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

% **Pronounced on: 13th September, 2023**

\+ O.M.P. (COMM) 294/2019 & I.A. 764/2020
NATIONAL HIGHWAYS AUTHORITY OF INDIA
..... Petitioner
Through: Ms. Madhu Sweta and Ms. Raveena Dewan, Advocates

versus

ASHOKA BUILDCON LTD. ..... Respondent
Through: Mr. Jay Salva, Sr. Advocate with Mr. Rajpal Singh, Advocate

CORAM:
HON'BLE MR. JUSTICE CHANDRA DHARI SINGH

J U D G M E N T

CHANDRA DHARI SINGH, J.

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:

> *"a) To quash and set aside the arbitral award dated 25.03.2019 passed by the Arbitral Tribunal, and/or*
> *(b) To pass such other order or direction as deemed fit and proper in the facts and circumstances of the present case."*

FACTUAL MATRIX

2. The petitioner, National Highways Authority of India (NHAI), is an autonomous body constituted under the National Highways Authority of India Act, 1988 having its office at G-5 & 6, Sector- 10, Dwarka, New Delhi-110075. NHAI functions towards developing, maintaining, and

managing the country's National Highways and for matters connected thereto.

3. The respondent, Ashoka Buildcon Ltd., is a company incorporated under the provisions of the Companies Act, 1956 having its office at S.No.861, Ashoka House, Ashoka Marg, Vadala, Nashik-422011 (Maharashtra).

4. The petitioner on 15th February 2016 invited a proposal for the construction of the Project Highway for the construction of Two/Four laning with paved shoulders of Govindpur (Rajgunj) -Chas-West Bengal Border section of NH-32 from km. 0.000 to km. 56.889 (hereinafter referred to as "Project Highway") in the State of Jharkhand on NHDP Phase-IV on Engineering, Procurement, and Construction (hereinafter "EPC") mode involving vide RFP no. NHAI/11012/JH/IV/2004/04 as per which, it prescribed the technical and commercial terms and conditions for undertaking the project.

5. The respondent submitted its bid pursuant to the proposal by the petitioner and the same was accepted by the petitioner *vide* Letter of Acceptance no. NHAI/11012/JH/4/2004/04/85826 dated 19th July 2016. Accordingly, the Contract Agreement dated 1st August 2016 was entered into between the parties for the execution of the above mentioned project.

6. Thereafter, the respondent invoked the provisions of arbitration as per Clause 26.3 of the Contract Agreement on 31st July 2017 and accordingly submitted a list of disputes to the petitioner leading to the setting up of the Arbitral Tribunal on 26th September 2017.

7. The respondent filed its Statement of Claims before the learned Arbitral Tribunal which was followed by the Statement of Defence on

behalf of the petitioner on 11th November 2017 and 10th March 2018 respectively. The respondent further filed a rejoinder on 30th April 2018.

8. The learned Arbitral Tribunal passed the impugned Arbitral Award on 25th March 2019, whereby, a sum of Rs. 3628.79 lakhs plus GST as per actual was awarded in favour of the respondent.

9. Hence, on being aggrieved by the impugned Award dated 25th March 2019, the petitioner has approached this Court challenging the abovesaid Award by way of the instant petition under Section 34 of the Act, 1996.

SUBMISSIONS

(On behalf of the petitioner)

10. Learned counsel appearing on behalf of the petitioner submitted that the learned Arbitral Tribunal had allowed the claim of the respondent towards the delay by completely omitting the applicable provisions namely Clause 4.1.4, 8.3, and 10.5 of the Contract Agreement.

11. It is submitted that the appointed date is consequent to the handing over of the Right of Way (hereinafter "ROW") and is not mutually independent. The petitioner's counsel further stated that the claim was wrongfully approved because the petitioner had failed to transfer at least 90 percent of the ROW as required by the Contract Agreement. It is further submitted that the ROW was handed over to the respondent as per the Contract Agreement *vide* the petitioner's letter dated 7th October 2016.

12. Learned counsel for the petitioner submitted that the learned Arbitral Tribunal ought to have adverted to clause 8.3 which provides the formula for calculating the damages in case of delay in handing over the site.

13. It is contended that even if it had been assumed that there was an error in providing the ROW, as the damages, has to be calculated in accordance with Article 4 of the Contract Agreement. They had referred to Clause 4.1.4, which had provided for damages and time extension in case of any delay in providing the ROW.

14. Learned counsel for the petitioner submitted that the learned Arbitral Tribunal failed to consider Clause 4.1.5 of the Contract Agreement which states that damages provided under Clause 8.3 shall be full and final of all claims of the respondent and such compensation shall be the sole remedy and final cure against the delays of the respondent.

15. It is further submitted that the learned Arbitral Tribunal failed to consider the Non-Obstante Clause which clearly states that aggregate damages payable to the respondent would be limited to 1% of the contract price.

16. Learned counsel for the petitioner submitted that the amount awarded towards overhead charges, idle charges, and charges of demobilization of plant and machinery are perverse and without any reasoning. It is submitted that the respondent's allegations lacked support and evidence, rendering them speculative, hypothetical, and baseless.

17. It is contended that the learned Arbitral Tribunal failed to consider that the amount awarded under Claim no. 5 including the interest clearly contravenes Clause 26.3 (iv) of the Contract Agreement which has clearly mentioned that the cost of Arbitration shall be borne by each party itself.

18. It is contended that the learned Arbitral Tribunal went against the provisions of the Contract Agreement in awarding both the pre-lite and pendent lite interest on the amount awarded from the date of the

submissions of the Statement of Claims i.e., 12th November 2017 till 25th March 2019 i.e., the date of the impugned Award at the rate of 10% per annum. The petitioner has further relied on the judgment in the case of ***ONGC v. Wig Brothers Builders and Engineers Private Limited*** **(2010) 13 SCC 377**, where it was held that the Arbitrator's jurisdiction is confined to the terms and conditions of the contract. Therefore, the petitioner argued that the Arbitral Award exceeded its jurisdiction and should be set aside.

19. It is further contended by the petitioner that they had relied on Clause 26.3.1(vi) of the Agreement, which had stated that each party would bear its own expenses in connection with the arbitration proceedings.

20. It is submitted that the awarding of interest on the entire award \ to the respondent is against the applicable law and further contrary to the provisions of the Contract Agreement. It is submitted that the learned Arbitral Tribunal unlawfully and unreasonably upheld the respondent's arguments by failing to take their substantive concerns into account.

21. It is further submitted that the finding in the impugned Award at paragraph 8.4(e) is wholly perverse and in contradiction to its own finding at Para 7.1(b). The learned Arbitral Tribunal while passing the Impugned Award had erred in overlooking the fact that the fixing of the appointed date was consequent to handing over the ROW and were not mutually independent.

22. It is submitted that the finding in the Arbitral Award at para 8.4(g) was wholly perverse, non-speaking, and suffered from non-application of mind. The learned Arbitral Tribunal had failed to consider Clause 4.1.5 of

the Contract Agreement, which was a non-obstante clause and clearly stated that the aggregate damages payable to the respondent in case of any breach of its obligations under the Contract Agreement would be limited to 1% of the Contract Price.

23. It is submitted that the Impugned Award is wholly perverse and contrary to the law of damages under Section 73 and 74 of the Contract Act. The learned Arbitral Tribunal had awarded damages beyond the maximum cap stipulated in the Contract Agreement, which was not permissible under the law.

24. It is submitted that the Impugned Award is in complete contravention to the settled law and the same is evident from the findings of the learned Arbitral Tribunal at paragraph 6.3.2 and 6.3.3, which indicated that there were various omissions, non-application of mind, and failure to consider relevant contractual provisions and pleadings of the respondent.

25. It is further submitted that the learned Arbitral Tribunal had erred in awarding claim in favor of the respondent which is contrary to Clause 26.3.1(vi) of the Contract Agreement, which stated that each party shall bear its own expenses in connection with the arbitration proceedings.

26. It is submitted that the Impugned Award is in conflict with the 'public policy' of India within the meaning and scope of Section 34 (2) (b) (ii) of the Act, 1996. It was contended that the impugned majority award is wholly vitiated as the Arbitral Tribunal had failed to consider the petitioner's detailed submissions concerning various disputes and had rendered its findings dehors the provisions of the Contract Agreement.

27. The petitioner had further contended that the Impugned Award is patently illegal as the learned Arbitral Tribunal had completely disregarded the provisions of the Contract Agreement, thus, rendering the award untenable. Therefore, it is submitted that the Impugned Award is liable to be set aside under Section 34 of the Act, 1996.

(On behalf of the respondent)

28. Mr. Jay Salva, learned senior counsel for the respondent submitted that the instant petition is nothing but an abuse of the process of law. It is submitted that it is the settled position of 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. It is also submitted that an award can be challenged only on limited grounds mentioned Act. Therefore, in the absence of any such ground, it is not possible to re-examine the facts or evidence on the record.

29. Learned counsel for the respondent submitted that the NHAI under Section 26 of the Act of 2002 was under an obligation to remove the unauthorized occupants and further take steps to remove the occupations which was not adhered to by the petitioner.

