IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 30TH DAY OF JULY, 2025

PRESENT

THE HON'BLE MR. VIBHU BAKHRU, CHIEF JUSTICE

AND

THE HON'BLE MR. JUSTICE C M JOSHI

COMMERCIAL APPEAL NO. 135 OF 2025

BETWEEN:

THE STATE PROJECT DIRECTOR,
RASHTRIYA MADHYAMIKA SHIKSHANA
ABHIYANA,
NEW PUBLIC OFFICES ANNEX BUILDING,
K R CIRCLE, NRUPATUNGA ROAD,
BENGALURU-560 001.

...APPELLANT

(BY SRI ADITYA VIKRAM BHAT, AGA)

AND:

MYCON CONSTRUCTION LTD.,
A COMPANY INCORPORATED UNDER THE PROVISIONS
OF THE COMPANIES ACT, 1956,
HAVING REGISTERED OFFICE AT INDUSTRY HOUSE,
NO.45, RACE COURSE ROAD, BENGALURU-560 001.
REP. BY ITS MANAGING DIRECTOR,
SRI ANIL KUMAR MALPANI

...RESPONDENT

THIS COMAP/COMMERCIAL APPEAL UNDER SECTION 13(1)(A) OF COMMERCIAL COURT ACT 2015, PRAYING TO SET ASIDE THE JUDGMENT DATED 02.12.2024, PASSED IN COM.AP NO. 202/2023, ON THE FILE OF THE HON'BLE LXXXVI ADDITIONAL CITY CIVIL AND SESSIONS JUDGE AT BENGALURU, AND CONSEQUENTLY TO SET ASIDE THE AWARD DATED 13.09.2023 PASSED BY THE LEARNED SOLE ARBITRATOR IN AC NO. 299/2022.

THIS APPEAL, COMING ON FOR ORDERS, THIS DAY, JUDGMENT WAS DELIVERED THEREIN AS UNDER:

CORAM: HON'BLE MR. VIBHU BAKHRU, CHIEF JUSTICE
and
HON'BLE MR. JUSTICE C M JOSHI

ORAL JUDGMENT

(PER: HON'BLE MR. VIBHU BAKHRU, CHIEF JUSTICE)

1. For the reasons stated in the application-I.A No.2/2025, the same is allowed. The delay in filing the appeal is condoned.

2. Feeling aggrieved by dismissal of a challenge under Section 34 of Arbitration and Conciliation Act, 1996 [**the A&C Act**] in COM.A.P.No.202/2023 passed by learned 86th Additional City Civil and Sessions Judge, [**Commercial Court**], Bengaluru, dated 02.12.2024, the petitioner [**Rashtriya Madhyamika Shiksha Abhiyan**] is before this Court in an appeal under Section 37(1)(c) of the A&C Act.

3. The appellant had invited tender for construction of the model schools and for upgrading and strengthening of existing Government High Schools in 30 districts across the State of Karnataka. The respondent was the successful bidder for

construction of buildings under Package A-B. Accordingly, the appellant and the respondent entered into construction agreement dated 15.05.2013, which consisted of General Conditions of Contract [**GCC**] and also Special Conditions of Contract [**SCC**]. During the execution of the work, additional quantity of work was also entrusted to the respondent and a supplementary agreement on 14.03.2017 was entered into in this regard. In the original tender notification that was floated on E-procurement portal, Clause No.39 was pertaining to 'Price Adjustment'. There was a note below the tender document, which stated that "the price adjustment clause may be treated as deleted". However, the agreements entered into on 15.05.2013 and 14.03.2017 contained the Price Adjustment Clause No.39. As per the terms of the contract, the respondent commenced the work and completed the same, although with certain defects; while raising the bills, the respondent raised the bills under the head of price adjustment clause also. The same was objected by the appellant resulting in an arbitral reference in A.C.No.299/2022.

4. The Arbitral Tribunal commenced the proceedings and adopting fast-track procedure passed an award on 13.09.2023,

partly allowing the claim of the respondent for a sum of ₹1,27,73,641/- as against the claim of ₹2,84,15,897/- along with interest. The Arbitral Tribunal held that the price adjustment clause is valid. Being aggrieved by the same, the appellant preferred a petition under Section 34 of the A&C Act. After hearing both the parties, the said petition came to be dismissed by the Commercial Court through the impugned order.

