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

\+ FAO(OS) (COMM) 238/2023 & CM APPLs. 56000/2023, 56001/2023 & 56002/2023

DCM LTD. ..... Appellant

Through: Ms. Maninder Acharya, Senior Advocate with Mr. Mukesh Gupta, Mr. Aman Gupta, Mr. Raghav Gupta and Mr. Ishant Sehrawat, Advocates.

versus

M/S. AGGARWAL DEVELOPERS PVT. LTD AND ORS ..... Respondents

Through: None.

% ***Date of Decision: 31st October, 2023***

CORAM:
HON'BLE MR. JUSTICE MANMOHAN
HON'BLE MS. JUSTICE MINI PUSHKARNA

J U D G M E N T

MINI PUSHKARNA, J: (ORAL)

1. The present appeal has been filed under Section 37 of the Arbitration and Conciliation Act, 1996 ("Arbitration Act") challenging the judgment dated 25th May, 2023 passed by the learned Single Judge in *O.M.P. (COMM) 487/2019*. By way of the impugned judgment, the petition filed on behalf of the appellant under Section 34 of the Arbitration Act challenging the Arbitral Award dated 12th July, 2019 was dismissed.

2. The present dispute relates to agreements dated 27th November, 1993 and 13th December, 1994 executed between the parties for acquiring,

transfer and sale of land in village Mangar on Delhi-Haryana border and village Chakkarpur, district Gurgaon, Haryana. Disputes arose between the parties that were referred to the sole Arbitrator for adjudication in terms of the arbitration clause as contained in the agreements between the parties. By the Award dated 12th July, 2019, the learned Arbitrator held that the respondent no. 1 was liable to refund the amount of Rs. 8.05 crores advanced to it by the appellant herein. However, the learned Arbitrator held that the appellant was not entitled to any interest, as the same had been waived by it based upon letter dated 09th November, 2005 signed by Dr. Vinay Bharat Ram, who was then the Chairman and Managing Director of the appellant.

3. Thus, aggrieved by the Award, appellant challenged the Award by way of petition under Section 34 of the Arbitration Act, being *OMP (Comm.) 487/2019*. The issue raised by the appellant before the learned Single Judge in the petition under Section 34 of the Arbitration Act was confined to one issue, i.e., whether the learned Arbitrator had correctly given the finding that the appellant had waived its claim for interest upon the amount of Rs. 8.05 crores due from respondent no.1. By the impugned judgment dated 25th May, 2023, the learned Single Judge upheld the finding given by the learned Arbitrator thereby holding that the fact of waiver of interest by the appellant is found to have been proved on the basis of the communication addressed by the appellant to the respondent no. 1. Hence, the present appeal has been filed.

4. On behalf of the appellant, it is contended as follows:

4.1 The impugned Award is in direct contravention to the express terms and conditions of the agreements between the parties. The agreements

between the parties expressly provided that if the respondents failed to fulfil the obligations under the agreement, the respondents were bound to refund the advance amount received along with interest @18% per annum. The learned Arbitrator gravely erred in not awarding the claim of interest in favour of the appellant on the amount of Rs. 8.05 crores that was held due and payable to the appellant by the respondent no.1.

4.2 The veracity of the letter dated 09th November, 2005 allegedly written by Dr. Vinay Bharat Ram, has been categorically denied by the alleged author of the letter with cogent reasons. The respondent failed to prove the veracity of the said letter by any cogent evidence. Therefore, in the absence of any evidence to prove the alleged waiver of the claim of interest, the learned Arbitral Tribunal went contrary to the express terms of the agreements between the parties and wrongly rejected the claim of interest on the advance amount of Rs. 8.05. crores.

4.3 The alleged letter dated 09th November, 2005 was not on the letterhead of the writer or the appellant company and the same was written on a blank sheet. Further, the said letter is not backed by any Board Resolution of the Directors of the company.

