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Reserved

Case :- APPEAL UNDER SECTION 37 OF ARBITRATION AND CONCILIATION ACT 1996 No. - 219 of 2022
Appellant :- Hindustan Steelworks Construction Limited
Respondent :- New Okhla Industrial Development Authority
Counsel for Appellant :- Varad Nath, Agarwal Archi Piyush
Counsel for Respondent :- Kaushalendra Nath Singh

Hon'ble Manoj Kumar Gupta,J.
Hon'ble Vikram D. Chauhan,J.

(Per Manoj Kumar Gupta, J.)

1. The instant appeal has been filed under Section 13 of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 read with Section 37 of the Arbitration and Conciliation Act, 1996 (for the sake of brevity hereinafter referred to as 'the Act') challenging the order of the Commercial Court, Gautam Budh Nagar dated 23.5.2022 in Arbitration Case No. 13 of 2015, setting aside the Arbitral Award dated 15.12.2014, by the Sole Arbitrator, in a dispute between the parties.

BACKGROUND

2. In the year 2002, the New Okhla Industrial Development Authority (NOIDA), the respondent herein, entered into negotiation with U.P. State Bridge Corporation Limited for construction of two flyovers with clover leaves and allied work at M.P. Road No.3 Express Highway near Amity School and at T-junction near Film City, Gautam

Budh Nagar. It submitted a proposal of Rs.106.10 crores for execution of the Project on turnkey basis, including centage charges but which was not accepted.

3. The appellant herein, i.e. Hindustan Steel Works Construction Limited (HSCL), is a Government of India Undertaking, registered under the Companies Act, 1956. It also gave proposal to NOIDA to execute the Project at the same cost of Rs.106.10 crores. The offer of HSCL was accepted by NOIDA and the parties entered into a formal contract- a Memorandum of Understanding (MoU) on 27.03.2003. The work under the contract was to be completed by the HSCL within 27 months from the date of start, which was to be counted from 30 days after the receipt of deposit advance from NOIDA or from the date of possession of land, which ever is earlier. The HSCL was obliged to submit performance security equivalent to 5% of the contract value in shape of bank guarantee. NOIDA was under obligation to pay interest free deposit advance of 15% of project cost secured by the bank guarantee (excluding centage charges) within thirty days from the date of award of work. The advance so paid was to be adjusted in the subsequent demand of funds on the basis of actual work executed by HSCL. The subsequent demand was to be submitted after utilization of 75% of the deposit advance released as above. Under Clause 7, HSCL was entitled to price variation in cost of building material as per NHAI

guidelines and formula for computing the same was provided for in the General Conditions of Contract (GCC) executed between the parties in addition to the MoU. Clause 11 stipulated that if the work is temporarily suspended due to any reason which is not attributable to HSCL, suitable extension of time shall be granted by the NOIDA on the request of HSCL. In case the work is delayed due to reasons attributable to HSCL, it was made liable to penalty at the rate of 5% per month of centage charges to NOIDA. The period for which extension would be granted is provided in the GCC. The GCC also provided for compensation to HSCL in case of suspension of work exceeding 30 days in certain circumstances. Clause 14 made the agreement irrevocable till the expiry of defect liability period unless there has been breach of any terms and conditions of the MoU. Clause 22 contained an arbitration clause for resolution of disputes or differences between the parties, arising out of the contract. It reads thus: -

> "In the event of any question, dispute or difference not being settled in between the parties the matter shall be referred to Chairman/C.E.O. NOIDA for nominations of an arbitrator, whose decision shall be final and binding on the both of the parties."

4. The General Conditions of Contract (GCC) contained specific provisions relating to – Extension of Time (Clause 2); Interest Free Mobilization of Advance (Clause 7B); Payment due to increase/ decrease in prices (Price Escalation) after receipt of contract for works

and the manner of calculation thereof (Clause 8); Foreclosure of Contract Due to Abandonment or Reduction in Scope of Work (Clause 11); Cancellation of Contract in Full or Part (Clause 12); Suspension of Work and payment of compensation to the contractor in cases where such suspension is not attributable to any default on part of the contractor (Clause 13) etc.

5. In terms of the agreement, HSCL started work since 7.04.2003.

6. On 6.09.2003, the State Government directed for holding of enquiry, suspecting that contract value was highly inflated. On 19.09.2003, the NOIDA addressed a communication to HSCL informing it that a Review Committee had been constituted by it to review the cost of the project. HSCL was required to submit all drawings and other relevant details before the said Committee. It was also directed to slow down the project till it is cleared by the Review Committee.

7. It seems that thereafter the Review Committee got the costing done by M/s SOWil Limited, a project planning and appraisal company and Indian Institute of Technology (IIT) Delhi. According to the report of M/s SOWil, the cost was on higher side by around 40 crores. The report of IIT, assesses the costing to be inflated by 60 crores. Consequently, on 22.09.2003, the appellant was directed to stop all work with immediate effect. The work, therefore, came to a standstill

and remained suspended for 928 days.

8. Under Clause 13 (iii) of GCC, if work remains suspended for more than four months, HSCL had the option to treat it as 'foreclosure of contract' under Clause 11 of GCC and thereby entitling it to payment for the work already executed, cost of building material lying at the construction site or its stores and reasonable compensation. NOIDA would not be entitled to recovery, if any done against Mobilisation Advance. Any retention money held had to be released. All Bank Guarantees would stand discharged forthwith.

9. However, HSCL chose not to invoke Clause 11 of GCC and it continued to negotiate with NOIDA for resumption of work. Series of meetings were held between the parties. NOIDA insisted on revision of rates, but which was not agreed to by HSCL.

10. The Chief Executive Officer, NOIDA in a communication dated 12.10.2004 addressed to the Special Secretary, U.P. Government, Lucknow disclosed that NOIDA had taken legal advice, according to which it would be exposed to monetary claim of damages, besides cost escalation, in case the contract is terminated and that would not be in the public interest and therefore it should make effort for a negotiated settlement with HSCL. It was also brought to the notice of the Government that HSCL was, by that time, paid Rs.49.98 crores and according to report of experts, the value of work executed was Rs.20

crores only. Thus, there was excess payment of around Rs.30 crores. Therefore, he suggested that NOIDA should be permitted to proceed with the contract, subject to re-negotiation of price and HSCL agreeing to the amendments in the original contract.

11. In response, the State Government by letter dated 11.03.2005 permitted NOIDA to go ahead with the contract, subject to re-negotiation of the terms of MoU to make the contract value competitive.

12. According to HSCL, at that time, it was under acute financial distress because of abrupt suspension of work. It was unable to meet its financial obligations. It therefore agreed to give up its right to claim damages and price escalation during the period work remained suspended by its letters dated 29.04.2005 and 10.05.2005.

13. The parties executed a Supplementary MoU dated 22.03.2006. The letters dated 29.04.2005 and 10.05.2005 of HSCL, wherein it agreed to forego its claim towards damages and price escalation during the period contract remained suspended, were made part of the Supplementary MoU. The Supplementary MoU stipulated that the appellant would complete the project at the original cost of Rs.106.10 crores and not claim compensation and price escalation on account of suspension of work.

14. The parties signed the Supplementary MoU on 22.03.2006 and the contract period was extended. The parties also agreed that subject to any contrary term in the Supplementary MoU, the provisions contained in the earlier MoU would continue to govern the rights of parties.

15. On 8.04.2006, HSCL re-commenced the work at the site and completed the work on 30.04.2008.

16. On 25.02.2008, just before completion of work, HSCL made claims towards price variation under Clause 8 of GCC. It referred to Clause (1) of Supplementary MoU in contending that Clause 8 of GCC would not stand suspended by execution of Supplementary MoU. It was emphasised that HSCL only waived price escalation during suspension period. The price escalation provision for the period after recommencement of work remained binding on the parties and therefore NOIDA should honour its claim towards price escalation. Again on 10.04.2008, HSCL send another communication to NOIDA, emphasising that price escalation Clause 8 of GCC remained suspended as per terms of Supplementary MoU only during period of suspension of work. It would stand revived for the period post recommencement of work. Therefore, its bills towards price escalation for the said period be honoured forthwith. To the same effect were the letters dated 23.05.2008 and 16.09.2008.

17. It is noteworthy that during all this period, HSCL never made any claim towards damages on account of suspension of work, either under Clause 13(ii)(b) of GCC nor under any other provisions of the Contract being conscious of the fact that vide Clause 3 of Supplementary MoU, it had agreed to forego all claims in respect thereof.

18. However, vide a letter dated 16.02.2009, almost one year after completion of work, HSCL made a claim of Rs.37.12 crores towards damages during suspension period relying on Clause 13(ii)(b) of GCC. It also claimed Rs.23.9420 crores towards price escalation for the period – prior to and post recommencement of work and Rs.42.00 lakhs towards extra work, apart from interest i.e. total sum of Rs.76.8316 crores. HSCL also invoked Clause 22 of the MoU dated 27.03.2003 and requested NOIDA to refer the dispute to arbitration. It made the same request vide letter dated 20.03.2009. However, NOIDA vide letter dated 17.06.2009 rejected all the claims relying on Clause 3 of the Supplementary MoU and refused to refer the matter to arbitration.

REFERENCE TO ARBITRATOR

19. On 7.9.2009, HSCL approached this Court under Section 11 of the Act for appointment of arbitrator. In para 9 of the said application, HSCL for the first time alleged undue influence and coercion on part of NOIDA in obtaining Supplementary MoU containing clause relating to waiver of the right of HSCL to claim damages/liquidated damages

under Clause 13(ii)(b) of GCC during the suspension period. It also raised other claims. This Court allowed the application under Section 11 of the Act and referred the matter to a sole arbitrator.

