract.

88. Therefore, the rejection of Claim No. 8 by Impugned Award merits no interference and the petitioner is not entitled to payment of interest.

SETTING ASIDE OF THE AWARD UNDER SECTION 34

89. In view of the foregoing discussion, this Court is of the opinion that clause 3 and clause 4 of the Impugned Award are on the face of it, patently in violation of statutory provisions of Contract law therefore, they are not in public interest. Such an award is likely to adversely affect the administration of justice.

90. The said claims should be set aside since it is contrary to fundamental policy of Indian Law and patently illegal. Moreover, the illegality in these claims are such that they go to the root of the matter and is not of trivial nature.

91. Furthermore, the award of the learned tribunal in terms of these claims is so unfair and unreasonable that shocks the conscience of the Court since, the learned tribunal despite taking into consideration the delay caused in the project is attributable to the respondent, it did not give any remedy to the petitioner. The tribunal gave the reasoning that the petitioner cannot be given since, the Contract only provides for extension of time. However, the learned Tribunal failed to appreciate the fact that in the peculiar facts, the petitioner was not given the same and instead, the Contract was terminated

by the respondent. Such a situation which was not anticipated in the Contract, the learned Tribunal should have transgressed the boundary of Contract and granted the relief to the petitioner which it is rightly entitled to and have accordingly, have also placed material on record to support their claims.

92. In view of the aforesaid discussion, this Court will discuss the scope of setting aside the Award under Section 34 of the Act.

93. It is a settled principle of law that various claims of the award can be severed and the court by way of entertaining an application under section 34 can set aside certain claims of the award which in the opinion of the court is perverse and illegal. Such piecemealing of award would not affect the claims which have been upheld by the court.

94. Modification of the award is when, the court makes certain changes/modification in the claim example by way of modifying the amount of damages awarded, modifying the interest rate, etc., instead of setting aside claim. The purpose of ensuring that there is no modification of the award passed by the tribunal is that the modification requires that there should be appreciation of evidence and pleadings on record. Under section 34 of the Act, this court cannot re appreciate the pleadings and evidence on record to arrive at conclusion and accordingly make changes in the award passed by the tribunal. This Court under section 34 can therefore set aside certain claims on the grounds mentioned in section 34 of the Act.

95. Such claims which are set aside by the court does not amount to modification of the award. It merely infers that the court has partially set aside the award.

96. The aforesaid principle of law pertaining to setting aside of the Award under Section 34 of the Act has been discussed in the judgment of ***Dyna Technologies (P) Ltd. v. Crompton Greaves Ltd.*** **(2019) 20 SCC 1**, this Court held as follows: (SCC p. 15, paras 36-37)

> *"36. At this juncture it must be noted that the legislative intention of providing Section 34(4) in the Arbitration Act was to make the award enforceable, after giving an opportunity to the Tribunal to undo the curable defects. This provision cannot be brushed aside and the High Court [Crompton Greaves Ltd. v. Dyna Technologies (P) Ltd., 2007 SCC OnLine Mad 427] could not have proceeded further to determine the issue on merits.*
>
> *37. In case of absence of reasoning the utility has been provided under Section 34(4) of the Arbitration Act to cure such defects. When there is complete perversity in the reasoning then only it can be challenged under the provisions of Section 34 of the Arbitration Act. The power vested under Section 34(4) of the Arbitration Act to cure defects can be utilised in cases where the arbitral award does not provide any reasoning or if the award has some gap in the reasoning or otherwise and that can be cured so as to avoid a challenge based on the aforesaid curable defects under Section 34 of the Arbitration Act. However, in this case such remand to the Tribunal would not be beneficial as this case has taken more than 25 years for its adjudication. It is in this state of affairs that we lament that the purpose of arbitration as an effective and expeditious forum itself stands effaced."*

97. In the judgment titled ***Larsen Air Conditioning and Refrigration Company v. Union of India 2023 Scc OnLine SC 982***, the Hon'ble Supreme Court held as follows:

> *"15. The limited and extremely circumscribed jurisdiction of the court under Section 34 of the Act, permits the court to interfere with an award, sans the grounds of patent illegality, i.e., that "illegality must go to the root of the matter and cannot be of a trivial nature"; and that the tribunal "must decide in accordance with the terms of the contract, but if an arbitrator construes a term of the contract in a reasonable manner, it will not mean that the award can be set aside on this ground" [ref : Associate Builders (supra)]. The other ground would be denial of natural justice. In appeal, Section 37 of the Act grants narrower scope to the appellate court to review the findings in an award, if it has been upheld, or substantially upheld under Section 34. It is important to notice that the old Act contained a provision which enabled the court to modify an award. However, that power has been consciously omitted by Parliament, while enacting the Act of 1996. This means that the Parliamentary intent was to exclude power to modify an award, in any manner, to the court. This position has been iterated decisively by this court in M. Hakeem:*
>
> *"42. It can therefore be said that this question has now been settled finally by at least 3 decisions [McDermott International Inc. v. Burn Standard Co. Ltd., (2006) 11 SCC 181], [Kinnari Mullick v. Ghanshyam Das Damani, (2018) 11 SCC 328 : (2018) 5 SCC (Civ) 106], [Dakshin Haryana Bijli Vitran Nigam Ltd. v. Navigant Technologies (P) Ltd., (2021) 7 SCC 657] of this Court. Even otherwise, to state that the judicial trend appears to favour an interpretation that would read into Section 34 a power to modify, revise or vary the award would be to ignore the previous law contained in the 1940 Act; as also*

to ignore the fact that the 1996 Act was enacted based on the Uncitral Model Law on International Commercial Arbitration, 1985 which, as has been pointed out in Redfern and Hunter on International Arbitration, makes it clear that, given the limited judicial interference on extremely limited grounds not dealing with the merits of an award, the "limited remedy" under Section 34 is coterminous with the "limited right", namely, either to set aside an award or remand the matter under the circumstances mentioned in Section 34 of the Arbitration Act, 1996."

16. In view of the foregoing discussion, the impugned judgment warrants interference and is hereby set aside to the extent of modification of rate of interest for past, pendente lite and future interest. The 18% per annum rate of interest, as awarded by the arbitrator on 21.01.1999 (in Claim No. 9) is reinstated. The respondent-state is hereby directed to accordingly pay the dues within 8 weeks from the date of this judgment."

98. Moreover in the judgment of ***Union of India v. Alcon Builders & Engineer (P) Ltd*** **2023 SCC OnLine Del 160**, the following observations were made :

"On partial setting aside of an award
18. In the course of hearing the parties, a preliminary query was raised as to whether, in exercise of its jurisdiction under Section 34 of the A&C Act, this Court can partly set aside an arbitral award. Learned counsel for the parties answered the query in the affirmative, to say that in any case, the challenge was only to the arbitrator's decision on two aspects; and the parties have accepted and acted upon the rest of the award. That being said however, this Court finds it necessary to refer to the decision of the Supreme Court in NHAI v. M. Hakeem [NHAI v. M. Hakeem, (2021) 9 SCC 1], in which case it was held that the court's power under Section 34 of the A&C Act does

not include the power to "modify" an award. The question then arises whether partial setting aside of an award would amount to "modification" thereof. It would be beneficial at this point to extract para 42 of M. Hakeem case [NHAI v. M. Hakeem, (2021) 9 SCC 1] which reads as under : (SCC p. 28, para 42)

> *"42. It can therefore be said that this question has now been settled finally by at least 3 decisions McDermott International Inc. v. Burn Standard Co. Ltd. [McDermott International Inc. v. Burn Standard Co. Ltd., (2006) 11 SCC 181], Kinnari Mullick v. Ghanshyam Das Damani [Kinnari Mullick v. Ghanshyam Das Damani, (2018) 11 SCC 328 : (2018) 5 SCC (Civ) 106], Dakshin Haryana Bijli Vitran Nigam Ltd. v. Navigant Technologies (P) Ltd. [Dakshin Haryana Bijli Vitran Nigam Ltd. v. Navigant Technologies (P) Ltd., (2021) 7 SCC 657 : (2021) 4 SCC (Civ) 157] of this Court. Even otherwise, to state that the judicial trend appears to favour an interpretation that would read into Section 34 a power to modify, revise or vary the award would be to ignore the previous law contained in the 1940 Act; as also to ignore the fact that the 1996 Act was enacted based on the Uncitral Model Law on International Commercial Arbitration, 1985 which, as has been pointed out in Redfern and Hunter on International Arbitration, makes it clear that, given the limited judicial interference on extremely limited grounds not dealing with the merits of an award, the 'limited remedy' under Section 34 is coterminous with the 'limited right', namely, either to set aside an award or remand the matter under the circumstances mentioned in Section 34 of the Arbitration Act, 1996."*

19. Upon a closer reading of M. Hakeem case [NHAI v. M. Hakeem, (2021) 9 SCC 1] however, it transpires that the said case concerned a claim for payment of compensation for land acquisition and the District Court, in exercise of its powers under Section 34 of the A&C Act, had increased the quantum of compensation awarded by the competent authority. M. Hakeem case [NHAI v. M. Hakeem, (2021) 9

SCC 1] therefore, was not a case where some of several claims made before the Arbitral Tribunal were set aside.