4.4 The appellant still has the title deeds of the three companies which were provided by the respondents in terms of the Guarantor Agreement dated 13th December, 1994, which itself negates the plea of the respondent pertaining to full and final settlement between the parties and waiving of interest by the appellant on the basis of the alleged letter. Attention of this Court has been drawn to paragraph 17 of the Evidence by way of Affidavit filed on behalf of CW-2. This aspect was not considered by the learned Single Judge.

5. Having heard learned Senior Counsel for the appellant and perusing the record, it is manifest that the primary dispute in the present case revolves around the issue whether the appellant herein had waived its claim for interest on the amount of Rs. 8.05 crores that has been found to be due and payable to the appellant by respondent no.1. The learned Arbitrator has held that the appellant herein was not entitled to interest on the amount payable to it, in view of the finding that the interest had been waived by the appellant by virtue of letter dated 09th November, 2005 addressed to a Director of respondent no.1 by Dr. Vinay Bharat Ram, who was then the Chairman and Managing Director of the appellant company.

6. The learned Arbitrator has clearly recorded in his Award dated 12th July, 2019 that as regards the letter dated 09th November, 2005, Dr. Vinay Bharat Ram had inspected the original of the same and stated that he was not in a position to state whether he had signed or not signed the letter. Further, during the course of his cross-examination, Dr. Vinay Bharat Ram deposed that the signatures on the letter dated 09th November, 2005 resembled his signatures and that the said signatures would have been his, if the contents of the letter had been credible. Further, he deposed that he did not sign any blank sheets of paper. The impugned judgment passed by the learned Single Judge, thus, records these facts in the following terms:

> *7. Having heard learned counsel for parties, I am of the view that the impugned award does not call for interference in the limited scope afforded by Section 34 of the Act. The case of the respondents with regard to waiver turns upon a letter dated 09.11.2005, addressed by the Chairman and Managing Director of the petitioner to a Director of respondent No.1. The communication has been reproduced in paragraph 27 of the award as follows:-*
>
> *"Dt. 9th Nov. '05*
>
> *Dear Ramesh Ji,*

As agreed, I am authorizing Sh. Ashwani Singhal, the bearer of this letter, to meet you personally and collect from you the amount of Rupees Six Crores Five Lacs towards full and final settlement of our account in respect of Manger and Chattarpur agreements between DCM ltd. and your company.

Kindly square off this transaction before this financial yearend.

With warm regards

Yours truly,

Sd/-

Vinay Bharat Ram"

8. The aforesaid communication was referred to in the reply filed by the respondents in the arbitral proceedings, to support their contention of waiver of interest. It appears from the documents on record that it was thereafter produced in the arbitral proceedings on 12.05.2008, when the purported signatory – Dr. Vinay Bharat Ram was present. In the rejoinder filed by the petitioner on 06.11.2008, the letter dated 09.11.2005 and the proceedings before the tribunal on 12.05.2008 have been described in the following terms:-

"It is denied that the parties mutually agreed that the principal amount which was advanced to the respondent No.1 should be returned. It is further denied that the Respondents shall also pay an amount of Rs. Sixty lacs towards agreement in respect of Mangar Land. ***It is denied that as per the understanding reached between Sh. Vinay Bharatram and the respondent No. 2, a letter dated 09.11.2005 was written by Mr. Vinay Bharatram, wherein he requested for the refund of Rs. 6.05 crores towards full and final settlement of accounts between the Claimant company and the respondent No. 1. No such understanding was ever reached between Mr. Vinay Bhartram and Mr. Ramesh Chandra Aggarwal. Mr. Vinay Bharatram never wrote any letter dated 09.11.2005 for and on behalf of the Claimant and/or on his personal behalf to the Respondents agreeing for a refund of Rs. 6.05 crores in full and final settlement of accounts between the parties. The letter dated 09.11.2005 is not admitted****. The Claimant had filed an application for production of the original letter dated 09.11.2005 and some other original letters. Copies of which had been filed by the Respondent before the Hon'ble Arbitration Tribunal. The fact*

with regard to the production of the originals of the said letters was discussed by the parties before this Ld. Tribunal during its hearing on 02.05.2008. ***With consent of the parties, a hearing date was fixed on 12.05.2008 for inspection of the original letters by Mr. Vinay Bharat Ram and some Directors/ officers of the Claimant.*** *During the hearing on 12.05.2008 the Respondent's counsel had produced two letters one of which was dated 09.11.2005 and other letter was dated 20.03.2006.*