30. Learned counsel for the respondent submitted that the damages of 1% shall be applicable only if there was any delay in providing the ROW to the land which forms part of the appendix i.e., if there is a delay in handling oversite of the remaining 10% of the total length of the Project. It is further submitted that the learned Arbitral Tribunal clearly held that none of the Clauses provides for aggregate damages to be limited to 1% of the Contract Price applied.

31. It is further submitted that Clause 4.1.5 of Contract Agreement only restricts the aggregate damages with regard to clauses 4.1.4, 8.3, and 9.2 and not for violation of the specific warranties and representation and removing occupations agreed under Clause 8.4.

32. It is submitted that this Court in its order dated 2nd August 2019 held that there was an inordinate delay of 16 months in fixing the appointed date. Further, it is submitted that the authority was under an obligation to provide Right of Way (ROW) to a minimum of 90% of the Project Highway, which was the requirement under the Contract Agreement.

33. Learned counsel for the respondent submitted that the Contract Agreement is dated 1st August 2016 while the date of appointment fixed under the Contract was 10th December 2017 which clearly breaches the warranties and representations of the Contract Agreement.

34. It is submitted that the Clause restricting the damages to 1% is unconscionable and would be against the Public Policy of India. The parties can only determine genuine pre-estimated damage under Section 74 of the Indian Contract Act, of 1872 and restricting the damages to 1% of the Contract Value cannot be genuine pre-estimated damages.

35. It was further submitted that the petitioner had not handed over the required 90% of the length of the Project Highway within 15 days of the Contract Agreement's execution. Due to this failure, the respondent claimed that they could not commence the work on the Project Highway.

36. It is contended by the respondent that the ROW handed over by the petitioner constituted only 83% of the required length, making it impossible to commence the physical work at the site.

37. It is submitted that the contents of the petitioner's petition and the grounds therein were false and frivolous. The respondent asserted that the petition was not maintainable under the provisions of Section 34 of the Arbitration and Conciliation Act, 1996, as it was in the nature of an appeal. The petitioner could not seek re-appreciation of the evidence or interpretation of the contract, as the learned tribunal had already considered and interpreted the same.

38. It is contended that the petitioner has wrongly alleged that the impugned award was illegal, contrary to applicable provisions of law, or against the terms of the contract agreement or fundamental policy of Indian law.

39. It is submitted that there is no alleged requirements which were to be performed by the respondent such as approval of the change of scope, work delay, tree plantation, identification of the trees to be felled, approval of the proof consultant, submission of design and drawings, etc., which were attributable to the respondent.

40. It is submitted that the letter dated 09th September 2019 addressed by them to the petitioner contradicted the petitioner's claim of losses, as it showed the petitioner's willingness to bid for future projects. Finally, the respondent submitted that the award amount with interest as of 02nd August 2019 was Rs. 44.11 crores, not Rs. 36.28 crores as claimed by the petitioner.

41. It is further contended that in respect of the claim no.4 is there is no arbitrariness in awarding overheads for the delay period in para8.4(h),(ii),(iv),(vi) of the Award. The petitioner has wrongly contended that there is no basis for passing the Award.

42. It is submitted that the award does not go beyond the terms of contract and law. It is denied that the arbitrator has exceeded his jurisdiction. The objection to jurisdiction was never taken by the petitioner and cannot be taken for the first time in the present proceedings.

43. It is submitted that the impugned award did not suffer from patent illegality or contravene the law. While, the petitioner's submission regarding the provisions of clause 26.3.1(vi) of the Contract Agreement restricted the arbitral tribunal's discretion in determining costs had been refuted by the respondent. There is no prohibition in the contract for grant of compensation for delay in making the 90% project length available for work and appointed date. The conduct of the petitioner shows that he expected the respondent to take steps for execution of work such as mobilization and applicable permits etc. prior to appointed date including the utility shifting and tree cuttings and change of scope etc.

44. It is submitted that the damages agreed between the parties in the contract pertain to the period after appointed date whereas compensation awarded is pertaining to the period of delay caused by petitioner prior to the appointed date. The reliance placed by the petitioner of the Apex Court judgment in this regard is not correct as the facts in the judgment cited and the present case are different. The petitioner admits to the entitlement of the respondent for compensation under Section 73 of the Indian Contract Act is applicable to the present dispute also. The respondent has proved the damages and the damages awarded are found reasonable by the arbitral tribunal.

45. It is contended that the petitioner on one hand pleads that the damages for delay if are to be awarded are required to be mutually agreed in the contract and wrongly uses the words liquidated damages'.

46. It is submitted that learned Tribunal in Claim no. 5 awarded interest is nor against applicable law of arbitration neither contrary to the provisions of contract agreement hence, the objection of the petitioner is vague and may kindly be rejected by this Court.

47. It is further contended with reference to Para 19, it had been clarified by the respondent that the letter dated 09th September 2019, addressed by the petitioner to the respondent, had been misleading and had presented a different portrayal of the situation.

48. It is submitted that the arbitral tribunal has rightly appreciated all the arguments and judgments. The award cannot be equated with the judgment of the Courts. The petitioner has not shown as to how the RJ-6 has affected the award. The judgment cited by the petitioner have facts which are different from the facts in the present case the judgment is not applicable.

49. Learned senior counsel for the respondent submits that the impugned Award is in accordance with the law and cannot be set aside on the ground of re-appreciation of evidence.

50. It further submits that it is within the jurisdiction of the learned Arbitral Tribunal to interpret the Contract or its any particular Clause.

51. Learned senior counsel for the respondent submits that where two views prevail, the view taken by the learned Arbitral Tribunal would be considered as a plausible view.

52. It is submitted that Court does not sit as a Court of Appeal over the decision of an Arbitral Tribunal and to adjudicate the correctness of an Award passed unless there is a patent illegality or perversity on the face of the Award.

53. Therefore, it is submitted that the instant petition is liable to be dismissed for being devoid of any merit.

FINDINGS AND ANALYSIS

54. Heard both the parties at length and perused the material on record including the pleadings and judgments relied upon.

55. Before proceeding further, this Court finds it necessary to briefly revisit the existing of position of law with respect to the scope of interference with an arbitral award in India.

56. 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.

57. 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.

58. 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, rendering a Clause in the Agreement to be redundant, such interpretation cannot be sustained.

59. It is a settled law that there are essentially three broad areas in which an arbitral award is likely to be challenged under Section 34 of the Act, 1996. Firstly, an award may be challenged on jurisdictional grounds- for example, the non-existence of a valid and binding arbitration Agreement on grounds that go to the admissibility of the claim determined by the Tribunal. Secondly, an award may be challenged on what may broadly be described as procedural grounds, such as failure to give a party an equal opportunity to be heard. Thirdly and most rarely, an award may be challenged on substantive grounds on the basis that the Arbitral Tribunal made a mistake of law.

60. In the case of ***PSA Sical Terminals Pvt. Ltd. vs. The Board of Trustees of V.O. Chidambranar Port Trust Tuticorin and Others,*** **2021 SCC OnLine SC 508,** the Hon'ble Supreme Court held as under:-

> *"41. It will be relevant to refer to the following observations of this Court in the case of MMTC Limited (supra):*

"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."

42. In Ssangyong Engineering and Construction Company Limited (supra), this Court after considering various judgments including the judgment in Associate Builders (supra) observed thus:

"34. What is clear, therefore, is that the expression "public policy of India", whether contained in Section 34 or in Section 48, would now mean the "fundamental policy of Indian law" as explained in paras 18 and 27 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] i.e. the fundamental policy of Indian law would be relegated to "Renusagar" understanding of this expression. This would necessarily mean that Western Geco [ONGC v. Western Geco International Ltd., (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12] expansion has been done away with. In short, Western Geco [ONGC v. Western Geco International Ltd., (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12], as explained in paras 28 and 29 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204], would no longer obtain, as under the guise of interfering with an award on the ground that the arbitrator has not adopted a judicial approach, the Court's intervention would be on the merits of the award, which cannot be permitted post amendment. However, insofar as principles of natural justice are concerned, as contained in Sections 18 and 34(2)(a)(iii) of the 1996 Act, these continue to be grounds of challenge of an award, as is contained in para 30 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204].

35. It is important to notice that the ground for interference insofar as it concerns "interest of India" has since been deleted, and therefore, no longer obtains. Equally, the ground for interference on the basis that the award is in conflict with justice or morality is now to be understood as a conflict with the "most basic notions of morality or justice". This again would be in line with paras 36 to 39 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204], as it is only such arbitral

awards that shock the conscience of the court that can be set aside on this ground.

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

37. Insofar as domestic awards made in India are concerned, an additional ground is now available under sub-section (2-A), added by the Amendment Act, 2015, to Section 34. Here, there must be patent illegality appearing on the face of the award, which refers to such illegality as goes to the root of the matter but which does not amount to mere erroneous application of the law. In short, what is not subsumed within "the fundamental policy of Indian law", namely, the contravention of a statute not linked to public policy or public interest, cannot be brought in by the backdoor when it comes to setting aside an award on the ground of patent illegality.

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).

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.

41. What is important to note is that a decision which is perverse, as understood in paras 31 and 32 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204], while no longer being a ground for challenge under "public policy of India", would certainly amount to a patent illegality appearing on the face of the award. Thus, a finding based on no evidence at all or an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside on the ground of patent illegality. Additionally, a finding based on documents taken behind the back of the parties by the arbitrator would also qualify as a decision based on no evidence inasmuch as such decision is not based on evidence led

by the parties, and therefore, would also have to be characterised as perverse.