ARBITRATION PROCEEDINGS

20. HSCL filed its Statement of Claim (SOC) before the Arbitral Tribunal under nine different heads. There were two major claims. The first major claim (Claim No.1) of Rs.23.9420 Crores was in respect of escalation of price while work was in progress i.e. excluding the period when work remained suspended. It was based on Clause 7 of MoU read with Clause 8 of GCC. The other major claim was Claim No.2 towards damages allegedly suffered on account of suspension of work. The said claim was based on Clause 13(ii)(b) of GCC for a sum of Rs.35.92 Crores. The detail of all the claims is as follows :-

Claim	**Head of Claim**	**Amount Claimed**
Claim 1	On account of Price Variation	Rs. 2394.20 Lakhs
Claim 2	On account of Suspension of Work	Rs. 3592.00 Lakhs
Claim 3	On account of delayed payment IRA 3 and 4	Rs. 388.68 Lakhs
Claim 4	Damages on account of extra Bank Guarantee Charges	Rs. 27.44 Lakhs
Claim 5	Damages on account of expected loss of profit	Rs. 1060.00 Lakhs
Claim 6	On account of cost of Arbitration	Rs. 25 Lakhs

Claim 7	On account of Interest	Rs. 5666.34 Lakhs
Claim 8	On account of Pendente lite Interest	12% on Awarded Amount
Claim 9	Extra items of work	Rs. 36.18 Lakhs
Claim 10	On account of Final Bill	Rs. 48.85 Lakhs
TOTAL		**9677.61 Lakhs**

21. The NOIDA denied the claims of HSCL by filing Statement of Defence (SOD). It specifically pleaded therein that the claims relating to escalation/price variation (Claim No.1) and compensation owing to suspension of work (Claim No.2) are not sustainable in view of HSCL having unequivocally agreed to forego these claims during process of re-negotiation and also while entering into the Supplementary MoU. It also pleaded that HSCL had not alleged any coercion or duress at the time of entering into Supplementary MoU nor till the completion of work in pursuance of Supplementary MoU. The plea of duress and coercion was taken for the first time before the arbitrator and thus not sustainable in law. It contended that in a commercial bargain, plea of coercion and duress is unsustainable, particularly in the instant case, where HSCL is a Government of India Undertaking and had at its disposal best of legal advise and also the option to treat the suspension of work to be foreclosure of contract and in which event, it would have

been paid value of the work executed and other amounts as envisaged under Clause 11 of GCC.

22. The parties filed documentary evidence and also various affidavits in support of their respective cases. By order dated 17.05.2012, the Arbitral Tribunal permitted the parties to lead oral evidence, but no oral evidence was led by any party. The tribunal framed as many as twenty (20) issues. It ultimately passed a final award on 15.12.2014 in favour of HSCL awarding a sum of Rs.97.10 crores, inclusive of the cost of arbitration, alongwith pendente lite and future interest.

23. The issues framed by the Arbitral Tribunal are as follows:-

> 1. Whether the purported question, dispute and or difference regarding execution of Supplementary MOU is immoral, one sided, wholly unconscionable, unilateral, induced by 'Undue Influence', obtained under duress, without free will and consent, under coercion etc. as contained in paragraphs 7 and 8 of the Statement of Facts and Claims is the subject matter of reference to arbitration before the arbitral Tribunal for adjudication?
> 2. Whether the arbitral Tribunal has jurisdiction to decide and declare the validity of Supplementary MOU in view of allegations of coercion, duress, undue influence etc.?
> 3. Whether the Supplementary Memorandum of Understanding is vitiated by the purported contentions of coercion, duress, undue influence, economic pressure, immoral and unreasonable?
> 4. Whether the Claimant's proposal of Rs. (sic Rest.) 106,09,91,236/- for the Work was accepted by the Respondent on a lump sum turnkey basis?
> 5. Whether the GCC are the part of the Claimant's proposal or the Respondent's letter of acceptance and or the

MOU or the Supplementary MOU?
6. Whether the purported claims of the Claimant are barred by limitation?
7. Whether the Claimant had made a request for foreclosure of contract?
8. Whether the Claimant offered and agreed to continue left over work on grant of extension of time at a fixed cost of Rs. 106.10 crores?
9. Whether the Claimant agreed not to pursue its claims pertaining to escalation and compensation due to suspension of Work?
10. Whether the suspension of Work was due to reasons beyond the control of New Okhla Industrial Development Authority?
11. Whether the Claimant has complied the pre-requisite conditions in respect of the purported disputes before seeking reference to the arbitration.
12. Whether the costing/ estimation done by IIT, Delhi for referred in Reports/Letters is acceptable or not?
13. Whether the Claimant is entitled to an amount on account of price variations? If so, what amount?
14. Whether the Claimant is entitled to an amount on account of Clause 13(b) of GCC? If so, what amount?
14 (A). Whether the Claimant is entitled to any amount on account of nonpayment of 4" RA Bill in time? If so what amount.
15. Whether the Claimant is entitled to damages on account of extra Bank guarantee charges? If so, what amount?
16. Whether the Claimant is entitled to damages on account of loss of profit? If so, what amount?
17. Whether the Claimant did extra items? If so, what are such items and what amount the Claimant is entitled in respect thereof.
18. Whether the claim for extra items is maintainable? If so, what amount the Claimant is entitled.
19. Whether the Claimant is entitled on account of final bill? If so, what amount?
20. Whether the Claimant is entitled to interest? If so, what amount and at what rate and for what period.

23 (a). Issues no.1, 2 and 3 were decided together. The tribunal held that the issue relating to undue influence and coercion was well within the scope of reference; that it had jurisdiction to decide the validity of Supplementary MoU on basis of allegations of coercion, duress and undue influence and that duress and undue influence was played upon HSCL in obtaining Supplementary MoU, NOIDA being in a dominating position.

23 (b). Issue no.4 was decided in favour of HSCL and it was held that the contract price was lumpsum amount of Rs.106,09,236/- plus price variation as per the contract.

23 (c). Issue no.5 has also been decided in favour of HSCL and it is held that GCC was integral part of the main contract.

23 (d). The plea of NOIDA relating to the claims being barred by time was decided vide Issue No.6. The plea was repelled and it was held that HSCL had invoked the arbitration clause well within three years and therefore the claims were not barred by time.

23 (e). Issue no.7 was decided in favour of HSCL.

23 (f). Issue no.8 was decided in favour of HSCL and it is held that the term “fixed cost” is referable to the originally agreed amount and does not preclude the claim in respect of price variation etc. in accordance with the MoU, GCC and Supplementary MoU.

23 (g). Issue no.9 has been decided in favour of HSCL and it has been held that Clause 3 of the Supplementary MoU prohibited claim in respect of escalation and compensation only from 22.9.2003 till recommencement of the work. It did not preclude HSCL from making claim in respect of compensation/escalation subsequent to re-commencement of the work.

23 (h). Issue no.10 as to whether suspension of work was due to reasons beyond control of NOIDA, was decided against NOIDA holding that it was responsible for unnecessarily holding up the work for a period of 928 days.

23 (i). Issue no.11 has been decided in favour of HSCL holding that the claimant-appellant had complied with the pre-requisite conditions before seeking reference to the arbitration.

23 (j). Issue no.12 as to whether costing/estimation done by IIT, was acceptable or not, has been decided in favour of HSCL.

23 (k). Issue no.13 related to claim in respect of price variation - post re-commencement of the work. The tribunal, after considering various clauses of the MoU, GCC and Supplementary MoU made distinction between claim in respect of price variation and compensation under Clause 13(ii)(b) of GCC. It held that Price Variation Clause in the original MoU (Clause 7) and GCC (Clause 8) remained eclipsed only during work suspension period. Post

recommencement of work, these clauses revived, and the claim of Rs.23.94 crores towards price variation – post recommencement of work, was fully admissible and was allowed.

23 (l). Issue no.14 in respect of damages @ Rs.4 lakh per day during work suspension period has been decided in favour of HSCL and a sum of Rs.35.92 crores has been awarded as liquidated damages under Clause 13(ii)(b) of GCC.

23 (m). Issue no.14-A related to award of interest on account of late payment of 4th RA bill. It has been decided in favour of HSCL and a sum of Rs.1.66 crores has been awarded in its favour.

23 (n). Issue no.15 relating to claim on account of extra bank guarantee charges was rejected.

23 (o). Issue no.16 relating to claim for damages on account of loss of profit has been rejected.

23 (p). Issues no.17 and 18 pertaining to claim in respect of extra work have also been decided against HSCL.

23 (q). Issue no.19 has been decided in favour of HSCL and it has been awarded Rs.48.85 lakhs towards final bill.

23 (r). Issue no.20 has been decided in favour of HSCL and it is held that HSCL is entitled to pendente lite and future interest on the sums awarded.

24. Claim No.1 – towards price escalation has been dealt with under Issue No.13. It has been decided in favour of HSCL. The other major Claim No.2 – towards damages @ Rs.4 lakh per day for the period work remained suspended, also decided in favour of HSCL, is covered under Issues No.1, 2, 3 and 14.

PROCEEDINGS BEFORE COMMERCIAL COURT (Sec. 34 of the Act)

25. NOIDA, feeling aggrieved by the award, filed objections under Section 34 of the Act before the Commercial Court, Gautam Budh Nagar, which has been allowed by the impugned order dated 23.05.2022.

26. The Commercial Court did not find any perversity in respect of the finding recorded by the tribunal on issue no.13 i.e. claim in respect of price variation (Claim No.1). However, it has set aside the award of Rs.35.02 crores towards damages on account of suspension of work for period of 928 days (Claim No.2). It held that HSCL by signing the Supplementary MoU had surrendered its right to compensation during period of suspension of the contract. It also repelled the plea of coercion, duress, undue influence and unequal bargaining power set up by HSCL and the finding of the arbitral tribunal that Supplementary MoU is void and unenforceable. The award of liquidated damages under Clause 13(ii)(b) of GCC while deciding issue no. 14 is held to

suffer from a patent illegality warranting exercise of power under Section 34 of the Act.

27. The Commercial Court placed reliance on a judgement of Delhi High Court in **M/s Classic Motors Limited Vs. Maruti Udyog Limited**[1], wherein four factors have been laid down to ascertain whether any duress or coercion has been played upon any party in a commercial contract. The factors are: (i) Did the party protest before or soon after the agreement? (ii) Did the party took any step to avoid the contract? (iii) Did the party has any alternative course of action or remedy? and (iv) Did the party convey benefit of the independent advice?