5. We have heard the learned Additional Government Advocate appearing for the appellant.

6. It is contended by the learned Advocate appearing for the appellant that the intention of the appellant was to delete the Price Adjustment Clause in the agreement. It is submitted that the tender notification/RFP at Exhibit P2 did not contain the price adjustment clause and it was required to be treated as deleted. Only on the ground that the agreement containing the Price Adjustment clause was erroneously signed by the State Project Engineer, on behalf of the appellant, the Arbitral Tribunal has fallen into an error. Therefore, the respondent is not entitled to claim any amount under the Price Adjustment clause. The learned Arbitrator as well as the

Commercial Court have not considered the said aspect and have landed in an erroneous finding. It is also contended that the Commercial Court has not appreciated the grounds mentioned in the petition and on the other hand, it has straight away stated that the appellant has not made out any grounds that are available under Section 34 of the A&C Act, *inter alia*, he has also relied on the decision in the case of **K P Chowdhry Vs State of Madhya Pradesh: AIR:1967:SC:203**.

7. It is urged that when it is clearly mentioned in the note at the bottom of the tender notification/RFP that the price adjustment clause has been treated as deleted, it was not open for the parties to incorporate the said clause in the agreement and as such, the authority who signed the agreement on behalf of the appellant was not supposed to have incorporated the same.

8. In the light of the above submissions, the only point that arises for our consideration in the present appeal is, whether the grounds urged by the learned counsel for the appellant would fall within the ambit of Section 34(2A) of the A&C Act?

9. At this stage, it is relevant to observe that the only question urged by the learned counsel for the appellant relates to the challenge to the award of ₹1,27,73,641/- towards price escalation by applying the Price Variation Clause (Clause No.39) of the agreement. The said clause reads as under:

> "39.1 Contract Price shall be adjusted for increase or decrease in rates and Prices of Labour, Materials, Fuels and Lubricants in accordance with the following Principles and Procedures and as per the Formulae given in the Contract Data.
>
> a) The Price Adjustment shall apply for the Work done from the Date of Commencement upto the End of Original Period of Completion or Extensions granted by the Employer and shall not apply to Work carried out beyond the Stipulated Period of Completion for Reasons attributable to the Contractor.
>
> b) Price Adjustment shall be admissible from the Date of Opening of Tenders (Original or Extended)
>
> c) The Price Adjustment shall be determined during each quarter from
>
> the Formulae given in Contract Data.
>
> d) Following Expressions and Meanings are assigned to the Work done during the quarter: R= Total Value of Work done during the quarter. It will exclude Value for Works executed under Variations for which Price Adjustment (if any) will be worked out separately based on the Terms mutually agreed.
>
> 39.2 To the extent that full compensation for any rise or fall in costs to the Contractor is not covered by the Provisions of this or other. Clauses in the Contract, the Unit Rates included in the Contract shall be deemed to include

Amounts to cover the Contingency of such other rise or fall in costs."

10. There is no controversy that the amount of escalation computed is in conformity with the said clause. The only contention raised is that the said clause did not form part of the agreement between the parties.

11. In this regard, it is relevant to note that the tender documents as placed in the e-portal included the SCC as well as the GCC. The terms and conditions of the draft agreement included Clause No.39 as set out above. However, the e-portal also contained a note to the effect that "Price Adjustment Clause No.39 may be treated as deleted". The appellant contends, on the basis of the aforesaid note, that Clause No.39 was not a part of the agreement between the parties. However, there is no dispute that the agreement finally signed by the parties included Clause No.39 as set out above. The agreement between the parties neither included a note to the effect that the said clause may be treated as deleted nor was the said clause scored out in the documents as executed by the parties. The appellant did not dispute that the agreement finally signed between the parties included the said clause. However, he

contends that since it was not the intention of the Government to include such a clause, the agreement to the said effect falls foul of Article 299 of the Constitution of India. In other words, it is the appellant's case that Clause No.39 of the agreement must be treated as non-existent, as according to the appellant it was included in the agreement without authority.