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

Similarly, as regards the letter of 09.11.2005, Dr. Vinay Bharat Ram had inspected the original of the same and stated that he was not in a position to either state whether he had signed or not signed the letter. This was particularly because he said that he did not sign such important letters unless they were typed on his letter heads and further that the format of the letter was not the one that he adopted for writing such letters*. For example, he stated that he would not mention the date as 'Dt'. He also stated that he did not recall signing such a letter. The original letter dated 09.11.2005 was marked Exbt. 'B' and was initiated by the Arbitration Tribunal."*

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10. Dr. Vinay Bharat Ram was produced for cross-examination on 06.05.2011. He tendered the aforesaid affidavit in examination-in-chief. The relevant contents of his cross-examination are reproduced below:-

"Qn. No.1 I draw your attention to paragraph 7 of your affidavit dated 19.2.2010 wherein you have stated that letter dated 9.11.2005 is not admitted. Your attention is also invited to the minutes of the proceedings of 12th May, 2008 where it is recorded that "As regards the letter dated 9th November, 2005, Dr. Vinay Bharat Ram has inspected the original of the same and says that he is not in a position to state whether he has signed or not signed the letter." It is further recorded in the minutes that Dr. Vinay Bharat Ram states that he does not recall signing such a letter. My question to you is whether the original letter dated 9.11.2005, which has been seen by you in the proceedings today, bears your signatures or not?

Ans. ***By looking at this document which is the letter of***

9.11.2005, of which I have the original in my hand now, I say that the signatures on this document resembles my signatures.
(Volunteered: They would have been my signatures if the contents of the letter had been credible)

Qn. No.2 Please clarify what you mean by the word 'credible'

Ans. ***The contents of the letter and the language used therein do not typify the language I use for such kind of a letter****. As for example, I would not write "Dt" For the word "Date". Also, I do not sign blank sheets of paper nor do I sign a letter which is not on my letter head or the letter heads of one of the Companies in which I hold shares.* ***(Volunteered: The document is of 2005 and is too recent for my memory to be hazy about it.)****"*

7. On the basis of the evidence on record, the learned Arbitrator has given a categorical finding that the appellant herein has been unable to establish that the letter dated 09th November, 2005 relied upon by respondent no.1, was a false, fabricated or forged document. The learned Arbitrator has held very clearly that the letter was voluntarily signed by Dr. Vinay Bharat Ram, which clearly indicated that the amount of Rs. 6.05 crores had been settled towards full and final settlement of their accounts, since a sum of Rs. 2 crores had already been refunded by the respondent no.1 out of the total advance amount of Rs. 8.05 crores. Thus, the learned Arbitrator has held as follows:

> *"28. On reading the said document, it is apparently addressed to Mr. Ramesh Chandra Agarwal of ADPL and has apparently been issued by Dr Vinay Bharat Ram. The latter, in his affidavits by way of evidence or in the course of cross-examination has/not specifically denied his signature. He has only raised doubts about his signature on the said document on account of the alleged 'credibility' of the said document. It must be remembered that he has also categorically stated that he does not sign blank sheets of paper. He has also not stated, and it is also not the case of DCM that his signatures had been obtained on a blank sheet*

of paper by ADPL and the same was misused by ADPL. On the other hand, he has stated that the signatures on the letter dated 09.11.2005 is similar to his signature. It is clear from these circumstances that DCM has been unable to establish, and the onus was on them, that the letter dated 09.11.2005 which has been produced by ADPL is a false, fabricated or forged document. In all likelihood and probability, the said letter dated 09.11.2005 was signed by Dr Vinay Bharat Ram. The content of the letter may have been drafted by someone else but it was voluntarily signed by Dr Vinay Bharat Ram.