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

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.

34. In the case of ***SAIL vs. Gupta Brother Steel Tubes Ltd.*, (2009) 10 SCC 63,** the Hon'ble Supreme Court has, on the aspect of extent of

limitation imposed upon a court while adjudicating a petition challenging an arbitral award, held as under: -

> *"16. In ONGC Ltd. [(2003) 5 SCC 705] , while dealing with the aspects of liquidated damages, this Court considered the aforesaid Constitution Bench decisions in Chunilal V. Mehta & Sons [AIR 1962 SC 1314] and Fateh Chand [AIR 1963 SC 1405] and after reference to relevant parts of Sections 73 and 74 of the Contract Act held thus: (ONGC Ltd. case [(2003) 5 SCC 705] , SCC p. 733, para 46)*
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> > *"46. From the aforesaid sections, it can be held that when a contract has been broken, the party who suffers by such breach is entitled to receive compensation for any loss which naturally arises in the usual course of things from such breach. These sections further contemplate that if parties knew when they made the contract that a particular loss is likely to result from such breach, they can agree for payment of such compensation. In such a case, there may not be any necessity of leading evidence for proving damages, unless the court arrives at the conclusion that no loss is likely to occur because of such breach. Further, in case where the court arrives at the conclusion that the term contemplating damages is by way of penalty, the court may grant reasonable compensation not exceeding the amount so named in the contract on proof of damages. However, when the terms of the contract are clear and unambiguous then its meaning is to be gathered only from the words used therein. In a case where agreement is executed by experts in the field, it would be difficult to hold that the intention of the parties was different from the language used therein. In such a case, it is for the party who contends that stipulated amount is not reasonable compensation, to prove the same."*
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> *17. In Tarapore & Co. [(1994) 3 SCC 521] , a two-Judge Bench of this Court considered few decisions of this Court including the decisions in Sudarsan Trading*

Co. v. Govt. of Kerala [(1989) 2 SCC 38 : AIR 1989 SC 890] , Associated Engg. Co. v. Govt. of A.P. [(1991) 4 SCC 93 : AIR 1992 SC 232] and J&K Handicrafts v. Good Luck Carpets [(1990) 4 SCC 740] and held that where an arbitrator travels beyond a contract, the award would be without jurisdiction and the same would amount to misconduct and such award would become amenable for being set aside by a court. In Sudarsan Trading Co. [(1989) 2 SCC 38 : AIR 1989 SC 890] this Court held that an error by the arbitrator relatable to interpretation of the contract is not amenable to correction by courts.

18. It is not necessary to multiply the references. Suffice it to say that the legal position that emerges from the decisions of this Court can be summarised thus:

(i) In a case where an arbitrator travels beyond the contract, the award would be without jurisdiction and would amount to legal misconduct and because of which the award would become amenable for being set aside by a court.

(ii) An error relatable to interpretation of the contract by an arbitrator is an error within his jurisdiction and such error is not amenable to correction by courts as such error is not an error on the face of the award.

(iii) If a specific question of law is submitted to the arbitrator and he answers it, the fact that the answer involves an erroneous decision in point of law does not make the award bad on its face.

(iv) An award contrary to substantive provision of law or against the terms of contract would be patently illegal.

(v) Where the parties have deliberately specified the amount of compensation in express terms, the party who has suffered by such breach can only claim the sum specified in the contract and not in excess thereof. In other words, no award of compensation in case of breach of contract, if named or specified in the contract, could be awarded in excess thereof.

(vi) If the conclusion of the arbitrator is based on a possible view of the matter, the court should not interfere with the award.

(vii) It is not permissible to a court to examine the correctness of the findings of the arbitrator, as if it were sitting in appeal over his findings."

61. The abovesaid principle on limited interference by this Court has also been enunciated by the Hon'ble Supreme Court in the judgment of ***M/S Larsen Air Conditioning and Refrigration Company v. Union of India & Ors.*** **CA no. 3798 of 2023 dated 11th August 2023,** wherein the Hon'ble 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 provision14 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 Project Director, National Highways No. 45E and 220 National Highways Authority of India v 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."

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

63. The petitioner is partially challenging the Impugned Award qua Claim No.4, Claim No.5 and Claim No.6.This Court will adjudicate upon the whether the abovesaid claims of the impugned Award.

64. Now this Court will examine Claim no. 4 of the Impugned Award.

Claim No. 4 – Compensation on account of delay on account of access to site for the period from signing of agreement to appointed date.

65. The relevant portion of the Award pertaining to Claim no. 4 which deals with determination of the losses and entitlement of the damages by the Claimant on account of various factors during the time lapsed after

the execution of the agreement and till the fixation of the 'Appointed Date' has been reproduced below:

> *"8.4 Claim No.4: This Claim fundamentally emanates from the factum of non commencement of work due to Inability of Respondent to hand over Right of Way no less than 90% of the total unencumbered length of Project Highway thereby. Parties not able to fix the 'Appointed Date' under the CA. In effect this Claim is by way of quantification in pursuance of the arguments given in Claim no. 1. Claim No. 4 is for the determination of the losses and entitlement of the damages by the Claimant on account of various factors during the time lapsed after the execution of the agreement till fixation of the 'Appointed Date'.*
>
> *a) In this context, we have noticed that after the Claimant had performed his obligations as per Clause 7.1 of CA, the Contract provisions do not recognize the unreasonable delay caused for commencement of work on the part of Respondent for meeting his reciprocal obligation to provide the Right of Way on no less than 90% (Ninety per cent) of the total length of Project Highway as per warranties represented by Respondent thus enabling Parties to fix the 'Appointed Date'.*
> *b) AT considers Its mandate is to decide the Claim No. 4 based on principles of what is fair and just.*
> *c) We also observe that Respondent has misrepresented the provision of Clause 5.2 (g) and (h) thereby, causing breach of Contract provisions leading to non fixation of 'Appointed Date' by the Parties.*
> *d) The Claimant, soon after signing of CA and furnishing Performance Security in compliance to Article 7.1.1, has not to wait to get directions for mobilization of his resources (machinery and manpower) from any quarter and is contractually expected to appropriately mobilise his resources conforming to the agreed scope of work. We feel that such an action by the Claimant towards mobilisation is*

a step in the right direction, and if such mobilised resources are rendered "idle" on account of breach of Contract, then the opposite Party has to compensate the damages caused due to un-fulfillment of the reciprocal obligations foreseen under the Contract on its part.

e) We are of the opinion that provisions of Clause 8.3 as proposed by the Respondent is not applicable as the instant case relates to 'non commencement' of work due to inability of fixing 'Appointed Date' and is not a case of 'delay' per say in handing over the site. One has to differentiate between 'non commencement' of work and 'delay' in carrying out the work. As such, the prescribed formula for working out the damages is only applicable to the 'delay' caused in handing over the remaining 10% of site of work.

f) The Claimant laid emphasis on provisions in law and in judicial decisions on compensation payable in general as a consequence of breach in contract performance by the other party.

g) The Clause 4.1.5 provides for the aggregate damages under Clause 4.1.4, 8.3 and 9.2 to be limited to 1% of the Contract Price. These Clauses deal with 'delay' in providing ROW or approval of GAD by Railways (Clause 4.1.4); delay in handing over site (Clause 8.3) and shifting of utilities (Clause 9.2). The AT notices that the constituents of Claim No. 4 does not fall within the aforesaid categories aad hence the ceiling of 1% is not applicable. h) We have noticed that the Claimant has preferred a very significant amount of Rs. 9098.06 lakhs as basic Claim and an Rs. 257.54 lakhs towards interest @ 10% compounded quarterly for the period from the date of notice of Arbitration (31.07.2017) to the date of submission of SOC (11.11.2017) for the purported breaches of performance of the Respondent. The Claimant has submitted details of Claim No. 4 (refer Exhibit C-729, modified Annexure 2.0 in "CD -23", on page 6609) as follows:

i). Expenditure on the bidding and entering into the contract including estimating the cost to be quoted, survey, consultancy, purchase of bid security and keeping it alive, pre-qualification, submission of the bid, entering into agreement etc. (Annexure - 2.1): Rs. 23.76 lakhs - NOT PRESSED.

AT has not considered the Claim of Rs. 23.76 lakhs since the Claimant has not pressed for it.

ii). Overheads of the project after signing of the agreement (Annexure 2.2): As per actual. (C-707 Rs. 3865.49 lakhs).