20. In order to better appreciate and apply M. Hakeem case [NHAI v. M. Hakeem, (2021) 9 SCC 1], and to understand the correct meaning of what amounts to "modification" of an arbitral award, it is necessary to refer to the following decisions:

21. In J.G. Engineers (P) Ltd. v. Union of India [J.G. Engineers (P) Ltd. v. Union of India, (2011) 5 SCC 758 : (2011) 3 SCC (Civ) 128] which involved multiple claims dealt with and decided by the arbitrator, this is what the Supreme Court had to say : (SCC p. 775, para 25)

> *"25. It is now well settled that if an award deals with and decides several claims separately and distinctly, even if the court finds that the award in regard to some items is bad, the court will segregate the award on items which did not suffer from any infirmity and uphold the award to that extent…."*

22. Then again, in R.S. Jiwani v. Ircon International Ltd. [R.S. Jiwani v. Ircon International Ltd., 2009 SCC OnLine Bom 2021] a Full Bench of the Bombay High Court has dealt with the concept of severability of the decisions on various claims/counterclaims comprised in an award and has held as follows….

23. The judgment in R.S. Jiwani case [R.S. Jiwani v. Ircon International Ltd., 2009 SCC OnLine Bom 2021] has been relied upon recently in a judgment of the Bombay High Court in NHAI v. Commr. [NHAI v. Commr., 2022 SCC OnLine Bom 1688]

*****

28. Upon a combined and meaningful reading of the provisions of the A&C Act and the aforesaid judicial precedents, in the opinion of this Court, the following position emerges:

29. A court exercising power under Section 34 of the A&C Act cannot "modify" an arbitral award;

30. The arbitrator's decision on each claim and counterclaim, taken individually, is final. "Modification" means to substitute the court's own decision for the decision made by the arbitrator on any given claim or counterclaim; which the court cannot do.

31. If objections are filed under Section 34, impugning the arbitrator's decision only on some of the claims or counterclaims, it is not necessary for the court to set aside the entire arbitral award viz. the decision on all claims and counterclaims. This follows from the limited ambit of the court's powers under Section 34. Besides, the decision on a Section 34 petition cannot go beyond the scope of the challenge itself.

32. When the arbitrator's decisions on multiple claims and counterclaims are severable and not interdependent, the court is empowered under Section 34 to set aside or uphold the arbitrator's decisions on individual and severable claims or counterclaims; without having to set aside the entire arbitral award. That would not amount to modification of the arbitral award.

33. The above is also in line with the overarching principle that the scope of interference by the court under the A&C Act in arbitral proceedings and arbitral awards, is to be minimal. The statute does not command the court to go for the overkill. To adapt a phrase famously used by Justice Felix Frankfurter, while exercising power under Section 34, it is not necessary to burn the house to roast the pig."

99. The Coordinate Bench of this Court in the judgment of ***NHAI v. Trichy Thanjavur Expressway Ltd. 2023 SCC OnLine Del 5183*** has summarized the law pertaining to setting aside of the Award under Section 34 as follows:

100.

"87. The Court thus records its conclusions as follows:—

A. While attempting to answer the issues flagged above, we must at the outset, acknowledge the shift in legislative policy which underlies the Act and which mandates intervention by courts to be minimal. This flows from the recognition of the theory that once parties have agreed to the resolution of their disputes by an alternative adjudigcatory forum, courts must, as a matter of first principle, refrain from interfering with the same except on the limited grounds that the statute recognises. Courts are thus obliged to bear in mind the principle of minimalist intervention insofar as awards are concerned.

B. However, at the same time while courts are enjoined to follow the minimalist intervention route, it would clearly be a travesty of justice if courts were to fail to intervene where circumstances warrant and demand corrective measures being adopted. It is these compulsions which have led to courts evolving the serious irregularity or the patent illegality grounds to interfere with an award. Section 34 is a clear and unequivocal embodiment of the Legislature's intent to balance these competing facets of arbitration.