29. This being the position and since his signatures have admittedly not been obtained in blank papers, the contents of the letter dated 09.11.2005, albeit not typically in his style of writing, have to be attributed to Dr Vinay Bharat Ram. They clearly indicate that the amount of Rs 6.05 crores had been settled between him and Mr. Ramesh Chandra Agarwal of ADPL towards full and final settlement of their account in respect of the said Agreements between DCM and ADPL.

30. From the schedule of payments made by ADPL to DCM as indicated in paragraph 13 above, it is evident that a sum of Rs 2 crores had been refunded by 02.07.1996 out of the total advanced amount of Rs 8.05 crores. This left a balance of Rs 6.05 crores. This is the very sum which is mentioned in the letter dated 09.11.2005. It is further evident from the table of payments set out in paragraph 13 hereinabove that after 09.11.2005, ADPL cleared the balance amount of Rs 6.05 crores through 13 payments beginning from 15.02.2006 and ending on 20.03.2006. On the latter date, the final payment of Rs 15 lacs was made.

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35. Insofar as Dr Vinay Bharat Ram is concerned, it is evident from his affidavits and cross-examination that he was, at the time of giving evidence, the CEO of DCM. Earlier, he was the Chairman cum Managing Director of DCM. That being the position, it is difficult to believe that he did not have the authority to issue the letter dated 09.11.2005. In any event, the said letter, the existence of which stands established, has been acted upon by ADPL in making the payments of the balance amount of Rs 6.05 crores. The said payments have admittedly been received by DCM. Therefore, in my view, DCM cannot retract from the position that the payment of Rs 6.05 crores made pursuant to the said letter dated 09.11.2005 was by way of full and final settlement of the accounts between DCM and ADPL."

8. The learned Arbitrator has further held that the letter dated 09th

November, 2005 represents the thinking, understanding and commercial expediency of the management of DCM and that it is difficult to agree that the said letter of Dr. Vinay Bharat Ram, who was the Chairman and Managing Director of DCM, was without the authority of DCM. Thus, the learned Arbitrator has held as follows:

> *"39. In response, the learned counsel for DCM submitted that the claim for interest was not given up. It was submitted that the first refund of Rs 2 crore was done in 1996 and thereafter no payments were received till 2006. As such, DCM took a commercial call, after waiting for a period of three years till1999 before it discontinued making a provision for interest because it did not expect ADPL to pay such interest to it. It was further submitted that the argument of the Respondents runs counter to DCM's stand that the full and final settlement was made in November 2005.*
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> *40. Considering the rival contention on this aspect, it is clear that initially DCM did consider that the amount of Rs 8.05 was recoverable from ADPL 'with interest'. In 1996, the recoverable amount came down to Rs. 6.05 crore on account of refund of a sum of Rs 2 crore. Even the balance figure of Rs 6.05 was shown to be recoverable 'with interest' in 1997 and 1998. Thereafter, from 1999 onwards, only the principal amount of Rs 6.05 crore was shown as recoverable and not the interest amount. The explanation offered by DCM for dropping the provisioning for interest, because it did not expect ADPL to pay interest, in fact, supports the plea of ADPL that interest had been waived by DCM and that this arrangement had been ultimately formalised in the letter of 09.11.2005 of Dr Vinay Bharat Ram. The fact that DCM did not expect that ADPL would pay interest but would, in all likelihood, refund the balance sum of Rs 6.05, indicates that, in the circumstances, DCM would be content to receive the sum of Rs 6.05 crore to close the account with ADPL even if it did not receive any interest.*
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> *41. In this backdrop, it is evident that the letter of 09.11.2005 represents the thinking, understanding and commercial expediency of the management of DCM. For this reason also, it is difficult to agree with the submission of learned counsel for DCM that the said letter of Dr Vinay Bharat Ram, who was the Chairman and Managing Director of DCM, was without the authority of DCM."*

9. The aforesaid findings as given by the learned Arbitrator are plausible findings and are based on the evidence before the learned Arbitrator. This