12. It was the respondent's case before the Arbitral Tribunal that the price variation clause was a term of the agreement executed between the parties. The respondent furnished a bid of ₹14,47,03,419.50/- [Fourteen Crores Forty Seven Lakhs Three Thousand Four Hundred Nineteen Rupees and Fifty Paise only]. However, during the negotiations the said price was reduced to ₹13,85,42,803/- [Thirteen Crores Eighty Five Lakhs Forty Two Thousand Eight Hundred and Three Rupees only]. It was contended on behalf of the respondent that it had agreed to the said reduction on the basis of the Price Adjustment Clause. The respondent also claimed that during the course of the meeting held on 13.02.2013, the concerned authorities had expressly stated that there was no requirement for quoting higher premiums as there was a provision of a price adjustment clause.

13. In addition to the above, the respondent also claimed that it was the policy of the Government to include the Price Adjustment Clause in all contracts where the estimated cost is above ₹100 Lakhs and the period of completion is twelve months or more. In support of his contention the respondent referred to the Government Order dated 26.11.2004. The relevant extract of the said order reads as under:

> "1.(a) A Price Adjustment clause shall be included in all Works contracts whose estimated cost put to tender is Rs.100 lakhs or more and the period of completion is 12 months or more. The Price Adjustment clause and the formulae for adjustment shall be as per Annexure-I."

14. The Arbitral Tribunal had accepted the contentions advanced by the respondent. First of all, the Arbitral Tribunal held that the expression "may be treated as deleted", used in the note to Clause No.39 in the tender documents, as projected on the e-portal, could not be construed to mean that Clause No.39 stood deleted. The Arbitral Tribunal found that the Request for Proposal [RFP] as projected on the e-portal, could not be read to mean that Clause No.39 stood omitted. The Arbitral Tribunal held that the signed

agreement between the parties retained Clause No.39 without any note to the effect that the said clause may be treated as deleted. Thus, the Arbitral Tribunal held that the terms of the agreement as signed by the parties and the agreement entered into between the parties could not be read to exclude Clause No.39 solely because of a note in the RFP as projected on the e-portal.

15. The contention of the appellant that the State Project Engineer was not authorised to sign the agreement was also rejected, as the appellant had not taken any steps to rescind the agreement or to issue any corrigendum/ modification. The Arbitral Tribunal observed that admittedly, the respondent had executed the works between 2018 and 2019 and no steps were taken to modify, rectify or rescind the contract. It is relevant to note that it is not the appellant's case that there was no contract between the parties. Its contention, in effect, is that the agreement entered into between the parties did not include Clause No.39 of the agreement. It is clear from the above that the controversy is not regarding non-existence of a contract between the parties, but as to the terms of the contract entered into by the parties. The dispute, essentially, relates to the rights and obligations of the parties under

the agreement. The said dispute falls squarely within the jurisdiction of the Arbitral Tribunal.

16. In ***MSK Projects India (JV) Ltd. v. State of Rajasthan another: (2011) 10 SCC 573***, the Supreme Court had observed as under:

> "17. If the arbitrator commits an error in the construction of the contract, that is an error within his jurisdiction. But if he wanders outside the contract and deals with matters not allotted to him, he commits a jurisdictional error."

17. In ***SAIL v. Gupta Brother Steel Tubes Ltd., : (2009) 10 SCC 63***, the Supreme Court had summarized the law as under.

> "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."

[emphasis added]

18. Although the said decision was rendered in the context of the Arbitration Act, 1940, the principles as enunciated are equally applicable in the context of the A&C Act.

19. In ***State of Rajasthan v. Puri Construction Co. Ltd: (1994) 6 SCC 485***, the Supreme Court had emphasized that a distinction needs to be drawn between disputes as to the jurisdiction of the Arbitrator and the disputes as to in what way that jurisdiction should be exercised. An error within the jurisdiction of the Arbitrator would not ordinarily warrant any interference by the courts. The relevant extract of the said decision is set out below:

> "26. The arbitrator is the final arbiter for the dispute between the parties and it is not open to challenge the award on the ground that the arbitrator has drawn his own conclusion or has failed to appreciate the facts. In Sudarsan Trading Co. v. State of Kerala [Sudarsan Trading Co. v. State of Kerala, (1989) 2 SCC 38] it has been held by this Court that there is a distinction between disputes as to the jurisdiction of the arbitrator and the disputes as to in what way that jurisdiction should be exercised. There may be a conflict as to the power of the arbitrator to grant a particular remedy. One has to determine the distinction between an error within the jurisdiction and an error in excess of the jurisdiction. Court cannot substitute its own evaluation of the conclusion of law or fact to come to the conclusion that the arbitrator had acted contrary to the bargain between the parties. Whether a particular amount was liable to be paid is a decision within the competency of the arbitrator. By purporting to construe the contract the court cannot take upon itself the burden of saying that this was contrary to the contract and as such beyond jurisdiction. If on a view taken of a contract, the decision of the arbitrator on certain amounts awarded is a possible view though perhaps not the only correct view, the award cannot be examined by the court. Where the reasons have been given by the arbitrator in making the award the court cannot examine the reasonableness of the reasons. If the parties have selected their own forum, the deciding forum must be conceded the power of appraisement of evidence. The arbitrator is the sole judge of the quality as well as the quantity of evidence and it will not be for the court to take upon itself the task of being a Judge on the evidence before the arbitrator."

20. We also consider it apposite to refer to the decision of the Supreme Court in ***Assam SEB v. Buildworth (P) Ltd: (2017) 8 SCC 146***. In the said case, the Supreme Court had observed as under:

> "13. The arbitrator has taken the view that the provision for price escalation would not bind the claimant beyond the

> scheduled date of completion. This view of the arbitrator is based on a construction of the provisions of the contract, the correspondence between the parties and the conduct of the Board in allowing the completion of the contract even beyond the formal extended date of 6-9-1983 up to 31-1-1986. Matters relating to the construction of a contract lie within the province of the Arbitral Tribunal. Moreover, in the present case, the view which has been adopted by the arbitrator is based on evidentiary material which was relevant to the decision. There is no error apparent on the face of the record which could have warranted the interference of the court within the parameters available under the Arbitration Act, 1940. The arbitrator has neither misconducted himself in the proceedings nor is the award otherwise invalid."

21. The learned Commercial Court had noted that the Arbitral Tribunal's findings were based on evidence and such findings could not be held to be patently illegal or one that offends the public policy of India. The learned Commercial Court had rightly held that the courts cannot re-appreciate the evidence to interfere with the arbitral award. It is settled law that the scope of interference with the arbitral award is confined to the grounds as set out in Section 34 of the A&C Act.

22. In ***Delhi Airport Metro Express Private Limited v. Delhi Metro Rail Corporation Limited: AIR Online 2021 SC 78***, the Supreme Court has explained the scope of interference under Section 34 of the A&C Act in the following words:

> "While deciding applications filed under Section 34 of the Act, courts are mandated to strictly act in accordance with and within the confines of Section 34, refraining from appreciation or re-appreciation of matters of fact as well as law."

23. The Arbitral Award may be set aside, if it is vitiated by patent illegality. [Section 34(2A) of the A&C Act]. In this regard, the Supreme Court had observed as under:

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

24. We are unable to accept that the challenge laid by the appellant to the Arbitral Award can be sustained on the grounds as set out in Section 34(2) or 34(2A) of the A&C Act.

25. We are unable to accept the applicability of the principles laid down in the case of **K P Chowdhry** (*supra*) as it pertains to a matter where there was no written agreement entered into subsequent to the auction that was held. In the case on hand there being a signed agreement between the parties. Further, there is no dispute that the contract for execution of the works was awarded to the respondent and an agreement for the said purpose was authorised.

26. More importantly, it is not the case of the appellant that a contract does not exist between the parties as observed above, the dispute is confined to the terms of the agreement. The Arbitral Tribunal had considered the question whether Clause No.39 was binding between the parties and had found in favour of the respondent. The Arbitral Tribunal had also noted that the appellant had not taken any steps to rescind or rectify the agreement in question.

27. In the given circumstances, we do not find any grounds to interfere with the impugned award. We also find no infirmity with the learned Commercial Court dismissing the appellant's application to set aside the impugned award.

28. The appeal is accordingly dismissed.

29. Pending application is also disposed of.

Sd/-
(VIBHU BAKHRU)
CHIEF JUSTICE

Sd/-
(C M JOSHI)
JUDGE

KPS
List No.: 1 Sl No.: 23