28. The Commercial Court held that the appellant failed to pass the test laid down in the said judgement. It also placed reliance on the judgement of the Supreme Court in **Central Inland Water Transport Corporation Ltd. Vs. Brojo Nath Ganguly**[2], judgement of Bombay High Court in **Balaji Pressure Vessels Ltd. Vs. Bharat Petroleum Corporation Ltd.**[3] and judgement of Andhra Pradesh High Court in **Government of Andhra Pradesh Irrigation Department Vs. G. Kondala Rao**[4] and held that the plea of coercion and undue influence was after thought, “patently erroneous, perverse, in ignorance of vital

1 1997 (40) DRJ
2 1986 (3) SCC 156
3 2014 SCC OnLine, Bombay 1079
4 (2004) 1 An WR 526 (WB)

evidence on record, contrary to the terms of the Supplementary MoU and in clear breach of public policy of India".

29. The Commercial Court thereafter relying on **Dakshin Haryana Bijli Vitran Nigam Ltd. Vs. M/s Navigant Technologies Pvt. Ltd.**[5] held that since in relation to some of the issues, the findings are perverse, against public policy of India and covered by grounds contained in sub-section (2) and (2-A) of Section 34 of the Act, the award cannot be upheld in part as it would amount to modifying the award. Accordingly, the award has been set aside in its entirety.

30. We have heard Sri Amit Saxena, Senior Advocate assisted by Sri Varad Nath and Sri Pranay Agarwala, learned counsel for the appellant and Sri Manish Goyal, Senior Advocate assisted by Sri Kaushalendra Nath Singh and Ms. Anjali Goklani, learned counsel for the respondent at great length and perused the material on record with the assistance of learned counsel for the parties.

SUBMISSIONS OF LEARNED COUNSEL FOR THE APPELLANT :

31. It is submitted on behalf of the appellant that the impugned order of the Commercial Court is manifestly illegal and contrary to the well established principles on which an award of an Arbitral Tribunal could be set aside. The tribunal decided Issues No. 1, 2, 3 and 14 relating to award of damages during suspension period in terms of Clause 13(ii)(b)

5 2021 (7) SCC 657

of the GCC after taking into consideration the case of the parties, evidence on record and the law laid down by the Supreme Court in respect of fraud and coercion. The power of the court under Section 34 of the Act is limited one, circumscribed by the parameters laid down under the said provision. To hold an award to be opposed to public policy of India, the patent illegality should go to the root of the matter. In deciding objections under Section 34 of the Act, the court does not exercise the power of an appellate court and it cannot re-appreciate or re-assess evidence. Once the tribunal had assessed the evidence before it in detail, the court does not have jurisdiction to take another view even if it is possible. The court has to examine whether the view taken by the Arbitrator is a plausible view on the facts, pleadings and evidence before it. Once the view taken is found to be a plausible view, the court will not have power to substitute its findings in place of the findings recorded by the Arbitral Tribunal. The extent of judicial scrutiny under Section 34 is very limited.

32. It is urged that the Arbitral Tribunal had in great detail considered the stipulations contained in the MoU, GCC and Supplementary MoU as well as the communication exchanged between the parties during the period contract remained suspended. It had also duly considered the directions issued by the State Government which prompted NOIDA to compel the appellant to enter into Supplementary MoU on terms

dictated by it and thereafter arrived at a finding of fact that execution of the Supplementary MoU by the appellant was a result of undue influence and coercion. The appellant had no other option left with it but to accept the conditions imposed upon it for resuming the work or else the consequences would have been disastrous. It would have resulted in termination of the contract; blacklisting of the appellant; difference in cost of balance work got executed from third party being realised from the appellant; invocation of bank guarantee of Rs.15.30 crores; non payment of unpaid dues of Rs.8.21 crores; loss of reputation and incurring heavy amount in litigation. It is also urged that the NOIDA was conscious of his imbalance in negotiating power and it got legal opinion to compel the appellant to give up its right to claim damages under the original MoU. The Supplementary MoU dated 5.04.2006 was prepared and drafted by NOIDA and the appellant was directed to sign the same within 15 days. NOIDA had included in the Supplementary MoU various terms which absolves it of its liabilities arising out of its unilateral act of suspending the contract.

33. Even after resumption of work on 8.04.2006, NOIDA continued to withhold payments due to the appellant for the works executed prior to suspension of work until the work was completed and delivered by the appellant Company on 30.04.2008. NOIDA failed to provide completion certificate and also withheld the bank guarantee.

34. After having successfully delivered the Project, the appellant was in a position to invoke the arbitration machinery for seeking damages under the MoU. It did so by way of its letter dated 20.03.2009 and wherein it specifically made a claim for price variation (Rs.2394.20 lakhs) and damages for suspension of work (Rs.3712.00 lakhs). Again in para 9 of the arbitration application filed by the appellant under Section 11 of the ACA before this Court, the plea of coercion was specifically taken.

35. It was thus contended that the plea of coercion and undue influence was duly taken by the appellant at the first opportunity. The Arbitral Tribunal was well within its jurisdiction to examine the said plea and to record findings in favour of the appellant. The Commercial Court has wrongly held that the plea of coercion and undue influence or unequal bargaining power is not applicable in commercial contracts. In support of the said contention, learned counsel for the appellant has placed reliance on various judgements which will be discussed while dealing with the contention.

36. The judgement of the Delhi High Court in **Classic Motors** was wrongly treated by the Commercial Court as laying down public policy of India. The said judgement was rendered by a Single Judge of Delhi High Court while deciding objections under Section 34. The said judgement does not consider various decisions of the Supreme Court on

the subject of coercion and undue influence. The Commercial Court has also wrongly relied on the judgement in **Central Inland Water Transport Corporation Ltd.** and **Balaji Pressure Vessels Ltd**.

37. The issue pertaining to coercion and duress is a pure question of fact. It was decided by the Arbitral Tribunal after hearing both the parties and considering all the material evidence on record. The view taken by the Arbitral Tribunal in this behalf was a plausible view. The Commercial Court erred in re-appreciating the evidence and giving its own interpretation to the same.

38. The Supplementary MoU was drafted by NOIDA and the appellant had no option but to agree to the conditions contained therein, failing which, the appellant, who had already invested huge sum of money in the Project, was bound to be sidelined, apart from being visited with evil consequences provided under the original contract. Consequently, there was no *consensus ad idem* between the parties.

39. The Supplementary MoU did not override or amend or delete Clause 13(2)(b) of the GCC, either specifically or by necessary implications. The Supplementary MoU does not even refer to Clause 13(ii)(b) of the GCC. The Commercial Court has relied upon the intention and reasoning of executing the Supplementary MoU but overlooked that no such intention was evident from the language of the Supplementary MoU.

40. The Arbitrator held that the Supplementary MoU did not amend the MoU by deleting the Price Variation Clause. The Commercial Court has upheld claim under Price Variation Claim. The same reasoning as upheld by the Commercial Court in relation to the Claim awarded for Price Variation would apply to the claim of Rs. 4 Lakhs per day under Clause 13 (ii)(b) of the GCC.

41. The Commercial Court accepted the Award given by the Arbitrator in relation to issue no. 13 i.e. with respect to Award of Rs. 23.94 Cr on account of price variation. Despite having upheld the award on that claim, the Commercial Court has wrongly held that since there is no power to modify the award, "the entire award has to be set aside", relying on a Supreme Court judgement in the case of **Dakshin Haryana Bijli Vitaran Nigam Ltd. vs M/s Navigant Technologies (P) Ltd.** (supra).

42. The Commercial Court has erred in law in proceeding on this assumed legal position that where an award comprises several distinct monetary claims being awarded on independent grounds, and award of some of the monetary claims are interfered with under Section 34 then the entirety of the award is set aside even though the award on other claims was upheld.

43. The judgement **Dakshin Haryana Bijli Vitaran Nigam Ltd.'s** case relied upon in the impugned order, is distinguishable on facts. In the said case, it was not really dealing with the issue of modification of an Award by the court under Section 34 of the Arbitration Act, however, it had relied upon the law laid down in the case of **McDermott International Inc vs. Burn Standard Co. Limited**[6] to decide the issue of relevance of a dissenting opinion.

44. In the present case, there were several distinct amounts awarded by the Tribunal on independent reasonings, including, inter alia, an amount of Rs. 23.94 Cr towards Price Variation and an amount of Rs. 35.92 Cr under Clause 13 (ii)(b) of GCC. The Commercial Court could not have set aside the entire Award because it found that the Award of Rs. 35.92 Cr under Clause 13 (ii)(b) of GCC was against public policy. The Court is fully empowered to set aside the award in regard to particular claim only, while refusing to interfere with the remaining portion of the Award.

SUBMISSIONS OF LEARNED COUNSEL FOR THE RESPONDENT:

45. The award of the Arbitral Tribunal primarily flows from the erroneous finding that the Supplementary MoU between the parties was signed under coercion and duress. The said finding is not supported by

6 (2006) 11 SCC 181

the evidence on record and hence amounts to a patent illegality as envisaged under Section 34 of the Act.

46. It has to be ascertained whether the party alleging coercion exercised a free will or not while entering into the Supplemental Agreement. For this purpose there are several factors which need to be looked into. They are (1) Did the party protest before or soon after the agreement? (2) Did the party take any steps to avoid contract? (3) Did the party have an alternative course of action or remedy? If so, did the party pursue or attempt to pursue the same? (4) Did the party convey benefit of independent advice?

47. If the aforesaid factors are applied on the present facts, the Arbitral Tribunal failed to consider, that HSCL in their own wisdom and being fully conscious of their legal rights and remedy, sent letters dated 29.4.2005 & 10.5.2005 to NOIDA. In these letter(s) HSCL expressly submitted to complete the contract at the fixed value of Rs.106.10 crore and voluntarily agreed to claim no compensation or price escalation at all under the contract. Those letters formed the part of the Supplementary MoU and no prompt protest was lodged by HSCL. Since 22.03.2006, when the Supplementary MoU was executed and work was continued after recommencement, HSCL did not protest to the execution of the Supplementary MoU, in any form or manner. Almost after completion of the entire contract and reaping benefits

under it, HSCL used the term coercion, in an attempt to create a false dispute between the parties by going contrary to the conduct and express agreement. The plea of coercion and undue influence was not only sham and an afterthought, but also merely a cause to secure unjust enrichment at the cost of public exchequer.