AT has deliberated on this Claim and concluded: (a). In SOC "CD-I" (page 203) the Claimant has shown an amount of Rs. 3777 lakhs instead, (b). Keeping in view the agreed scope of work under the contract, AT found that the level of mobilization was not adequate since no earth moving and paving machinery for the Highway Project were brought by the Claimant to the site. The Overhead charges(OH) @ 8 % and 25% as given in Ministry's Standard Data Book are for the full mobilization of equipment and other resources for Highway upgradation works, whereas in this case the resources have been only partially mobilized and the saving accrued to the Claimant has not been accounted for while preparing the Claim amount, (c). The OH charges as per - ' MORTH'S Standard Data Book considers that the equipment and other resources are carrying out productive work consuming POL and incurring expenditure on the maintenance etc for the mobilized equipment. However, in the instant case I since the 'Appointed Date' was not fixed so no work had commenced and the resources mobilized remained idle. The saving so accrued on account of POL saving to the Claimant has not been accounted for in Claim No. 4.(d). Claimant has worked out ("CD-23" Part -I, page

6612) an amount of Rs. 3973.98 lakhs considering 8% O.H. charges on road and culvert works for Rs. 35919 lakhs and 25% for major and minor bridges for Rs. 12681 lakhs for a proportionate period of 480 days. Claimant also submitted CA Certificate based on balance sheet of FY 2016-17 and FY 2017-18 as Rs. 38.65 Crore (C-707 Page No. 6377 and 6378). AT observed that CA certificate on page 6377 shows turn over of Rs. 202,512.56 lakhs during FY 2016-17 and worked out O.H. charges @ 11.84%. Since no work was carried out prior to 'Appointed Date' as it was fixed on 10.12.2017 which is beyond the FY 2016-17, so AT had not considered such o certificate issued by CA. AT has decided the amount of OH charges which is 'just' and 'fair' under the circumstances.

iii). Arrangement for supply of the material, Sub Contractors and labours for the project (Annexure 2.3):Rs. 847.63 lakhs. Since the contract has not been terminated by the Respondent, such claim is not reasonable / admissible.
iv). Idle charges of machinery and plant (Annexure 2.4) Rs. 1122.97 lakhs.

The Claimant has furnished a list of 58 nos. of Machinery and Plants in SOC "CD-I" on page 206 showing the date of deployment and demobilization / status as on 31.10.2017. Claimant has also given a list of above mentioned 58 nos. Machinery and Plants in "CD-23" on page 6615-6617 showing date of deployment and / or demobilization / status as on 10.12.2017. A close look of the above two documents shows that the dates so mentioned do not match in case of several machineries and plants listed therein. Most of machineries and plants are shown 'Idle' but few are shown as 'Working' for which also the amount due to Idling has been claimed and included in Rs. 1122.97 lakhs. AT has deliberated and decided to include only

those machinery and plants that have been stated to be 'Idle' and for the shortest period shown in two different submissions of the Claimant. Accordingly, AT has worked out the admissible amount of the claim.

v). Additional expenditure on the Items arising out of peculiar situation (Annexure 2.5): Rs. 12.23 lakhs. Claimant has furnished the details of his above claim of Rs. 12.23 lakhs in "CD- 1" on page 210 - 214 and also in "CD-23" on pages 7312 - 7316 and the same has been deliberated upon by AT. AT is of the opinion that such expenditure) forms part of the OH charges and, therefore, decided it to be not admissible.

vi). Demobilization of plant, machinery, manpower and sub-contractors etc. (Annexure 2.6)Rs. 4.46 lakhs + approx Rs. lakhs + 10 lakhs =Rs. 19.46 lakhs. Including in point no.(2) above.

The Claimant has given details of this claim of Rs. 19.46 lakhs in "CD-I" on page 215 and also in "CD-23" on page 7317. AT appreciates the step taken for demobilizing few equipment and manpower to mitigate the losses of the defaulting party i.e. the Respondent in this case and therefore, agree to consider the relevant expenditure in the Award. For demobilization of Sub-contractors (Annexure 2.6.3) on page 219 ("CD-I") and on page 7321 ("CD- 23"), AT observed that no details of whatsoever nature (equipment type, manpower etc) have been furnished in this regard in the claim. As such, AT decided not to consider the claim of demobilization of Sub-contractor. AT has decided to consider the demobilization of machinery, plant and manpower.

vii). Losses on account of cost of works and maintenance not commenced / not completed (Annexure 2.7): Rs. 3195.62 lakhs.

Claimant submitted in SOC ("CD-I" on page 190-191) in para (g) that 'Since the Claimant was fully mobilized for execution of work he suffered losses on account of cost of works and maintenance not commenced / not completed at the rate of 10% of the project cost which works out to Rs. 3037.50 lakhs in Annexure 2.7 on page 220. For the same claim the Claimant has subsequently submitted "CD-23", page 7322 modifying the amount of Rs. 3195.62 lakhs citing Clause 23.6.2 (c). AT deliberated the claim considering modified amount and found that Clause 23.6.2 (c) of CA relates to sub-head 'Termination Payment'. AT found that in the instant case after fixing 'Appointed Date' on 10.12.2017, the execution of work at site has commenced and no termination of contract has taken place. In view of this, the claim sought under Clause 23.6.2 (c) has not been appreciated by AT and therefore, not admissible.

viii). Loss of Bonus (Annexure 2.8):- NOT PRESSED - Claimant has submitted of Rs. 911.25 lakhs value of claim in "CD-I" on page 221 and also in "CD-23" on page 7323, but has preferred not to press for it. As such, AT has not considered it.

ix). The expenditure incurred in barricading and repairing the barricades for Telmachu bridge and keeping the machinery ready for demolition of structures as ordered by Respondent (Annexure 2.9): Rs. 10.90 lakhs.

Claimant has. included this claim in "CD-I" on page 222 and in "CD-23" on page 7324. No details have been furnished by the Claimant in his submission of see justifying the need for erecting barricades for demolition of Telmachu bridge which seems to be additional work outside the agreed scope of work. During execution of the Project Highway, there will be always few additional items of work which are executed

and paid for. As this claim item under Claim No. 4 is missing from the SOC, therefore, the Respondent has not made any mentioned / comments on this claim item. The Claimant while submitting "CD- 23" which includes this claim of Rs. 10.90 lakhs under Claim No. 4 has submitted some details on page 7324 regarding Telmachu bridge barricading without justifying need for the same / authorization of carrying out such work by the Respondent. AT therefore, decides that since this claim item is not under dispute of the Parties, the cost incurred in erecting barricades if any, for Telmachu bridge forms additional work item and can still be claimed by the Claimant separately as undisputed item and AT has no role to play in this regard.

x). Loss of opportunity: Rs. 0.00001 lakhs- AT has not considered it.

xi). Pre-lite interest and pendent-elite interest - Claimant in his submission of SOC ("CD-I") on page 154 has claimed interest @ 18% on the award amount of Claim No. 1 to 5 awarded from the date of Award to date of realization (as actual) without mentioning the amount involved. Claimant while submitting "CD-23", on page 6609 has claimed 'Pre-lite interest and pendent-lite interest as actual'. Against the claimed Pre-Lite interest and pendent-elite interest @ 18%, the Respondent in his SOD at page 74 has submitted that as per section 31 of Arbitration Act, the interest rate shall be 2% higher then the current rate of interest of deposits as per RBI. Respondent further submitted that the current rate of interest of deposits is 6.25% and therefore objected the claimed Interest @ 18% as It has not been stipulated In Clause 19.2.7 as agreed rate by the Parties.

AT has deliberated on the applicable rate of Interest In this case for Pre-lite Interest and pendent-lite Interest.

AT does not agree with the Claimant's Interest rate @18% . AT found that Interest rate during the Intervening period has remained low. Since this claim form part of Claim No. 7 so It has been dealt therein.

In view of above, the claimed amount of Total (1) to (10) = 9098.06 lakhs + actual under Claim No. 4 stands modified as given in the Award."

66. The above mentioned claim pertains to non- commencement of the work due to the fact that there was inability on behalf of the petitioner in handing over the ROW to the respondent. As per the terms of the Contract, the petitioner was bound to hand-over 90 % of the ROW, to the respondent.

67. The learned Tribunal had allowed the claim of the respondent on the various grounds which are overheads of the project after signing of the agreement; idle charges of machinery and plant; additional expenditure on the items arising out of peculiar situation; demobilization of plant, machinery, manpower and sub-contractors etc.; losses on account of cost of works and maintenance not commenced/not completed; the expenditure incurred in barricading and repairing the barricades for Telmachu bridge and keeping the machinery ready for demolition of structures as ordered by the petitioner etc. Under the Clause 4.1.5 provides for the aggregate damages under Clause 4.1.4, 8.3 and 9.2 of the Contract Agreement to be limited to 1% of the Contract Price. These Clauses deal with 'delay' in providing ROW or approval of GAD by Railways (Clause 4.1.4); delay in handing over site (Clause 8.3) and shifting of utilities (Clause 9.2) and the leaned Tribunal is of the view

that the damages as claimed under Claim No. 4 does not fall within the aforesaid categories and hence the ceiling of 1% is not applicable.

68. Upon bare perusal of the reasoning mentioned in the Impugned Award, it is observed by this Court that the learned Tribunal has taken into account the various factors which have influenced the appointment date and accordingly, arrived at the decision as to whether the respondent/ claimant is entitled for the loss as claimed by it.

69. This Court after taking into the consideration the reasons given above by the learned Arbitrator, finds it is crystal clear that all the submissions made by the parties as well as the documents which were referred by them have been duly taken into the consideration and after such due consideration, it reached to the conclusion that there was no delay in the arbitral proceedings.

70. In view of the above facts and circumstances, I do not find any reason to interfere in the findings given by the learned Arbitrator *qua* the claim No. 4.