C. Undisputedly, Section 34(2)(a)(iii) speaks of a part of an award being exorcised from the rest. The Court finds no justification to confer too much credence on Article 34 of the Model Law ultimately failing to allude to a partial setting aside power even though that was provisioned for in explicit terms in draft Articles 29, 30, 40 and 41. This since neither the Working Group Reports nor the contemporaneous material that we have noticed hereinbefore seem to suggest a conscious deletion of that power. The considerable material, on the aspects surrounding partial setting aside that we have had an occasion to review, does not evidence any deliberation or discussion which may have predicated or actuated its deletion. The said material is also not indicative of any principled decision that may have been taken by member nations for deletion of the partial setting aside power. Its absence from Article 34 which came to be ultimately adopted stands lost in a mist of conjecture.

D. We find that the key to understanding the intent underlying the placement of the Proviso in sub-clause (iii) of Section 34(2)(a) is in the nature of the grounds for setting aside which are spoken of in clause (a). As would be manifest from a reading of the five sub-clauses which are positioned in Section 34(2)(a), those constitute grounds which would strike at the very heart of the arbitral proceedings. The grounds for setting aside which are set forth in clause (a) strike at the very foundation of validity of arbitration proceedings. Sub-Clauses (i) to (v) thus principally constitute grounds which would render the arbitration proceedings void ab initio. Although the Section 34(2)(a)(iv) ground for setting aside also falls in the same genre of a fundamental invalidity, the Legislature has sought to temper the potential fallout of the award being set aside in toto on that score.

E. The Proviso to sub-clause (iv) seeks to address a comprehensibly conceivable situation where while some parts of the award may have dealt with non-arbitrable issues or disputes falling outside the scope of the reference, its other components or parts constitute an adjudication which could have been validly undertaken by the AT. The Proviso thus seeks to address such a situation and redeems as well as rescues the valid parts of an award. This saves the parties from the spectre of commencing arbitral proceedings all over and from scratch in respect of all issues including those which could have validly formed part of the arbitration.

F. The grounds for setting aside encapsulated in Section 34(2)(b) on the other hand relate to the merits of the challenge that may be raised in respect of an award and really do not deal with fundamental invalidity. However, the mere fact that the Proviso found in sub-clause (iv) of Section 34(2)(a) is not replicated or reiterated in clause (b) of that provision does not lead one to an inevitable conclusion that partial setting aside is considered alien when a court is considering a challenging to an award on a ground referable to that clause. In fact,

the Proviso itself provides a befitting answer to any interpretation to the contrary. The Proviso placed in Section 34(2)(a)(iv) is not only an acknowledgment of partial setting aside not being a concept foreign to the setting aside power but also of parts of the award being legitimately viewed as separate and distinct. The Proviso itself envisages parts of an award being severable, capable of segregation and being carved out. The Proviso is, in fact, the clearest manifestation of both an award being set aside in part as well as an award comprising of distinct components and parts.

G. Undoubtedly, an award may comprise a decision rendered on multiple claims. Each claim though arising out of a composite contract or transaction may be founded on distinct facts and flowing from separate identifiable obligations. Just as claims may come to be preferred resting on a particular contractual right and corresponding obligation, the decision which an AT may render on a particular claim could also be based on a construction of a particular covenant and thus stand independently without drawing sustenance on a decision rendered in the context of another. If such claims be separate, complete and self-contained in themselves, any decision rendered thereon would hypothetically be able to stand and survive irrespective of an invalidity which may taint a decision on others. As long as a claim is not subordinate, in the sense of being entwined or interdependent upon another, a decision rendered on the same by the AT would constitute an award in itself.

H. While awards as conventionally drawn, arranged and prepared may represent an amalgam of decisions rendered by the AT on each claim, every part thereof is, in fact, a manifestation of the decision rendered by it on each claim that may be laid before it. The award rendered on each such claim rules on the entitlement of the claimant and the right asserted in that regard. One could, therefore, validly, subject of course to the facts of a particular case, be entitled to view and acknowledge them as binding decisions rendered by the AT on separate and distinct claims.

I. Once an award is understood as consisting of separate components, each standing separately and independent of the other, there appears to be no hurdle in the way of courts adopting the doctrine of severability and invoking a power to set aside an award partly. The power so wielded would continue to remain one confined to "setting aside" as the provision bids one to do and would thus constitute a valid exercise of jurisdiction under Section 34 of the Act.

J. The Supreme Court in M. Hakeem, has enunciated the setting aside power as being equivalent to a power to annul or setting at knot an Arbitral Award. It has essentially held that bearing in mind the plain language of Section 34 coupled with the Act having desisted from adopting powers of modification or remission that existed in the erstwhile 1940 Act, a court while considering a challenge under Section 34 would not have the power to modify.