48. As regards the second and third factor to prove coercion, the question remained as to whether HSCL took any step to avoid the contract or did HSCL have an alternative course of action or remedy? No steps were taken to either avoid the contract or pursue the rights and remedies under the MoU or GCC. Despite being aware of its right both under the Contract and GCC, HSCL conspicuously chose to remain oblivious in exercising its right, to avoid execution of Supplementary MoU under coercion or undue influence.

49. Fourth factor pertains to whether HSCL convey benefit of the independent advice? It is undisputed that HSCL was an organization which is regulated and controlled by the Government of India. By no stretch of imagination, it can be assumed that the state entity i.e. NOIDA can exercise coercion and undue influence on an entity which is under control of the Government of India. There is no reason to assume, that HSCL being regulated by Central Government of India, didn't have able resources or means to have independent legal advice to determine the rights under the contract and were forced to enter into a

transaction on exercise of coercion and undue influence.

50. The power to set aside only part of the award is conferred on court by Section 34 only in one contingency which is to be found in Clause (iv) of sub-section (2) of Section 34 of the Act. In all other cases, if the court finds that only a part of the award is affected by illegality which is pointed out to the court, the court cannot itself modify the award, but if a party to the petition applies to the court in exercise of its power under sub-section 4 of Section 34, the court can direct the arbitral tribunal to resume the proceedings and take such action to eliminate the ground for setting aside the award. The placement of the proviso under sub-clause (iv) of clause (a) of sub-section 2 is crucial as it limits the application of the proviso to the said sub-clause alone. This position cannot be overlooked to extend the application of the proviso to the entire sub-section (2).

POINTS FOR DETERMINATION:

51. Two points which arise for determination are:

(A) Whether award of damages during the period of suspension of contract (Claim No.2), by the arbitral tribunal falls within the clutches of sub-section (2) or (2-A) of Section 34 of the Act, so as to warrant interference by the Court.

(B) Whether the Court, in proceeding emanating from Section 34

of the Act has power to sever bad part of the award from good part even in situations not covered under the *proviso* to Section 34 (2) (a) (iv) of the Act?

ANALYSIS

Point No.1:

52. Section 34 of the Act specifies the grounds on which arbitral award can be set aside by the court. It is noteworthy that Section 34 was amended by Act No.3 of 2016 w.e.f. 23.10.2015. The application in the present case was filed post amendment and would therefore be governed by the amended provisions. The relevant part of Section 34 is as follows:-

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

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

(b) the Court finds that--

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

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

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

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

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

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

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

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

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

Precedents on scope of Section 34 :

53. In **Ssangyong Engineering and Construction Company Ltd. Vs. National Highways Authority of India (NHAI)**[7], the Supreme Court considered the scope of Section 34 as amended. The Supreme

7 (2019) 15 SCC 131

Court also noted the amendments carried out simultaneously in Section 48, which deals with 'foreign awards', so as to bring the said provision in line with the amendments made in Section 34.

54. The Supreme Court explained that the phrase “public policy of India” used in Section 34 and 48 would now mean the “fundamental policy of Indian Law” as explained in paras 18 and 27 of **Associate Builders**. Therein reliance was placed on the meaning assigned to the aforesaid expression in **Renu Sagar**. Para 18 and 27 of **Associate Builders** reads thus:-

> 18. In Renusagar Power Co. Ltd. v. General Electric Co.3, the Supreme Court construed Section 7(1)(b)(ii) of the Foreign Awards (Recognition and Enforcement) Act, 1961:
>
> 7. Conditions for enforcement of foreign awards. (1) A foreign award may not be enforced under this Act-
>
> (b) if the Court dealing with the case is satisfied that-
>
> (ii) the enforcement of the award will be contrary to the public policy."
>
> In construing the expression "public policy" in the context of a foreign award, the Court held that an award contrary to
>
> (i) The fundamental policy of Indian law,
>
> (ii) The interest of India,
>
> (iii) Justice or morality,
>
> would be set aside on the ground that it would be contrary to the public policy of India. It went on further to hold that a contravention of the provisions of the Foreign Exchange Regulation Act would be contrary to the public policy of India in that the statute is enacted for the national economic interest to ensure that the nation does not lose foreign exchange which is essential for the economic survival of the nation (see SCC p. 685, para 75). Equally, disregarding orders passed by the superior courts in India could also be a contravention of the fundamental

> policy of Indian law, but the recovery of compound interest on interest, being contrary to statute only, would not contravene any fundamental policy of Indian law (see SCC pp. 689 & 693, paras 85 & 95).
>
> 27. Coming to each of the heads contained in Saw Pipes judgment, we will first deal with the head "fundamental policy of Indian law". It has already been seen from Renusagar[3] judgment that violation of the Foreign Exchange Act and disregarding orders of superior courts in India would be regarded as being contrary to the fundamental policy of Indian law. To this it could be added that the binding effect of the judgment of a superior court being disregarded would be equally violative of the fundamental policy of Indian law.

55. While holding that the test laid down in **Renu Sagar** would hold good even in respect of the amended provision, the wider interpretation given to the expression in **ONGC Limited Vs. Western Geco International Ltd**[8] is held not to lay down the correct position of law. Thus, under the guise of interfering with an award on the ground that the Arbitrator has not adopted a judicial approach, the courts' intervention would be on the merits of the award, which is held to be the impermissible post-amendment.

56. The Supreme Court also noted that interference with the award on the ground that it concerns “interest of India” has since been deleted and, therefore, no longer available for setting aside an award. It is also clarified that the ground for interference on the basis that it is in conflict with justice or morality is now to be understood as a conflict with “most basic notions of morality or justice”. Thus, the public policy

8 (2014) 9 SCC 263

of India is held to be confined to (a) the fundamental policy of Indian Law as understood in paragraphs 18 and 27 of Associate Builders; (b) if it is against basic notions of justice or morality as understood in paras 36 to 39 of **Associate Builders**. It is held that with the insertion of sub-section (2-A) to Section 34, an additional ground has been made available under Section 34 i.e. “patent illegality appearing on the face of the award”. The proviso clarifies that the patent illegality should be such as goes to the root of the matter. It should not merely be confined to an erroneous application of law. It also does not permit re-appreciation of evidence. The addition of the said ground does not mean that what is not subsumed within the fundamental policy of India, namely, the contravention of Statute not linked to public policy or public interest, can be brought in by the backdoor when it comes to setting aside of an award on the ground of patent illegality.

57. Before proceeding further, it would be advantageous to note paragraphs 36 and 37 of **Associate Builders**, which have been approved in **Ssangyong Engineering**:-

> 36. The third ground of public policy is, if an award is against justice or morality. These are two different concepts in law. An award can be said to be against justice only when it shocks the conscience of the court. An illustration of this can be given. A claimant is content with restricting his claim, let us say to Rs 30 lakhs in a statement of claim before the arbitrator and at no point does he seek to claim anything more. The arbitral award ultimately awards him Rs 45 lakhs without any acceptable reason or justification. Obviously, this would shock the conscience of the

court and the arbitral award would be liable to be set aside on the ground that it is contrary to "justice".

37. The other ground is of "morality". Just as the expression "public policy" also occurs in Section 23 of the Contract Act, 1872 so does the expression "morality". Two illustrations to the said section are interesting for they explain to us the scope of the expression "morality":

"(j) A, who is B's Mukhtar, promises to exercise his influence, as such, with B in favour of C. and C promises to pay 1000 rupees to A. The agreement is void, because it is immoral.

(k) A agrees to let her daughter to hire to B for concubinage. The agreement is void, because it is immoral, though the letting may not be punishable under the Indian Penal Code (45 of 1860)."

58. In paragraphs 38 and 39 (**Associate Builders**), it has been explained that the concept of morality as envisaged under Section 23 of the Contract Act is confined to sexual immorality and not to any other case. As regards construction of the terms of a contract, it has been held that it is primarily for an arbitrator to decide unless the arbitrator construes the contract in a manner that no fair minded or respectable person would construe it. In other words, interference with an interpretation given by the arbitrator to the terms of the contract is not warranted if it is a possible view.

59. In para 41 of the Law Report, it has been held that 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. Likewise, an evidence taken behind the back of the party and a decision based on it would also fall in the same

category, as such a decision would not be a decision based on evidence led by the parties.

60. More recently in **Delhi Airport Metro Express Pvt Ltd Vs. Delhi Metro Rail Corporation Ltd**[9], the Supreme Court again considered the scope of interference by the Court with an award under Section 34 in context of the interpretation given by the Arbitral Tribunal to the terms of the contract. In the said judgement again, the test of "possible view" laid down in previous judgements has been reiterated as laying down the correct position of law. The expression "patent illegality" in Section 34 (2-A) has been explained thus:-

> 29. Patent illegality should be illegality which goes to the root of the matter. In other words, every error of law committed by the Arbitral Tribunal would not fall within the expression "patent illegality". Likewise, erroneous application of law cannot be categorised as patent illegality. In addition, contravention of law not linked to public policy or public interest is beyond the scope of the expression"patent illegality". What is prohibited is for courts to re-appreciate 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

9 (2022) 1 SCC 131

supplied to the other party is a facet of perversity falling within the expression “patent illegality”.

61. In para 31 of the Law Report, the Supreme Court placing reliance on the interpretation given in **Ssangyong Engineering** reiterated the legal position that “contravention of a Statute not linked to a public policy or public interest” cannot be a ground to set at naught an arbitral award as being discordant with the fundamental policy of Indian Law and neither it can be brought within the confine to “patent illegality.... .”

62. In **Municipal Corporation of Delhi Vs. Jagan Nath Ashok Kumar and another**[10], the Supreme Court held that the Arbitrator is “the sole judge of the quality as well as quantity of evidence and it will not be for this Court to take upon itself the task of being a judge of the evidence before the arbitrator. It may be possible that on the same evidence the Court might have arrived at a different conclusion than the one arrived at by the arbitrator but that by it self is no ground in our view for setting aside the award of an arbitrator.”