Claim no. 5 - Cost of Arbitration

71. I will now adjudicate upon the Claim no. 5 which pertains to cost of arbitration amounting to Rs. 71,32,071/- .The relevant portion of the Claim has been reproduced as under:

> *" 8.5 Claim No. 5: Claimant on 01.02.2019 had submitted "CD-27" containing Exhibit C-743 (page 8131 to page 8245) seeking reimbursement of the expenditure of Rs. 71,32,071/- (for details refer table below) towards 'Cost of Arbitration' (till sittings upto 22.01.2019) which Is an Interim Claim of the Claimant and Include cost of getting arbitrators appointed, fees of the arbitrator, cost of venue, transport, legal and technical experts, administrative cost etc. Each*

time when the arbitration fee and other receivables became due, AT had ordered the Parties to deposit the amount but the Respondent stopped making any further payment to each member of AT towards arbitration fee and other receivables after depositing Rs. 2,41,000/- for each member, though AT had ordered the Parties .The claim amount is Rs. 71,32,071/- and inclusive of the expenditure upto the sitting dated 22.01.2019 and Rs. 15,00,000/- estimated for future sittings and other related expenditure. Details are tabulated below:

S. No	Description/Particulars	Amount Expended Claimant	Page No.	
	A	B	From	To
1	Expenditure of Arbitration Fees	13,50,000	8140	8158
2	Expenditure of Counselor Fees	15,00,000	8159	8164
3	Payment on behalf of Respondent	6,18,000	8165	8174
4	Expenditure on Venue etc	2,54,675	8175	8210
5	Expenditure of Directors & staff Travelling Exp and other Exp.	14,02,901	8211	8215
6	Office Expenses	89,489	8216	8244
7	Estimated Arbitration Expenditure etc.	15,00,000	--	
8	Reverse Charge Mechanism -18%	3,54,240	--	
9	Interest @ 18% p.a.(from date of payment to 31.01.2019 on payment made by Claimant on behalf of Respondent	62,766	8245	
	Total Amount in Rs.	71,32,071		

Subsequently, AT in his order dated 25.02.2019, sought advance deposit of fee and other receivables till the date of Award from the Parties. In the order it was made clear that in the event of any default on the part of the Respondent of making advance payment to AT, the Claimant shall make such defaulted payments to AT on behalf of Respondent and the same should be notified to AT so that such amount paid on behalf of Respondent by the Claimant get reflected in the Award. Since the Respondent did not comply with the AT's order dated 25.02.2019 in making advance payment to AT up to the date of Award, the Claimant complying to AT's order dated 25.02.2019 under such circumstances made payment of the balance pending amount on behalf of Respondent to AT. With this, AT has received full and final payments due to it from the Parties on this Arbitration case. The Claimant

while revising the amount, submitted final Claim No. 5 amounting to Rs. 1,03,83,376/- to AT with a copy to the Respondent. Details of final Claim No. 5 are shown in Exhibit C-743-R vide CD-27-R dated 14.03.2019 (page no. 8252 to page 8291). The details of final Claim No. 5 as submitted by the Claimant are tabulated below:

Exhibit C-743-R

S. No.	Description/ Particulars	Total Amount Expended in Rs.	Expenditure Incurred by Claimant in Rs. as per submission CD-27 (Exh C-743)		Expenditure Incurred by the Claimant from 23.01.2019 to 11.03.2019 i/c approx. Estimated cost CD-27-R (Exh-C-744)	Refer CD-27-R Page Nos.
1	Arbitration Fees	27,45,750	13,50,000	8140 to 8158	13,95,750	8258 to 8274
2	Counselor Fees	15,00,000	15,00,000	8159 to 8164	--	--
3	Payment on behalf of Respondent	32,58,750	6,18,000	8165 to 8175	26,40,750	8275
4	Expenditure on Venue etc	3,90,965	2,54,675	8175 to8210	1,36,290	8276 to 8288
5	Expenditure of Directors & staff Travelling Exp and other Exp.	14,50,511	14,02,901	8211 to 8215	47,610	8289
6	Office Expenses	89,989	89,489	8216 to 8244	500	8290
7	Estimated Arbitration Expenditure etc.	20,00,000	15,00,000	--	5,00,000	--
8	Reverse Charge Mechanism -18%	3,54,240	3,54,240	--	--	--
9	erest @ 18% p.a.(from date of yment to 31.01.2019 on yment made by Claimant on half of Respondent	93,171	62,766	8245	30,405	8291
	Total Amount	**1,18,82,976**	**71,32,071**		**47,51,305**	

AT has examined the above submission of the Claimant vide "CD-27-R" giving details of revised cost/expenditure of Arbitration subsequent to payment of fee and other receivables to the members of AT, inclusive of the expenditure incurred by the Claimant on behalf of the Respondent in making payments to AT. After deliberations, AT has decided that the Respondent is liable to pay to the Claimant, reasonable cost/expenditure incurred by the Claimant towards Arbitration and accordingly, modified the amount and included in the Award."

72. Before delving into merits of the instant claim no. 5, this Court has examined the law pertaining to the awarding of the cost.

73. Section 31A of the Act, 1996 pertaining to power of the Tribunal in awarding Cost for the reference of this Court has been reproduced as follows:

"31A. Regime for costs.—

(1) In relation to any arbitration proceeding or a proceeding under any of the provisions of this Act pertaining to the arbitration, the Court or arbitral tribunal, notwithstanding anything contained in the Code of Civil Procedure,1908 (5 of 1908), shall have the discretion to determine— (a) whether costs are payable by one party to another; (b) the amount of such costs; and (c) when such costs are to be paid.

Explanation.—For the purpose of this sub-section, "costs" means reasonable costs relating to— (i) the fees and expenses of the arbitrators, Courts and witnesses; (ii) legal fees and expenses; (iii) any administration fees of the institution supervising the arbitration; and (iv) any other expenses incurred in connection with the arbitral or Court proceedings and the arbitral award.

(2) If the Court or arbitral tribunal decides to make an order as to payment of costs,— (a) the general rule is that the unsuccessful party shall be ordered to pay the costs of the successful party; or (b) the Court or arbitral tribunal may make a different order for reasons to be recorded in writing.

(3) In determining the costs, the Court or arbitral tribunal shall have regard to all the circumstances, including— (a) the conduct of all the parties; (b) whether a party has succeeded partly in the case; (c) whether the party had made a frivolous counterclaim leading to delay in the disposal of the arbitral proceedings; and (d) whether any reasonable offer to settle the dispute is made by a party and refused by the other party. (4) The Court or arbitral tribunal may make any order under this section including the order that a party shall pay— (a) a proportion of another party's costs; (b) a stated amount in respect of another party's costs; (c) costs from or until a certain date only; (d) costs incurred before proceedings have begun; (e)

costs relating to particular steps taken in the proceedings;
(f) costs relating only to a distinct part of the proceedings; and (g) interest on costs from or until a certain date.
(5) An agreement which has the effect that a party is to pay the whole or part of the costs of the arbitration in any event shall be only valid if such agreement is made after the dispute in question has arisen."

74. The Hon'ble Supreme Court has enunciated upon the principle regarding cost which can be imposed by an Arbitral Tribunal in the case of ***ONGC v. Afcons Gunanusa JV***, **2022 SCC OnLine SC 1122**, and held as follows:

"91. *Section 31A provides that the arbitral tribunal or the court has the discretion to determine costs of arbitration which includes, inter alia, reasonable costs relating to the fees and expenses of the arbitrators, courts and witnesses. Sub-Section (5) of Section 31A specifies that an agreement between parties apportioning costs is only valid if it is made after the dispute has arisen. The provision has an effect of limiting party autonomy when an agreement regarding apportioning of costs can be entered between the parties. However, it does not completely efface the principle of party autonomy.*
xxx
97. *The above interpretation of this Court is in harmony with the observations of the Law Commission in the LCI 246th Report (supra) where it had recommended changes to the regime of costs only to provide a statutory recognition to the "loser pays" principle. The Report contained the following observations:*
"70. Arbitration, much like traditional adversarial dispute resolution, can be an expensive proposition. The savings of a party in avoiding payment of court fee, is usually offset by the other costs of arbitration - which include arbitrator's fees

and expenses, institutional fees and expenses, fees and expenses in relation to lawyers, witnesses, venue, hearings etc. The potential for racking up significant costs justify a need for predictability and clarity in the rules relating to apportionment and recovery of such costs. The Commission believes that, as a rule, it is just to allocate costs in a manner which reflects the parties' relative success and failure in the arbitration, unless special circumstances warrant an exception or the parties otherwise agree (only after the dispute has arisen between them).

71. The loser-pays rule logically follows, as a matter of law, from the very basis of deciding the underlying dispute in a particular manner; and as a matter of economic policy, provides economically efficient deterrence against frivolous conduct and furthers compliance with contractual obligations."