Court will not re-assess and re-examine the evidence before the learned Arbitrator. It is also to be noted that the present is an appeal under Section 37 of the Arbitration Act. Proceedings under Section 37 of the Arbitration Act are even more limited in scope than those under Section 34 of the Arbitration Act and cannot be equated with the normal appellate jurisdiction of the court. Thus, Supreme Court in the case of ***Reliance Infrastructure Ltd. Versus State of Goa***[1] held as follows:

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

[1] ***2023 SCC OnLine SC 604***

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."*

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***52.** In the case of Haryana Tourism Ltd. (supra), this Court yet again pointed out the limited scope of interference under Sections 34 and 37 of*

the Act; and disapproved interference by the High Court under Section 37 of the Act while entering into merits of the claim in the following words:

> *"8. So far as the impugned judgment and order passed by the High Court quashing and setting aside the award and the order passed by the Additional District Judge under Section 34 of the Arbitration Act are concerned, it is required to be noted that in an appeal under Section 37 of the Arbitration Act, the High Court has entered into the merits of the claim, which is not permissible in exercise of powers under Section 37 of the Arbitration Act.*
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> *9. As per settled position of law laid down by this Court in a catena of decisions, an award can be set aside only if the award is against the public policy of India. The award can be set aside under Sections 34/37 of the Arbitration Act, if the award is found to be contrary to : (a) fundamental policy of Indian Law; or (b) the interest of India; or (c) justice or morality; or (d) if it is patently illegal. None of the aforesaid exceptions shall be applicable to the facts of the case on hand. The High Court has entered into the merits of the claim and has decided the appeal under Section 37 of the Arbitration Act as if the High Court was deciding the appeal against the judgment and decree passed by the learned trial Court. Thus, the High Court has exercised the jurisdiction not vested in it under Section 37 of the Arbitration Act. The impugned judgment and order passed by the High Court is hence not sustainable."*
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> *XXX XXX XXX*

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

> *"**15.** This Court also accepts as correct, the view expressed by the appellate court that the learned Single Judge committed a gross error in reappreciating the findings returned by the Arbitral Tribunal and taking an entirely different view in respect of the interpretation of the relevant clauses of the implementation agreement governing the parties inasmuch as it was not open to the said court to do so in proceedings under Section 34 of the Arbitration Act, by virtually acting as a court of appeal.*
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> ***16**. As it is, the jurisdiction conferred on courts under Section 34 of the Arbitration Act is fairly narrow, when it comes*

to the scope of an appeal under Section 37 of the Arbitration Act, the jurisdiction of an appellate court in examining an order, setting aside or refusing to set aside an award, is all the more circumscribed.""

10. Likewise, holding that when it comes to the scope of an appeal under Section 37 of the Arbitration Act, the jurisdiction of an Appellate Court is all the more circumscribed, Supreme Court in the case of ***UHL Power Company Limited Versus State of Himachal Pradesh***[2] has held as follows:

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

***16.** As it is, the jurisdiction conferred on courts under Section 34 of the Arbitration Act is fairly narrow, when it comes to the scope of an appeal under Section 37 of the Arbitration Act, the jurisdiction of an appellate court in examining an order, setting aside or refusing to set aside an award, is all the more circumscribed. In MMTC Ltd. v. Vedanta Ltd. [MMTC Ltd. v. Vedanta Ltd., (2019) 4 SCC 163 : (2019) 2 SCC (Civ) 293] , the reasons for vesting such a limited jurisdiction on the High Court in exercise of powers under Section 34 of the Arbitration Act have been explained in the following words : (SCC pp. 166-67, para 11)*

"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

[2] ***(2022) 4 SCC 116***

> *cover compliance with statutes and judicial precedents, adopting a judicial approach, compliance with the principles of natural justice, and Wednesbury [Associated Provincial Picture Houses Ltd. v. Wednesbury Corpn., (1948) 1 KB 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.""*

11. In view of the aforesaid detailed discussion, this Court is not inclined to interfere with the impugned judgment passed by the learned Single Judge. Accordingly, the present appeal is dismissed along with the pending applications.

MINI PUSHKARNA, J

MANMOHAN, J

OCTOBER 31, 2023
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