63. In **State of Jharkhand and others Vs. HSS Integrated SDN and another**[11], the Supreme Court placing reliance on **NHAI Vs. Progressive -NVR (JV)**[12] reaffirmed the “possible view” theory -

“In **Progressive-MVR** (supra), after considering the catena of

10 (1987) 4 SCC 497
11 (2019) 9 SCC 798
12 (2018) 14 SCC 688

> decisions of this Court on the scope and ambit of the proceedings under Section 34 of the Arbitration Act, this Court has observed and held that even when the view taken by the arbitrator is a plausible view, and/or when two views are possible, a particular view taken by the Arbitral Tribunal which is also reasonable should not be interfered with in a proceeding under Section 34 of the Arbitration Act."

64. In **Maharashtra State Electricity Distribution Co. Ltd. Vs. Datar Switchgear Ltd**[13], it is held that the Arbitral Tribunal is the master of evidence and the findings of fact recorded by an Arbitral Tribunal on basis of the evidence on record are beyond scope of scrutiny under Section 34 of the Act. It is observed as follows:-

> "The proposition of law that the Arbitral Tribunal is the master of evidence and the findings of fact which are arrived at by the arbitrators on the basis of evidence on record are not to be scrutinised as if the Court was sitting in appeal now stands settled by a catena of judgments pronounced by this Court without any exception thereto."

Application to the facts of the case :

65. Keeping in mind the above principles, we now proceed to examine whether the Commercial Court acted within the bounds of its jurisdiction in setting aside the award in respect of Claim No.2 towards liquidated damages on account of suspension of work. The said claim of Rs.35.92 crores was made under Clause 13 of GCC.

66. Clause 13 of GCC confers power upon the Engineer-in-Chief to suspend progress of the works or any part thereof for such time and in such manner as he may consider necessary. When suspension of work

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13 (2018) 3 SCC 133

is for reasons enumerated in sub-para 13(i)(b) or (c), it would entitle the contractor to damages at the rate of Rs. 4 lakhs per day for the period exceeding 30 days. If suspension is prolonged for more than four months, it gives further option to treat such suspension as foreclosure of contract due to abandonment or reduction in scope of work. As the entire controversy hinges on the interpretation and scope of the said Clause, therefore, it is reproduced below for convenience of reference:-

> CLAUSE 13
> Suspension of Work
> (i) The Contractor shall, on receipt of the order in writing of the Engineer-in-Charge whose decision shall be final and binding on the Contractor) suspend the progress of the works or any part thereof for such time and in such manner as the Engineer-In-Charge may consider necessary so as not to cause any damage or injury to the work already done or endanger the safety thereof for any of the following reasons: -
> (a) on account of any default on the part of the Contractor or;
> (b) for proper execution of the works or part thereof for reasons other than the default of the Contractor; or
> (c) for safety of the works or part thereof.
> The Contractor shall, during such suspension, properly protect and secure the works to the extent necessary and carryout the instructions given by the Engineer-In-Charge.
> (ii) lf the suspension is ordered for reasons (b) and (c) in sub-para (i) above.
> (a) the Contractor shall be entitled to an extension of time equal to the period of every such suspension PLUS 25% for completion of the item or group of items of work for which a separate period of completion is specified in the contract and of which the suspended work forms a part, and;
> (b) <u>if the total cumulative period of all such suspensions in respect of an item or group of items if work for which a separate period of completion is specified in the contract exceeds thirty days, the Contractor shall in addition to (a) above, be entitled to @ Rs. 4,00,000/- (Rupees Four Lakh) per day for the period exceeding 30 days.</u>

(iii) If the works or part thereof is suspended on the orders of the Engineer-In- Charge for more than four months at a time, except when suspension is ordered for reason (a) in sub-para (i) above, the Contractor may treat such suspension under clause 11. i.e. foreclosure of Contract due to abandonment or reduction in scope of work."

67. The Arbitral Tribunal, while deciding issue no.10, has held that suspension of work was for reasons attributable to the respondent (NOIDA). The reason for suspension of work, thus, does not fall under sub-para (a) of Clause 13 (i) of GCC. In such an event, three situations are contemplated with different consequences -

(i) the contractor would be entitled to extension of time equal to the period of every such suspension, as also, 25% for completion of the item or group of items of work for which a separate period of completion is specified in the contract and of which suspended work forms a part;

(ii) if the period of suspension exceeds 30 days, the contractor would in addition to above, be entitled to Rs. 4 lakh per day for the period exceeding 30 days; and

(iii) if the period of suspension exceeds four months at a time, as in the instant case, the contractor had the option to treat such suspension as 'fore closure of contract' under Clause 11 of GCC.

68. Clause 11 of GCC contemplates payment of compensation to the contractor in the event there is foreclosure of work. It also provides for

the manner of calculation of compensation. It reads thus : -

CLAUSE 11:

Foreclosure Of Contract Due To Abandonment Or Reduction In Scope Of Work.

If at any time after acceptance of the offer, NOIDA shall decide to abandon or reduce the scope of the works for any reason whatsoever and hence not require the whole or any part of the works to be carried-out, the Engineer-In-Charge shall give notice in writing to that effect to the Contractor and the Contractor shall act accordingly in the matter. The Contractor shall have no claim to any payment of compensation or otherwise whatsoever, on account of any profit or advantage which he might have derived from the execution of the works in full but which he did not derive in consequence of the foreclosure of the whole or part of the works.

The Contractor shall be paid at contract rates full amount for works executed at site and in addition, a reasonable amount as certified by the Engineer-In-Charge for the items hereunder mentioned which could not be utilized on the works to the full extent in view of the foreclosure.

i) Any expenditure incurred on preliminary site work, e.g. temporary access roads, temporary labour huts, staff quarters and site office. Storage accommodation and water storage tanks.

ii) NOIDA shall have the option to take over Contractor's materials or any part thereof either brought to site or of which the Contractor is legally bound to accept delivery from suppliers (for incorporation in or incidental to the work) provided however, NOIDA shall be bound to take over the materials or such portions thereof as the Contractor does not desire to retain. For materials taken over or to be taken over by NOIDA cost of such materials shall be paid. The cost, shall, however, take into account purchase price, cost of transportation and damage which may have been caused to materials whilst in the custody of the Contractor.

iii) Reasonable compensation for transfer of T&P from site to Contractor's permanent stores or to his other works, whichever is less on actuals. If T&P are not transported! to either of the said places, no cost of transportation shall be payable.

iv) Reasonable compensation for repatriation of Contractor's site staff and imported labour to the extent necessary.

The Contractor, shall, if required by the Engineer-In-Charge furnish to him books of account wage books, time sheets and other relevant documents and evidence as may be necessary to enable him to certify the reasonable amount payable under this condition.

v) Recovery if any due, against Mobilisation Advance will not be effected. Any retention money held shall be released. All Bank Guarantees submitted to NOIDA shall be discharged forthwith.

The reasonable amount of items on (i), (iii) and (iv) above shall not be in excess of 4% (Four Percent) of the cost of the work remaining incomplete on the date of closure, i.e. total stipulated cost of the work as per accepted tender less the cost of work actually executed under the contract and less the cost of Contractor's materials at site taken over by the NOIDA as per item (ii) above.

69. It is an admitted position that even after expiry of four months of suspension, HSCL did not exercise its right of foreclosure. The parties kept negotiating with each other to break the deadlock. A number of meetings were held between them. Ultimately, HSCL by letter dated 29.4.2005 prayed for (i) revocation of the order suspending the work; (ii) extension of time in terms of Clause 13 and Clause 22 of GCC; and (iii) agreed not to make any claim towards escalation in prices or any

kind of compensation during suspension period. The letter dated 29.4.2005 is reproduced below: -

HINDUSTAN STEELWORKS CONSTRUCTION LTD.
(A Govt. of India Undertaking) 118 Vandhana 11 Tolstoy Marg,
New Delhi-110001

Ref. HSCL/DGM/ND/NOIDA – Flyover/2005-2240
Dt. 29.04.2005

The Chief Executive Officer,
New Okhla Industrial Development Authority.
Main Administrative Building.
Sector-VI, NOIDA,
Distt. Gautam Budh Nagar – 201301.

Sub: - NOIDA Board Special Meeting held on 26 April 2005 for the Construction of Flyovers in NOIDA vide Letter No. NOIDA/CPE/2005/191, Dated 15 April 2005.

Dear Sir,

Pursuant to the discussion held at the Special Meeting of NOIDA BOARD on 26 April 2005, it has been decided to commence the unfinished work of "Noida Flyovers" which was Suspended by the NOIDA Authority on 22 September 2003. It is submitted that we started the work of the "NOIDA FLYOVERS" and carried out the same till the work was suspended, with utmost sincerity, diligence and commitment and at no point of time, there was any breach or default on our part.

However, in the interest of Social Justice and Public Interest, it has been decided by us to complete the work at a Cost of Rs. 106.10 Crores. Further, we also agree not to pursue any escalation and compensation claim for abrupt Suspension of work with effect from 22 September 2003, as desired in the meeting.

Since considerable time has elapsed from the date of suspension of work, we request, in the interest of justice, for extension of time, in terms of Clause 13 and Clause 2.2 of General Conditions of Contract. Further, you may please appreciate the financial crunch we have undergone due to sudden and long suspension of work, therefore it is requested to kindly release the large pending amount immediately to meet the market liabilities and also to enable us to remobilise.

At the end, we would like to submit that the balance work in regard to the present assignment shall be completed in accordance with the existing Design/ Drawings which were already submitted, on the basis of which work has been executed so far.

In view of the foregoing, NOIDA Authority may kindly revoke the Suspension Order at the earliest to enable us to commence The work after Remobilisation of our resources which may take around a month from the date of revocation of the Suspension Order/release of pending payments.

Thanking you.

Yours faithfully,
For Hindustan Steelworks Construction Ltd.
(V.K. Singh)
Dy. General Manager.