98. *The Law Commission was seeking to regulate how costs are apportioned and recovered between parties by suggesting amendments to the legal framework on costs. The same LCI 246th Report (supra) dealt with redressing the issue of exorbitant fees being charged by arbitrators and recommended the introduction of a model schedule of fees, based on which High Courts could frame rules on fixing fees, to decrease the control arbitrators have over fixing their own fees. Hence, it is evident that the Law Commission understood that the issue of arbitrators' fees is independent of the issue of allocation of costs. The LCI 246th Report (supra) was attempting to address the concern of arbitrary and unilateral fixation of fees by the arbitrators. The interpretation suggested by the respondents, that while allocating costs the arbitral tribunal can enter into a fresh and unilateral determination of fees, would be contrary to what the Law Commission sought to achieve by recommending the regulation of fees charged by arbitrators.*

99. *The concepts of costs and fees in arbitration must be distinguished. Fees constitute compensation or remuneration payable to the arbitrators for their service. Arbitrators are entitled to "financial remuneration by the parties in return*

for performance of his or her mandate". While the national laws governing arbitration give a quasi-judicial status to arbitrators where they have to be impartial adjudicators, many aspects of the relationship between the parties and arbitrators are contractual in nature. Without acknowledging the contractual nature of the relationship, there is no satisfactory explanation for the parties' right to appoint arbitrator(s) (and the corresponding right of the arbitrator(s) to decline such appointment), arbitrators' remuneration, arbitrators' duty to conduct arbitration in terms of the arbitration agreement (independently of the requirement of fairness and equality) and the parties' right to jointly remove arbitrator(s). In Voestalpine Schienen GmbH v. Delhi Metro Rail Corpn. Ltd, this Court, while holding that the arbitrator has to act impartially and independently, recognised the contractual nature of the relationship between the parties and arbitrator(s) in the following extract:

"20. Independence and impartiality of the arbitrator are the hallmarks of any arbitration proceedings. Rule against bias is one of the fundamental principles of natural justice which applied to all judicial and quasi-judicial proceedings. ***It is for this reason that notwithstanding the fact that relationship between the parties to the arbitration and the arbitrators themselves are contractual in nature and the source of an arbitrator's appointment is deduced from the agreement entered into between the parties, notwithstanding the same non-independence and nonimpartiality of such arbitrator (though contractually agreed upon) would render him ineligible to conduct the arbitration. The genesis behind this rational is that even when an arbitrator is appointed in terms of contract and by the parties to the contract, he is independent of the parties****. Functions and duties require him to rise above the partisan interest of the parties and not to act in, or so as to further, the particular interest of either parties. After all, the arbitrator has adjudicatory role to perform and, therefore, he must be independent of parties as well as impartial. The*

United Kingdom Supreme Court has beautifully highlighted this aspect in Hashwani v. Jivraj [Hashwani v. Jivraj, [2011] 1 WLR 1872 : 2011 UKSC 40] in the following words : (WLR p. 1889, para 45)

"45. ... the dominant purpose of appointing an arbitrator or arbitrators is the impartial resolution of the dispute between the parties in accordance with the terms of the agreement and, although the contract between the parties and the arbitrators would be a contract for the provision of personal services, they were not personal services under the direction of the parties."

*(**emphasis supplied**)*

***100.** The relationship between parties and arbitrator(s) is contractual in nature. Upon that relationship, the law superimposes a duty upon the arbitrator(s) to act as an impartial and independent adjudicator. The principle of party autonomy plays a substantial role in the determination of arbitrators' fees. We have noted in **Section C.1** of this judgment that party autonomy plays a central role in the determination of arbitrators' fees in the rules of international arbitral institutions and domestic legislation of other countries. Aside from institutional arbitration, arbitrators' fees in ad hoc arbitration are arrived at through negotiations between the parties and the arbitrator(s. The primacy of parties' agreement in determination of arbitrators' fees was also reaffirmed by this Court in Gayatri Jhansi Roadways Ltd. (supra). However, there may be instances where the parties have not entered into any agreement with respect to the fees. In ad hoc arbitrations this leads to a peculiar situation where it has to be determined who will fix the fees in such circumstances. While certain foreign jurisdictions enable the arbitral tribunal to fix the fees typically subject to review by courts, there are jurisdictions which continue to give value to parties' consent in determining renumeration for arbitrators. As discussed above in **Section C.1**, in certain jurisdictions like Germany, arbitrators are prohibited from unilaterally fixing their fees because it violates the doctrine*

of the prohibition of in rem suam decisions, i.e., arbitrators cannot give an enforceable ruling on their own fees. Austria and Switzerland also do not allow arbitrators to issue binding and enforceable orders regarding fixation of their own fees. In Italy, while the arbitrators can determine fees in absence of an agreement between parties, such fees become binding only once the parties' consent to it. In Singapore, in absence of a written agreement, a party may approach the Registrar of the Supreme Court within the meaning of the Supreme Court of Judicature Act 1969 for the assessment of fees.

101. *In contrast, costs are typically compensation payable by the losing party to the winning party for the expenses the latter incurred by participating in the proceedings. In Salem Advocate Bar Assn. (II) v. Union of India, this Court has defined costs in a similar manner in the context of litigation:*

"37. Judicial notice can be taken of the fact that many unscrupulous parties take advantage of the fact that either the costs are not awarded or nominal costs are awarded against the unsuccessful party. Unfortunately, it has become a practice to direct parties to bear their own costs. In a large number of cases, such an order is passed despite Section 35(2) of the Code. Such a practice also encourages the filing of frivolous suits. It also leads to the taking up of frivolous defences. Further, wherever costs are awarded, ordinarily the same are not realistic and are nominal. When Section 35(2) provides for cost to follow the event, it is implicit that ***the costs have to be those which are reasonably incurred by a successful party except in those cases where the court in its discretion may direct otherwise by recording reasons therefore. The costs have to be actual reasonable costs including the cost of the time spent by the successful party, the transportation and lodging, if any, or any other incidental costs besides the payment of the court fee, lawyer's fee, typing and other costs in relation to the litigation****. It is for the High Courts to examine these aspects and wherever necessary make requisite rules, regulations or practice direction so as to provide appropriate guidelines for*

the subordinate courts to follow."
(emphasis supplied)

102. *The principle of the payment of "costs" remains the same in litigation and arbitration even though the form of expenses may vary. Redfern and Hunter on International Commercial Arbitration (supra) has classified the various components of costs under the following headings:*

"•'costs of the tribunal' (including the charges for administration of the arbitration by any arbitral institution);

•'costs of the arbitration' (including hiring the hearing rooms, interpreters, transcript preparation, among other things); and

•'costs of the parties' (including the costs of legal representation, expert witnesses, witness and other travel-related expenditure, among other things)."

103. *The first category of "costs of the tribunal" includes the fees, travel-related and other expenses, payable to the arbitrators. However, this category also includes fees and expenses relating to the experts appointed by the tribunal, administrative secretary or registrar and other incidental expenses incurred by the tribunal in respect of the case. Fees of arbitrators constitute a component of the diverse elements which make up the costs that are payable by one party to another. The purpose of awarding costs is to "indemnify the winning party". The "loser pays" principle apportions the costs between the parties through the costs follow the event method. The primary purpose of the CFE method is to "make the claimant whole". The CFE method has been statutorily recognised in some national legislations. The English Arbitration Act provides that "unless the parties otherwise agree, the tribunal shall award costs on the general principle that costs should follow the event except where it appears to the tribunal that this principle is not appropriate in relation to whole or part of the costs". Since costs are typically awarded at the conclusion of the proceedings on the basis of the relative success or failure of parties, an award of costs forms a part of the final award. However, interim awards or rulings on costs may also be*

issued. Most international arbitral institutions give arbitral tribunals the discretion to allocate costs unless there is an agreement between the parties regarding the apportionment of costs. It has been noted that the "loser pays" principle is a common approach followed for awarding costs. The UNCITRAL Rules, while providing that costs of arbitration shall be "borne by the unsuccessful party" as a general principle, allow the arbitral tribunal to take the ultimate decision. The LCIA Rules allow the arbitral tribunal to depart from the general principle "in circumstances (in which) the application of such a general principle would be inappropriate". The Arbitration Act also provides statutory recognition to the principle of "loser pays" in Section 31A (2) as the general principle of allocating costs, which can be derogated from at the discretion of the tribunal provided it records its reasons in writing. Further, the Arbitration Act seeks to limit the ability of parties to contractually allocate fees by specifying in Section 31A(5) that such an agreement will only be valid "if such agreement is made after the dispute in question has arisen". The intention of the legislature to limit party autonomy in allocation of costs is also evident from the deletion of the phrase "unless otherwise agreed by the parties" from Section 31(8) through the Amendment Act 2015.

104. *We can see that the functional role of costs and fees is different. While fees represent the payment of remuneration to the arbitrators, costs refer to all the expenses incurred in relation to arbitration that are to be allocated between the parties upon the assessment of certain parameters by the arbitral tribunal or the court. Section 31A(3) provides that an arbitral tribunal or the court has to take into account the following factors for determining costs:*

"(a) the conduct of all the parties;

(b) whether a party has succeeded partly in the case;

(c) whether the party had made a frivolous counter claim leading to delay in the disposal of the arbitral proceedings; and

(d) whether any reasonable offer to settle the dispute is made

by a party and refused by the other party."