K. The expression "modify" would clearly mean a variation or modulation of the ultimate relief that may be accorded by an AT. However, when a Section 34 Court were to consider exercising a power to partially set aside, it would clearly not amount to a modification or variation of the award. It would be confined to an offending part of the award coming to be annulled and set aside. It is this distinction between a modification of an award and its partial setting aside that must be borne in mind.

L. The power to partially sever an offending part of the award would ultimately depend on whether the said decision is independent and distinct and whether an annulment of that part would not disturb or impact any other finding or declaration that may have been returned by the AT. The question of severability would have to be decided bearing in mind whether the claims are interconnected or so intertwined that one cannot be segregated from the other. This for the obvious reason that if the part which is sought to be set aside is not found to stand independently, it would be legally impermissible to

partially set aside the award. A partial setting aside should not lead to a component of the award being rendered vulnerable or unsustainable. It is only when the award relates to a claim which is found to stand on its own and its setting aside would not have a cascading impact that the Court could consider adopting the aforesaid mode.

M. The Court is thus of the firm opinion that the power to set aside an award in part would have to abide by the considerations aforenoted mindful of the imperatives of walking a line which would not dislodge or disturb another part of the award. However as long as the part which is proposed to be annulled is independent and stands unattached to any other part of the award and it could be validly incised without affecting the other components of the award, the recourse to partial setting aside would be valid and justified".

101. In view of the law laid down in the aforesaid judgments, this Court is of the view that the under section 34 of the Act, the Court is vested with the jurisdiction to set aside certain problematic portion of the Award which are patently illegal and shocks the conscience of this Court.

102. However, the setting aside of the Award is subjected to the condition that the portion of the Award which has been upheld shall have due effect and cause no such cascading impact.

103. In the instant petition, therefore, this Court in case sets aside claim no. 3 and claim no. 4 then, the other claims shall nor be impacted by it neither have any perverse consequences.

CONCLUSION

104. In view of the aforesaid discussion, this Court discerns substantial material to establish the propositions put forth by the petitioner. Moreover, the Impugned Award passed in respect of Claim 3 and 4 is ex-facie erroneous and warrants interference of this Court.

105. The view taken by the learned Tribunal is perverse to the law since, the damages are not awarded to the petitioner despite the fact that the learned Tribunal has itself held that there is a delay on the part of respondent in completion of the project and the termination of the contract done by the respondent is wrongful. It has wrongfully held that as per the clauses of the Contract the petitioner is only liable to the extension of time, however the Tribunal failed to consider as per peculiar facts of the case the contract instead of being extended has been wrongfully terminated by the respondent.

106. The Impugned Award suffers from patent illegality since, the Tribunal despite holding that there has been delay on the part of the respondent in Claim no. 1, did not award damages to the petitioner.

107. Such situations warrants that the petitioner who suffered damages on account of delay committed by the respondent shall be compensated by the respondent. Hence, the petitioner is entitled to recover damages from respondent on the grounds of breach of contract by the respondent.

108. In view of the foregoing discussion, the petitioner has been able to make out a claim of intervention of this Court with regard to Claim no. 3 and 4 under Section 34 of the Act.

109. In terms of the Claim no. 6, 7 and 8 this Court is of the opinion that the petitioner has failed to make out such a case and was unable to show that the Award needs interference under Section 34 of the Act. This Court is of the view that the learned tribunal was well within its jurisdiction and capacity to award the claim/compensation in favor of the respondent in terms of the aforesaid claims.

110. A perusal of the impugned Award dated 6th March 2020 makes it evident on the face of the record requires interference under Section 34 of the Act in terms of Claim no. 3 and Claim no. 4 which deals with the claim pertaining to damages on Account of Idling of Machines and loss of overheads and loss of profits respectively.

111. This Court directs that the aforesaid claims are being remitted back to the Tribunal to decide a fresh, taking into consideration the settled principles of law and adjudicate the Claim no. 3 and Claim no. 4 afresh.

112. In view of the aforesaid findings, the impugned Award is liable to be partially set aside.

113. The petition is partially allowed in the aforesaid terms.

114. Pending applications also stand disposed.

115. The judgment be uploaded on the website forthwith.

(CHANDRA DHARI SINGH)
JUDGE

DECEMBER 12, 2023
gs/db/ryp

Click here to check corrigendum, if any