70. HSCL reiterated its above stand that it would complete the remaining work at agreed cost of Rs. 106.10 crores and not claim any compensation for the suspension period by another letter dated 10.5.2005, which is as follows:-

HINDUSTAN STEELWORKS CONSTRUCTION LTD.
(A Govt of India Undertaking) 118, Vandhana. 11 Tolstoy Marg,
New Delhi-110001

Ref.HSCL/DGM/ND/NOIDA-Flyover/2005-2252.
Dt:10.05.2005

To
The Chief Executive Officer, New Okhla Industrial Development Authority.
Main Administrative Building.
Sector-VI, NOIDA, District. Gautam Budh Nagar-201 301.

Sub: Construction of Two No. Flyovers in NOIDA

Ref: Our Letter No-HSCL/DGM/ND/NOIDA - Flyovers/2005-2240, dated 29.04.2005 and clarifications on 09.05.2005 to NOIDA Boards Query.

Dear Sir,

Further to our above referred letter and clarifications to NOIDA Board on 09.05.2005, we inform that suitable extension of time may kindly

be granted as per clause 11 of the M.O.U. for this work.

We further inform that in public interest, we will complete the work within our agreed scope at a fixed cost of Rs.106.10 crores and will not pursue escalation and compensation claim for past abrupt suspension of work.

In addition, we submit that considering the prevailing trend of price increase for construction material, NOIDA Authority may kindly revoke the suspension orders at the earliest and kindly release the large pending amount immediately to meet the market liabilities to enable us to commence the work after remobilization of our resources which may take about a month from the revocation of the Suspension Order / Release of payments, considering all the Practical aspects.

Your immediate and kind response in the above matter is solicited.

Thanking You,

Yours Faithfully.
for Hindustan Steelworks Construction Ltd.

(V.K. SINGH)
Dy. General Manager

71. On the above assurance of HSCL, NOIDA, after seeking approval of the Government, revoked the suspension by letter dated 8.3.2006, subject to the parties executing a supplementary MoU containing specific clause that HSCL would not claim any escalation or compensation on account of suspension of work.

72. Thus, after several rounds of meetings and deliberations, the parties entered into a supplementary MoU on 22.3.2006, which is as follows: -

1. Except in so far this Supplementary Memorandum of Understanding otherwise provides the earlier Memorandum of Understanding between the parties hereto for the construction of the aforesaid Flyover shall continue to remain in full force.

> 2. In accordance with Clause 11 of the earlier Memorandum of Understanding NOIDA has granted extension of time at the request of HSCL. HSCL shall resume further construction of the Flyover within 30 days allowed for remobilisation, from the date of issue of recommencement letter No. Noida/CPE/Flyover/2006/177 dt. 08.03.2006.
>
> 3. In accordance with the letter No.-HSCL/DGM/ND/ NOIDA-Flyover/2005-2240dt. 29.04.2005 and letter No.-HSCL/DGM/ND/NOIDA-Flyover/2005-2252 dt.10.05.2005 and subsequent meetings between the officer of NOIDA and HSCL, HSCL unequivocally agrees to complete the work on the original fixed cost of Rs. 106. 10 crores and not demand any escalation or any compensation, whatsoever on account of suspension of work during the period from 22.09.2003 till its recommencement. The letter dt. 29.04.2005 and 10.05.05 shall be deemed to be part of this Supplementary Memorandum of Understanding.
>
> 4 NOIDA has granted extension. Accordingly, the remaining works of the project shall be completed within stipulated period as per MOU, considering suspension period i.e. from 22.09.2003 to recommencement, so that HSCL still gets a total period of 27 months to complete the project as stipulated in the earlier Memorandum of Understanding.
>
> 5. Subject to the aforesaid clauses, all other terms and conditions as set out in the earlier MOU shall continue to govern the terms and conditions of the contract between the parties hereto for construction of Flyover with cloverleaves M.P. Road 3 and Express Highway and allied work near Amity School and Construction of Flyover and allied works at T-Junction near Film City in District Gautam Budh Nagar.

73. The effect of Clause 1 of Supplementary MoU was that matters specifically provided therein would have an overriding effect, leaving remaining matters to be governed by the original contract. Under Clause 3, it was stipulated that as agreed by HSCL in its letters dated 29.4.2005 and 10.5.2005, it *'will not demand any escalation or any*

compensation, whatsoever on account of suspension of work during the period from 22.9.2003 till its recommencement'. These letters were made part of Supplementary MoU. Accordingly, in terms of Clause 1 of Supplementary MoU, Clause 13(ii)(b) of GCC, making provision for liquidated damages for period of suspension of contract, stood superseded. HSCL was precluded from making any claim towards damages for the suspension period.

74. Despite the same, arbitral tribunal allowed Claim No. 2 of Rs. 35.92 crores towards liquidated damages under Clause 13(ii)(b) of GCC, after declaring Supplementary MoU to be void and unenforceable on ground of coercion, undue influence and duress, having been exercised by NOIDA upon HSCL in obtaining the same. The relevant findings from the award are extracted below:-

> 182. The Ld. Counsel for the Respondent has again reiterated his submissions and case law and set out in a chronological order the factors leading to the signing of the Supplementary MOU. He argued that the Supplementary MOU is a well thought out document which was also acted upon by the parties and as such the same cannot be challenged now as being vitiated by undue influence etc. The same case law was again referred.
>
> 183. On the other hand, the Claimant has reiterated the submissions made with regard to issue No.2 and pointed out that the bills worth Rs.8.21 crores were held up, bank guarantees worth Rs.20 crores were with the Respondent and that there was a threat of cancellation of the contract and awarding the balance work at his risk and cost. Claimant has also stated that various senior lawyers re-consulted by the Respondent felt that the Claimant should be "compelled" to sign the Supplementary MOU, he

> also argued that the idling of the resources were costing the Claimant very heavily and cancellation of the contract and consequent awarding the same at the Claimant's risk and costs would lead to the heavy litigation.
>
> 184. It is also evident that the Claimant has also set-up a case that what was obtained under duress and coercion is the clause that prohibited escalation and compensation and not the entire agreement. The letters obtained by the Respondent from various senior lawyers (Volume C - 1) show that their intention was to compel the Claimant to sign the MOU.
>
> 185. The points of both the parties were summarized in the written briefs filed with regard to issues No.2 & 3.
>
> 186. In view of the above including the long period of suspension, the opinions of the lawyers, the held up amounts etc., I find force in the contention of the Claimant that the Supplementary agreement has not been signed out of freewill.
>
> 187. Thus on issues 1 to 3 I hold that the issue of coercion is a matter to be decided by the tribunal, that the tribunal has the jurisdiction to decide the validity of the same and that the Supplementary MOU was not in fact signed by the Claimant out of free will.
>
> (emphasis supplied)

75. The commercial court held the aforesaid finding to be patently illegal and violative of public policy of India.

Plea of unequal bargaining power in a commercial contract :

76. One of the findings of the Commercial Court is that plea of unequal bargaining power, which has been accepted by the arbitral tribunal in holding Supplementary MoU to be void and unenforceable, does not apply to a commercial transaction. In coming to the said conclusion, Commercial Court placed reliance on the judgement of the

Supreme Court in **Central Inland Water Transport Corporation** (supra) and of Bombay High Court in **Balaji Pressure Vessels Ltd.** (supra).

77. In **Central Inland** (supra), the Supreme Court was examining the terms of contract of employment between employer and employee. In that context, it examined the issue as to whether a particular term of the contract which was unconscionable could still be enforced. A large number of decisions of the Courts of United States, United Kingdom and France were noticed and thereafter it was concluded that all legal systems permit judicial review of a contractual transaction in certain circumstances. The Courts will not enforce an '*unfair and unreasonable contract*', or an '*unfair and unreasonable clause in a contract*', entered into between the parties who are not equal in bargaining power. By way of illustration, it is noted that one such case would be where there is great disparity in the economic strength of the contracting parties. The second would be *"where a man has no choice, or rather no meaningful choice, but to give his assent to a contract or to sign on the dotted line in a prescribed or standard form or to accept a set of rules as part of the contract, however unfair, unreasonable and unconscionable a clause in that contract or form or rules may be"*. An exception to the above will be a case *"where the bargaining power of the contracting parties is equal or almost equal. This principle may not apply where*

both the parties are businessmen and the contract is a commercial transaction". However, it is also observed that "*in today's complex world of giant corporations with their vast infra-structural organizations and with the State through its instrumentalities and agencies entering into almost every branch of industry and commerce, there can be myriad situations which result in unfair and unreasonable bargains between parties possessing wholly disproportionate and unequal bargaining power. These cases can neither be enumerated nor fully illustrated. The court must judge each case on its own facts and circumstances"*.

78. In **Balaji Pressure Vessels Ltd.** (supra) the petitioner, which raised the plea of coercion, was manufacturer of cylinders which were used by the oil industries for liquid petroleum gas. The petitioner supplied oil cylinders in pursuance of purchase orders issued in its favour by the Oil Companies. The initial purchase order dated 1.05.1999 stipulated a provisional price of Rs. 678.77. The terms and conditions of the purchase order, *inter alia*, envisaged a formula for price escalation/de-escalation, according to which, final price would be fixed by the respondents and communicated to the petitioner. The provisional price fixed on 1.04.1999 was amended by letter dated 30.07.1999. The controversy between the parties arose when the respondents issued a Circular letter dated 31.10.2000 stating that as per

report of Industry Task Force, they had decided to revise the provisional price to Rs.645 w.e.f. 1.07.1999 and the differential amount would be realised by adjustment in future bills. The plea of coercion raised by the petitioner was repelled by holding that there was nothing on record to show that any illegitimate pressure was exerted on the petitioner so as to pressurize it to enter into contract against its will. It was held that as a matter of fact on 28.06.1999 when the petitioner was informed that the final price would be fixed after review by Industry Task Force, there was no question of the petitioner accepting depressed price under any economic compulsion. It willingly accepted the conditions contained in the letter dated 28.06.1999. The Court noticed that in fact the petitioner accepted the provisional price expecting that the final price would be higher than the provisional price. Consequently, the plea that the petitioner had no choice left in the matter or any coercion was exercised on it, has been repelled.