105. *This is accompanied by the general rule under Section 31A(2) that the unsuccessful party has to bear the costs of arbitration.*

106. *Another way to understand the difference between costs and fees is to distinguish between the nature of the claim that both reflect. Redfern and Hunter on International Commercial Arbitration (supra) discusses costs in Chapter 9, titled "Awards". It states that "[a] claim in respect of the costs incurred by a party in connection with an international arbitration is, in principle, no different from any other claim, except that it usually cannot be quantified until the end of the arbitral proceedings". The decision of an arbitral tribunal ordering one party to pay arbitration costs is considered as an "award" within the meaning of the New York Convention and UNCITRAL Model Law since the decision resolves a claim one party has towards another in respect to the entitlement of being repaid by the other party for expenses incurred during arbitration. Gary Born on Arbitration (supra) specifically notes the difference between costs and fees, and states that any decision of the arbitral tribunal relating to payment of fees to the members of the tribunal is not considered an award since it does not resolve a claim between the parties; rather it resolves a claim between the arbitrator(s) against the parties. The Swiss Federal Tribunal has observed in this context that:*

"[A]ccording to the majority of legal writing the arbitral tribunal has no authority to issue an enforceable decision as to the fees it may derive from the arbitration agreement (receptum arbitri). This is because claims resulting from the relationship between the arbitral tribunal and the parties do not fall within the arbitration clause; also because this would be an unacceptable decision in one's own case. The decision on costs in an arbitral award is therefore nothing else as a rendering of account which does not bind the parties or a circumscription of the arbitrators' private law claim based on the arbitration agreement on which in case of dispute the State Court will have to decide."

107. *The German arbitration law also takes the above position, where a portion of the award relating to costs of arbitration was denied enforcement as arbitrators are prohibited from fixing their own fees and costs, except when there is an agreement between the parties and arbitrators*[137]*.*

108. *Since fees of the arbitrators are not a claim that needs to be quantified at the end of the proceedings based, inter alia, on the conduct of parties and outcome of the proceedings, they can be determined at the stage when the arbitral tribunal is being constituted. Redfern and Hunter on International Commercial Arbitration (supra) discusses the concept of fees of arbitrators in Chapter 4, titled "Establishment and Organisation of an Arbitral Tribunal", indicating that fees have to be determined much earlier at the inception of the proceedings. In fact, the commentary states that in ad hoc arbitrations, "it is necessary for the parties to make their own arrangements with the arbitrators as to their fees. The arbitrators should do this at an early stage in the proceedings, in order to avoid misunderstandings later".*

109. *It has been argued on behalf of the respondents that the power of arbitrator(s) under Section 38(1) of the Arbitration Act to demand a deposit as an advance on costs "which it expects will be incurred" in relation to the claim and counterclaim (if any) indicates that the tribunal is entitled to determine its own fees. If such a deposit is not paid, the tribunal can suspend or terminate the proceedings under Section 38(2) of the Arbitration Act. It can also hold a lien on the award if the costs of arbitration remain unpaid under Section 39(1) of the Arbitration Act.*

110. *Gary Born on Arbitration (supra) explains the concept of an advance on costs or deposits in the following terms:*

"Once the arbitral tribunal is in place, the parties are generally required to provide security for the fees and costs of the arbitrators. Most institutional arbitration rules contain express provisions for payment by the parties of an advance on costs (or deposit), and arbitrators often have the power under national law to require payment of an advance

even absent express provision to that effect in either the arbitration agreement or institutional rules.
The amount of the advance on costs is based upon the expected total amount of fees and expenses of the arbitrators and institutional administrative costs. If the parties do not pay the advance, the arbitration will not go forward; if one party fails to make payment, the other may do so on its behalf, so that the arbitration will proceed, hopefully to conclude with a decision in its favor, in which the prevailing party will be awarded (among other things) reimbursement of the amounts it advanced on behalf of its counter-party."

75. As per Section 31 A of the Act which enunciates upon the principle of awarding cost, the Tribunal has the discretion to award cost to the parties. Section 31A(1) provides that in relation to any arbitration proceeding, the arbitral tribunal has discretion to determine whether costs are payable by one party to another,the amount of such costs and when such costs are to be paid. Section 31A(2) provides that if a tribunal decides to make an order as to the payment of costs, the general rule is that the unsuccessful party will be ordered to pay the successful party's costs. Alternatively, a tribunal may make a different order for reasons which must be recorded in writing. In exercising their powers under Section 31A of the Act. Under Section 31 A (3) enunciates various factors which have to taken into account for awarding the cost. Further, upon perusal of the observation of the Hon'ble Supreme Court in the aforementioned judgment, it is observed that the Court is entitled to award cost as it deems as per the circumstances of the case.

76. Section 31A(1) of the Act allows only for reasonable costs to be recovered and not actual costs as claimed by the party. Therefore, the test of reasonableness must be done by the Tribunal and the Tribunal must

consider the reasonableness of the costs claimed by the claimant. The factors which may be taken into consideration to determine reasonableness vary and such an assessment is not straightforward formula. The issues in determining reasonable costs are further compounded by the significant costs imposed on parties by their solicitors and counsel, which, along with the manner of billing, vary.

77. Now keeping in mind the principle governing awarding of cost by the Arbitral Tribunal. This Court will now examine claim no. 5.

78. The claim no. 5 pertains to the cost of the arbitration. The learned Tribunal *vide* Tribunal's order dated 25th February 2019 directed the parties to pay in advance the fees of the learned Tribunal and in case of default on account of the petitioner in making the said payment the petitioner shall make such payment to the learned tribunal. Thereafter, when the petitioner did not make the pay towards the arbitral fees due to the Tribunal and respondent in compliance with the said order paid the learened Arbitral Tribunal. Hence, the Tribunal held that the respondent is entitled for the cost of arbitration.

79. This Court is of the view that test of reasonableness of cost has been taken into account by the Tribunal towards the cost/expenditure incurred by the respondent towards Arbitration and accordingly, modified the amount and included in the Award for claim no. 5.In view of the above facts and circumstances, I do not find any reason to interfere in the findings given by the learned Arbitrator *qua* the claim No. 5.

Claim no. 6 - Interest on amount claimed both Pre-lite and Pendent elite.

80. The relevant portion of Claim no. 6 has been reproduced herein below:

> *"8.6 Claim No. 6: This Claim includes component of interest, both Pre-lite, Pendent elite @18% p.a. on the Award. AT deems it fit to allow Pre-lite and Pendent elite Interest on the amounts of Award against Claims No. 3 to Claim no. 5 which the Respondent is liable to pay from the date of submission of SOC (11.11.2017) till the date of Award (25.03.2019). Keeping in view the prevailing low rates of interest in the past, AT decides the payable rate of Interest @ 10% (simple) per annum, on the relevant amounts as included in the Award towards Pre-lite and Pendent-lite interest.*

81. Before delving into merits of this claim no. 6, this Court will examine the law applicable on Tribunal's power in awarding interest.

82. This Court has placed reliance on Section 31 (7)(a) of the Act pertaining to Tribunal awarding interest has been reproduced below:

> *"(7) (a) Unless otherwise agreed by the parties, where and in so far as an arbitral award is for the payment of money, the arbitral tribunal may include in the sum for which the award is made interest, at such rate as it deems reasonable, on the whole or any part of the money, for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made.*
> *[1][(b) A sum directed to be paid by an arbitral award shall, unless the award otherwise directs, carry interest at the rate of two per cent. higher than the current rate of interest prevalent on the date of award, from the date of award to the date of payment."*
> *Explanation.—The expression "current rate of interest" shall have the same meaning as assigned to it under clause (b) of section 2 of the Interest Act, 1978 (14 of 1978).]"*

83. In regard to the Tribunal's discretion in awarding interest under Section 31 (7) (a) of the Act, 1996, the Hon'ble Supreme Court in the judgment of ***Morgan Securities & Credits (P) Ltd. v. Videocon Industries Ltd.*, (2023) 1 SCC 602** held as follows:

> *"25. Section 31(7)(a) confers a wide discretion upon the arbitrator in regard to the grant of pre-award interest. The arbitrator has the discretion to determine the rate of reasonable interest, the sum on which the interest is to be* paid*, that is whether on the whole or any part of the principal amount, and the period for which payment of interest is to be made — whether it should be for the whole or any part of the period between the date on which the cause of action arose and the date of the award. When a discretion has been conferred on the arbitrator in regard to the grant of pre-award interest, it would be against the grain of statutory interpretation to presuppose that the legislative intent was to reduce the discretionary power of the arbitrator for the grant of post-award interest under clause (b). Clause (b) only contemplates a situation where the arbitration award is silent on post-award interest, in which event the award-holder is entitled to a post-award interest of eighteen per cent.*
>
> *26. The arbitrator has the discretion to grant post-award interest. Clause (b) does not fetter the discretion of the arbitrator to grant post-award interest. It only contemplates a situation in which the discretion is not exercised by the arbitrator. Therefore, the observations in Hyder Consulting [Hyder Consulting (UK) Ltd. v. State of Orissa, (2015) 2 SCC 189 : (2015) 2 SCC (Civ) 38] on the meaning of "sum" will not restrict the discretion of the arbitrator to grant post-award interest. There is nothing in the provision which restricts the discretion of the arbitrator for the grant of post-award interest which the arbitrator otherwise holds inherent to their authority.*
>
> *27. The purpose of granting post-award interest is to ensure that the award-debtor does not delay the payment of the*

award. With the proliferation of arbitration, issues involving both high and low financial implications are referred to arbitration. The arbitrator takes note of various factors such as the financial standing of the award-debtor and the circumstances of the parties in dispute before awarding interest. The discretion of the arbitrator can only be restricted by an express provision to that effect. Clause (a) subjects the exercise of discretion by the arbitrator on the grant of pre-award interest to the arbitral award. However, there is no provision in the Act which restricts the exercise of discretion to grant post-award interest by the arbitrator. The arbitrator must exercise the discretion in good faith, must take into account relevant and not irrelevant considerations, and must act reasonably and rationally taking cognizance of the surrounding circumstances.

28. In view of the discussion above, we summarise our findings below:

28.1. The judgment of the two-Judge Bench in S.L. Arora [State of Haryana v. S.L. Arora & Co., (2010) 3 SCC 690 : (2010) 1 SCC (Civ) 823] was referred to a three-Judge Bench in Hyder Consulting [Hyder Consulting (UK) Ltd. v. State of Orissa, (2015) 2 SCC 189 : (2015) 2 SCC (Civ) 38] on the question of whether post-award interest could be granted on the aggregate of the principal and the pre-award interest arrived at under Section 31(7)(a) of the Act.

28.2. Bobde, J.'s opinion in Hyder Consulting [Hyder Consulting (UK) Ltd. v. State of Orissa, (2015) 2 SCC 189 : (2015) 2 SCC (Civ) 38] held that the arbitrator may grant post-award interest on the aggregate of the principal and the pre-award interest. The opinion did not discuss the issue of whether the arbitrator could use their discretion to award post-award interest on a part of the "sum" awarded under Section 31(7)(a).

28.3. The phrase "unless the award otherwise directs" in Section 31(7)(b) only qualifies the rate of interest.

> *28.4. According to Section 31(7)(b), if the arbitrator does not grant post-award interest, the award holder is entitled to post-award interest at eighteen per cent.*
> *28.5. Section 31(7)(b) does not fetter or restrict the discretion that the arbitrator holds in granting post-award interest. The arbitrator has the discretion to award post-award interest on a part of the sum.*
> *28.6. The arbitrator must exercise the discretionary power to grant post-award interest reasonably and in good faith, taking into account all relevant circumstances"*

84. Under Section 31(7)(b) of the Act, 1996, the Arbitrator has the discretion to determine the rate of reasonable interest, the sum on which the interest is to be paid, that is whether on the whole or any part of the principal amount, and the period for which payment of interest is to be made. This discretion to the Court is subjected to be exercised by the learned Tribunal in a reasonable manner.

85. In the light of claim No. 6, it is, hereby, held by the learned Tribunal that in view of the prevailing low rates of interest in the past, it has decided the payable interest amount by way of simple interest at the rate of 10% per annum on the amounts as included in the Impugned Award towards the pre-lite and pendent-lite interest.

86. Therefore, this Court is of the view that the learned Tribunal has correctly exercised its discretion of awarding interest under Section 31(7)(b) of the Act, 1996 in a reasonable manner and has given its reason for awarding the interest. In view of the above facts and circumstances, I do not find any reason to interfere in the findings given by the learned Arbitrator *qua* the claim No. 6.

87. The relevant portion of the Award dated 25th March 2019 is reproduced hereunder:

> *9. AWARD*
> *9.1 This Award is based on the facts adduced before the AT consequent to Parties signing the CA on 01.08.2016 and later after a long gap fixed the 'Appointed O Date' as 10.12.2017 based on the 'waiver' given by the Claimant pursuant to Clause 27.4 of CA vide Claimant letter no. ABL/RCB/GM/NH-32/EPC/2017- 18/248 dated 20.11.2017 (refer "CD-12", page 5608: Exhibit C-526).*
> *9.2 The Arbitral Record comprises of Pleadings and Documents as were filed by the Parties with copies endorsed to the opposite Party. There is no original Document In the Arbitral Record other than the final Award, of which signed copies are provided to both the Parties.*
> *9.3 The AT decides that the finalized Award amount has to be paid by the Respondent to the Claimant. The details of the finalized Award amount as allowed after adjudication of disputes by the AT are as follows:*
> *(i). AT observed that Claim no. 1 and 2 do not carry any monetary value. Award amount as finalized by AT for the Claim no. 3, 4, 5 and 7 up to the date of submission of SOC on 11.11.2017 is Rs. 3192.36 lakhs plus the amount towards GST as per actual.*
> *(ii). AT allowed the reasonable amount towards Claim no. 6 i.e., component of interest for the period from 12.11.2017 till 25.03. 2019(the Date of Award) considering 499 days period @ 10% simple interest per annum. The interest amount so worked out is given below:*
> *(3192.36x499x0.1)/ 365 = Rs. 436.43 lakhs.*
> *So the Total Award amount payable by the Respondent to Claimant till the date of Award (25.03.2019) = (3192.36+436.43) lakhs+ GST as per actual = Rs. 3628.79 lakhs plus the amount towards GST, if any, as per actual.*

9.4 Amount towards 'Goods and Service Tax' (GST), if any, is to be paid by the Respondent to the Claimant as per law of the land. The exact amount involved shall be determined and agreed between the Parties at the time of making payment.

SUMMARY OF AWARD

(Amount in Rupees Lakhs)

Claim No.	Description	AS SUBMITTED BY THE CLAIMANT			AWARD AMOUNT
		Basic amount of claim	Compensation from date of notice of arbitration (31.07.2017) to date of submission of claims (11.11.2017) (@10% compounded quarterly based on the rate in clause 19.2.1)	Total Amount claimed by the Claimant till 11.11.2017 (i.e. submission of SOC)	
1	Declaratory award	--	--		Not applicable
2	Declaratory award	--	--		Not applicable
3	Compensation for delayed payment of the utility shifting bill of Rs.505.26 lakhs @10% quarterly compounded	33.08	0.94	34.02	28.63
4	Compensation on account of delay on account of access to site for the period from signing of agreement to appointed date.	9098.06	257.54	9355.60	3081.26
5	Cost of arbitration	Submitted separately as actual	--	103.83	82.47
7	GST @18% on all above amounts claimed by the Claimant.	1643.61	46.53	1690.14	As per actual
	Sub-total (till 11.11.2017)	**10774.75**	**305.01**	**11079.76**	**3192.36 + GST as per actual**
6	**Interest on the AWARD AMOUNT from 12.11.2017 till date of award on 25.03.2019 @ 10 % (simple) per annum (period =499 days)**			**N.A (Interest @ 10% compounded quarterly)**	**436.43**
	GRAND TOTAL AS ON THE DATE OF AWARD (25.03.2019)			**11079.76+ Interest @10% compounded quarterly from 12.11.2017 till 25.03.2019(Amt of Interest claimed but not shown by the Claimant)**	**3628.79 +GST AS PER ACTUAL**

9.5 This Award Is made on Non-Judicial Stamp Paper of Rs. 500/- at New Delhi on this the Twenty Fifth day of March

2019. The cost of this stamp paper was borne by the Claimant. Deficiency in the value of Non-Judicial Stamp Paper, if any, will be supplied by the Parties on equal sharing basis.

9.6 We, however, hold that in case the Respondent pays the awarded amount (Rs 3628.79 Lakhs +GST as per actual) to the Claimant within 90 days from the date of this Award (25.03.2019), no post award interest shall be payable. In the event payment of the awarded amount is not made by the Respondent within the said 90 days, the Respondent shall be liable to pay interest on the total awarded amount @ 10% (simple) per annum, from the date of award (25.03.2019) till the actual date of payment to the Claimant."

88. I do not find any reason to interfere in the findings given by the learned Arbitrator *qua* the claims No. 4,5 and 6 which have been challenged in the instant petition.Accordingly, this Court upholds the claims as awarded by the learned Tribunal

CONCLUSION

89. In light of the facts, submissions, and contentions in the pleadings, this Court finds no cogent reasons to entertain the instant petition. This Court finds that the petitioner has failed to corroborate with evidence as to how the learned Arbitrator had erred in adjudicating upon the dispute.

90. The law which has been settled by the Hon'ble Supreme Court is that the scope of interference with an Arbitral Award under Section 34 of the Act, 1996 is fairly limited and narrow. The Courts shall not sit in an appeal while adjudicating a challenge to an Award which is passed by an Arbitrator, the master of evidence, after due consideration of facts, circumstances, evidence, and material before him.

91. In the instant petition, it was argued that the Impugned Award is patently illegal and thus liable to be set aside. As stipulated by the

aforementioned precedents, it is essential that there be illegalities or deficiencies at the face of the Award which shocks the conscience of the Court in order for it to qualify to be set aside by an act of this Court while adjudicating upon a petition filed under Section 34 of the Act, 1996

92. In light of the facts of the instant case, the petitioner has failed to make out such a case and has been unable to show that the Impugned Award is patently illegal on the face of it.

93. A perusal of the Impugned Award makes it evident that there is no patent illegality or error apparent on the face of the record. The learned Arbitrator has passed the Impugned Award after considering all the relevant material placed before it during the arbitral proceedings. The said Award is well-reasoned and is not in contravention of the fundamental policy of Indian law. Therefore, as the petitioner has failed to show that any grounds that are stipulated under Section 34 of the Act, 1996 are being met, there is no reason for interfering with the Impugned Award.

94. In view of the above discussion of facts and law, this Court finds no reason to set aside the Impugned Arbitral Award.

95. The instant petition is, accordingly, dismissed. Pending applications, if any, also stand dismissed.

96. The judgment be uploaded on the website forthwith.

(CHANDRA DHARI SINGH)
JUDGE

SEPTEMBER 13, 2023
gs/db