78(a). In concluding part of the judgment, it has been observed that the plea of unequal bargaining power was hardly open to the petitioner. Even in the said case, after noticing the legal position expounded in **Atlas Express Ltd. vs. Kafco (Importers & Distributors) Ltd.,**[14], it was held that a plea of economic duress, if taken, has to be examined on the basis of principles laid down by the Privy Council in **Pao On**

14 QBD (1989) 1 All ER 641

and others vs. Lau Yiu Long and others[15]. The relevant extract from the said judgment is as follows: -

> 12. In *Altas Express Ltd.* (supra), we find a good deal of discussion on economic duress as a factor which vitiates a consent. A litany of judgments has been noted, where English judges have acknowledged the existence of this concept, and applied it to a variety of situations. The passages from the Judgment of Lord Scarman in *Pao On v. Lau Yiu* quoted therein succinctly bring out the meaning of economic duress. Duress, whatever form it takes, is a coercion of the will so as to vitiate consent, notes the learned judge, but explains that in a contractual situation commercial pressure on a party alone is not enough. There must be some factor "which could in law be regarded as a coercion of his will so as to vitiate his consent". In such cases, it may be material to enquire whether the person alleged to have been coerced did or did not protest; whether, at the time he was allegedly coerced into making the contract, he did or did not have an alternative course open to him such as an adequate legal remedy; whether he was independently advised; and whether after entering the contract he took steps to avoid it. Simple commercial pressure is not good enough. The pressure so as to constitute duress must be such that the victim must have entered the contract against his will, must have had no alternative course open to him, and must have been confronted with coercive acts by the party exerting the pressure. In other words, the pressure exercised by the other party must be such as the law would not regard legitimate. After a review of various authorities on the point, the necessary ingredients of a plea of economic duress as a ground for avoiding a contract are stated by the Delhi High Court as follows:
>
> “(a) Pressure which is illegitimate;
>
> (b) Its effect on the victim i.e. that the pressure must be a significant cause inducing the Claimant to enter into the contract;
>
> (c) Lack of reasonable alternative i.e. that the practical effect of the pressure was that there is compulsion on, or a lack of practical choice for, the victim."

79. In a recent judgment in **Gas Authority of India Ltd Vs. Indian**

15 22 (1979) 3 All ER 65 (PC)

Petrochemicals Corporation Ltd and others[16], the Supreme Court in case of a commercial contract between M/s Gas Authority of India Ltd. (for short 'GAIL'), a Government of India undertaking and Indian Petrochemicals Corporation Ltd. (for short 'IPCL'), formerly a public sector undertaking, upheld the plea of unequal bargaining power while striking down certain conditions of a contract between them.

79(a). The plea of IPCL that it had no choice but to enter into contract accepting the conditions stipulated by GAIL, in view of its unequal bargaining powers was accepted, observing thus :-

> 22. On a basic principle, it cannot be doubted that once GAIL has laid down the pipeline, it is entitled to structure in its cost in the contract. However, the issue is not simply that. We are faced with a scenario where two public sector enterprises entered into a contract in pursuance of the allocation made by the MOPNG. There was also a time constraint for IPCL. After incurring a heavy expenditure in the construction of the Gandhar Plant, IPCL had very little choice but to enter into the contract. What is of most significance is that IPCL was bound to follow the allocation terms provided by the principal authority, i.e., MoPNG. Thus, as pleaded by IPCL, they were faced with a "Hobson's choice", where they had to either give up the contract or accept the clauses levying transportation charges. On a conspectus of the above factors, it can be said that GAIL exercised an unequal bargaining power at the time of signing the contract.
>
> *(emphasis supplied)*

80. In a more recent judgment in **Kalpraj Dharamshri & Others vs. Kotak Investment Advisors Ltd. & Others,**[17] the Supreme Court applied the principles laid down in **Central Inland** (supra) in striking

16 (2023) 3 SCC 629
17 2021 (10) SCC 401

down unconscionable clause in a commercial transaction. The relevant extract is as follows: -

> 115. We are, therefore, of the view, in light of the law laid down in **Central Inland Water Transport Corpn. Ltd., KIAL** cannot be held to be bound by such unconscionable clause in the letter, which is in a prescribed format.
>
> (emphasis supplied)

81. None of the above judgments envisage a complete bar in examining the plea of economic duress in a contract between two business entities. However, as observed in **Central Inland** (supra), each case must be judged on its own facts and circumstances.

82. We now proceed to discuss the judgments cited on behalf of HSCL in support of its plea that economic duress had vitiated the supplementary memorandum of understanding executed between the parties on 22.03.2006. The first case cited is by the Supreme Court in **National Insurance Company Limited vs. Boghara Polycab Private Limited**[18]**,** where the High Court while disposing of the application under Section 11 of the Act, left the issue relating to accord and satisfaction of the claim to be decided by the arbitral tribunal. It has been observed that the view taken by the High Court that it was prima facie satisfied that the discharge voucher was not issued voluntarily and the claimant was under some compulsion or coercion and that the matter deserved detailed consideration by the arbitral tribunal, did not

18 (2009) 1 SCC 267

require interference by the Apex Court. The said judgment is not of much help to HSCL, except to the extent that in commercial transactions, a plea relating to economic duress is not completely barred and can be set up by a party and in which event, it would require adjudication by the court or by the tribunal, as the case may be.

83. On the same line is the judgment of Supreme Court in **K. Ramachandra Rao vs. Union of India & Others,**[19] wherein the Supreme Court left open the issue relating to accord and satisfaction based on no-dues certificate alleged to have been obtained under undue influence, to be decided by the court below while disposing of application under Section 20 of the Arbitration Act, 1940.

84. The next judgment is by the Delhi High Court in **Supermint Exports Private Limited vs. New India Assurance Company Limited and Others**[20]**.** In the said case, again a discharge voucher was alleged by the claimant to have been obtained by the other side by exercising undue influence and coercion. It has been held that such a defence is permissible in law. Further in the facts of that case, it was held that the finding returned by the arbitral tribunal that the discharge voucher was obtained by coercion, did not suffer from any such infirmity that may warrant interference by the court under Section 34 of the Act.

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19 1994 Supp (2) SCC 545 (2)
20 2021 SCC OnLine Del 5237

85. Another judgment of the Delhi High Court in **New India Assurance Company Limited vs. Khanna Paper Mills Limited**[21] was relied upon in contending that the finding of an arbitral tribunal on the issue of duress and coercion in a particular case is a finding of fact and cannot be interfered by the court. In this regard, reliance has been placed on paragraph no. 81 of the judgment which is extracted below: -

> 81. In the present case, the learned Arbitral Tribunal has found, on facts, that Khanna was under financial duress when it signed the joint discharge voucher on 27th May 2013. These findings, predicated on material on record, cannot be revisited under Section 34 of the 1996 Act, as they cannot be said to suffer from perversity, as understood in law. While this aspect of financial duress is by itself sufficient to sustain the finding of the learned Arbitral Tribunal that Khanna's claims did not stand extinguished by accord and satisfaction, the additional fact that Khanna had been made to sign a blank discharge voucher is of no little significance. Getting an insured to sign a blank discharge voucher is a practice which has been specifically deprecated by the Supreme Court in *Boghara Polyfabz*. It partakes, even by itself, of the nature of coercion. It cannot be expected that an insured would, willy nilly, and of its own volition, sign a blank discharge voucher, even before being told the amount which is being released to it.

85(a). As would reveal from a bare perusal of the passage quoted above, the court did not interfere with the finding of the arbitral tribunal after reaching to a satisfaction that the said finding did not suffer from perversity as understood in law. We are reluctant to read the aforesaid observation as laying down that in no case, a finding relating to coercion and duress returned by an arbitral tribunal, can be interfered

21 (2022) SCC OnLine Del 4269

with under Section 34 of the Act. It would depend upon fact of each case and if the finding suffers from a patent illegality or is covered by any of the grounds stipulated under Section 34 of the Act, then it would definitely be within the scope of interference by the Court.

86. In **Associated Constructions vs. Pawanhans Helicopters Pvt. Ltd.**[22], the contractor issued no-dues certificate, specifically mentioning that insistence on part of the other side for issuance of such a certificate as a condition precedent for clearing off the dues would amount to economic duress. It is again based on facts of that case and would help HSCL only to the extent that the plea of economic duress, if otherwise proved, can be a valid defence to counter the plea of accord and satisfaction. The relevant paragraphs are extracted below: -

> 26. The letter dated 9-12-1991 from Pawanhans to the contractor shows that payment could be considered provided the contractor submitted a “no-claim certificate”. It appears that such certificate was indeed issued but with no result on which the contractor in his letter dated 26-12-1991 in reply to the letter dated 9-12-1991, once again submitted that the payments be released insofar as they had been certified by the architects/consultants and if there was a dispute regarding the other payments, they should be referred to an arbitrator and in desperation further adds :
>
> > "However, if you want to hold us to economic duress by not paying what you wish to pay, without 'no-claim certificate’, we shall treat it as 'duress and issue you such a certificate much against our willingness as we cannot afford to liquidate our dues by such a certificate.
> >
> > Please do not hold us to a ransom and arrange to pay. In case you would still like to insist, let us know, so that we could issue you such a certificate under duress as we have serious financial problems"

22 2008 (16) SCC 128

27. It appears that despite the pleading tone of the aforesaid letter, no payment was made on which the contractor wrote yet another letter dated 17-2-1992 in which it was submitted as under :

> "In spite of our claim statements, you have insisted on ‘no-claim certificate’, we hereby give you this certificate that we have ‘no-claims’ and hence you pay us what you might have worked out as our ‘final dues’.
>
> In case, you have a particular draft in which a 'no-claim’ certificate needs to be issued to receive our dues of our bill, please let us have the draft, or else this letter may be treated as the certificate of no claim from our side.”

30. We have reproduced the correspondence in extenso to show that the contractor was compelled to issue a "no-dues certificate" and in this view of the matter, it could not be said that the contractor was bound by what he had written. It is also clear that there is voluminous correspondence over a span of almost 2 years between the submission of the first final bill on 3-6-1991 and the second final bill dated 2-2-1993 and as such the claim towards escalation or the plea of the submission of a "no-dues certificate" under duress being an afterthought is not acceptable.

87. The position which thus emerges is that there is no absolute bar in raising plea of duress/coercion and unequal bargaining power in a commercial contract between two business entities, albeit a heavy burden lies on the party who raises it, to prove the same. Therefore, we are of the opinion that finding of the arbitral tribunal that it was competent to examine the plea of duress, coercion and unequal bargaining power does not suffer from any such illegality as would require interference under Section 34 of the Act.

Economic Duress :

88. The Commercial Court has also held, as noted above, that HSCL had failed to prove the four factors specified in **Classic Motors Ltd.**

(supra) and has therefore failed to prove duress and coercion.

89. It is noteworthy that the four factors stipulated in **M/s Classic Motors** (supra) to adjudge whether any duress or coercion was played on a party in a commercial contract, primarily relates to ascertainment of the fact as to whether the party had raised any protest before or after the agreement or took any step to avoid the contract or recourse to any alternative course of action. The fourth factor is also inter-twined with the above three factors and which relates to party aggrieved having benefit of the independent advice.

90. It was vehemently contended by learned senior counsel appearing for HSCL that the judgment in **M/s Classic Motors** was rendered by the Delhi High Court while deciding objections under Section 34 of the Act. Therefore, it cannot be placed at such high pedestal as to treat the principles laid down therein as the public policy of India and set aside the award by applying the aforesaid principles.

91. The argument though attractive at first blush, does not have any substance. In fact, the judgment in **M/s Classic Motors** does not formulate any new test or principles of law. It only reiterates the legal position laid down in number of previous judgments. These judgments elaborately take into account the statutory provisions, the view of the Privy Council and the famous treatise on Contract by Chitty.

92. It is evident from para 31 of the Law Report in **M/s Classic**

Motors that it places reliance on the judgment in **Unikol Bottlers Limited vs. Dhillon Kool Drinks**[23], wherein the aforesaid principles have been noted after discussing the provisions of the Contract Act. Para 31 from the Law Report in **M/s Classic Motors** is extracted below: -

> (31) The plea of the plaintiff that clause 21 is invalid because of unequal bargaining power and duress and coercion also needs to be examined at this stage. My attention is drawn to a decision of this Court in **Unikol Bottlers Ltd. Vs. Dhillon Kool Drinks, reported in 1994 (28) DRJ 483.** Paragraph 32 of the said judgment being relevant for my purpose is extracted below:-
>
> > "For a valid contract it is essential that the parties have given their free consent for it. Section 10 of the Contract Act statutorily recognises the requirement of free consent for a valid contract. Section 13 of the Contract Act defines consent as follows:- `two or more persons are said to consent when they agree upon the same thing in the same sense'. Section 14 of the said Act defines `free consent' as `consent is said to be free when it is not caused by :- (1) Coercion, as defined in Section 15; (2) undue influence, as defined in Section 16; or (3) fraud, as defined in Section 17 or (4) misrepresentation, as defined in Section 18; or (5) mistake, subject to the provisions of Sections 20,21, and 22. Consent is said to be so caused when it would not have been given but for the existence of such coercion, undue influence, fraud, misrepresentation or mistake, 'Section 15 & 16 define coercion and undue influence. What follows from these statutory provisions is that an agreement to be valid should be the result of free consent apart from other requirements. While dealing with the question of duress/coercion and unequal bargaining power one is really concerned with the question of free will i.e. did the parties enter into the agreement with a free will? It is the plaintiff who has raised the question of its will being dominated by the defendants and, therefore, not being a free agent. Therefore, the plaintiff is on test. It has to be ascertained whether the plaintiff exercised a free will or not while

23 1994 (28) DRJ 483

> entering into the Supplemental Agreement. For this purpose there are several factors which need to be looked into. They are - (1) Did the plaintiff protest before or soon after the agreement? (2) Did the plaintiff take any steps to avoid the contract? (3) Did the plaintiff have an alternative course of action or remedy? If so, did the plaintiff pursue or attempt to pursue the same? (4) Did the plaintiff convey benefit of independent advice?"

93. The judgment in **M/s Classic Motors** also takes note of paragraph 37 of the judgment in **Unikol Bottlers Limited** (supra) which is pertinent to the controversy involved and is therefore extracted below: -

> (33) From the facts available before me, it is crystal clear that the defendant did not exercise any duress on the plaintiff or that the agreement was arrived at with the plaintiff without its free consent. At paragraph 37 of the judgment in Unikol Bottlers Ltd. (Supra.) it has been held thus:-
>
> > "The contracts are meant to be performed and not to be avoided. Justice requires that men who have negotiated at arm's length, be held to their bargains unless it can be shown that their consent was vitiated by fraud, mistake or duress. The real test is to first establish that the means pursued were illegitimate in the sense of amounting to or threatening a crime, tort or a breach of contract (though possible not plausible breach of contract will suffice). Secondly, one must establish that the illegitimate means were a reason, though not necessarily the pre-dominate reason for the victim's submission. Applying these tests to the facts of the present case. I am unable to persuade myself to hold that the consent of the plaintiff to enter into the Supplemental Agreement was not free or was vitiated on any of the grounds urged before me and discussed hereinbefore."

94. In another judgment in **Sara International Limited vs. Rizhao Steel Holding Company Limited**[24], the same principles have been

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24 2013 SCC OnLine 2236

applied to determine the plea of economic duress. The jurisprudential aspects based on the Commentary by Chitty on Contract and certain judgments of the Privy Council and Court of Appeal were elaborately considered. Chitty at 7-008 has observed that in a commercial transaction, it is not uncommon that pressure and threats do take place, but the two important factors which are to be considered are whether, (i) the pressure or threat is legitimate; and (ii) its effect on the victim. The relevant observations are extracted below: -

> “a. 7-008 "Legitimacy of the pressure or threat. Once it is accepted that the basis of duress does not depend upon the absence of consent, but on the combination of pressure and absence of practical choice, it follows that two questions become all-important. The first is whether the pressure or the threat is legitimate; the second, its effect on the victim. **Clearly, not all pressure is illegitimate, nor even are all threats illegitimate. In ordinary commercial activity, pressure and even threats are both commonplace and often perfectly proper**...".
>
> (emphasis supplied)

Chitty, further elaborating, observed that : -

> e. 7-031 "Reasonable alternative. It is certainly relevant whether or not the victim had a reasonable alternative. The victim‟s lack of choice was emphasised by Lord Scarman in the Pao On and Universe Sentinel cases and has clearly been an important factor in those cases in which relief has been given..."
> f. 7-034 "Protest.In the Pao On case it was said that it was relevant whether or not the victim protested. This again seems to be a question of evidence as whether or not the threat had a coercive effect. It has been accepted for many years that when a payment is made in order to avoid the wrongful seizure of goods, protest "affords some evidence...that the payment was not voluntarily made", but that the fact that the payment was made without protest does not necessarily mean that the payment was voluntary".

> g. 7-035 "Independent advice. Likewise in the Pao On case it was said that it is relevant whether or not the victim had independent advice. The relevance of this is perhaps less obvious: access to legal advice, for example, will not increase the range of options available to the victim, and lack of advice therefore cannot be an absolute requirement. However, whether or not the victim appreciated that he had an alternative remedy and what the practical implications of following it would be are relevant to the question of causation".

95. Privy Council in **Pao On** (supra) observed that *"Duress, whatever form it takes, is a coercion of the will so as to vitiate consent.....in a contractual situation commercial pressure is not enough. There must be present some fact 'which could in law be regarded as a coercion of his will so as to vitiate his consent'. .....In determining whether there was a coercion of will such that there was no true consent, it is material to inquire whether the person alleged to have been coerced did or did not protest; whether, at the time he was allegedly coerced into making the contract, he did or did not have an alternative course open to him such as an adequate legal remedy; whether he was independently advised; and whether after entering the contract he took steps to avoid it. All these matters are relevant in determining whether he acted voluntarily or not."*

96. The Bombay High Court in **Balaji Pressure Vessels** (supra) applied the same test laid down by Privy Council in **Pao On** (supra) in adjudging whether economic duress had vitiated the contract between

the parties or not. It has been concluded that simple commercial pressure is not good enough to vitiate the consent. The pressure exercised by the other party must be such as the law would not regard legitimate.

97. The Supreme Court in **GAIL Ltd.** (supra) has virtually applied the same principles to judge the plea of duress, coercion and unequal bargaining power. It held that IPCL was put in a situation where it was left with no meaningful choice. In such a case, not raising protest or not taking steps to avoid the contract looses its significance.

98. It emerges from the above discussion that the factors specified in **M/s Classic Motors** have their foundation in the basic jurisprudence and have been recognized in large number of other judgments. These principles have repeatedly been held to be guiding factors to adjudge the sustainability of a plea of economic duress.

Whether any option or remedy was available to HSCL:

99. Now the all important question is whether HSCL was having any meaningful choice after the work was suspended by NOIDA? Whether there was any pressure or threat which was illegitimate so as to vitiate consent to the new bargain i.e., Supplementary MoU?

100. The material on record reveals that the work was stopped as IIT (Delhi) reported the contract value to be higher by 60 crores. Another project appraisal and planning company estimated the value of contract

to be inflated by about 40 crores. Undoubtedly, HSCL did not agree to the proposal of NOIDA for revision of rates. At the same time, HSCL also did not invoke the option of treating the contract to be a 'foreclosure', nor terminated the same and sue NOIDA for damages, as in its economic wisdom, it felt that it would be more detrimental to it. On the other hand, the stand of NOIDA was that the mobilization advance and other amounts already paid to HSCL towards running bills, i.e. a sum of Rs. 49.98 crores, if taken into account, there was excess payment of about Rs. 20 – 30 crores, as compared to the work executed by that time. The consistent legal opinion it received was that determination of contract at the stage would be counter-productive and also against public interest. Therefore, it should ensure that a negotiated settlement takes place with HSCL. So, both the parties were vitally interested in breaking the deadlock so that the work is resumed. To achieve the said objective, they engaged themselves in several rounds of negotiations and ultimately, the ice was broken with NOIDA, accepting the stand of HSCL that there would be no reduction in contract value and it would be granted reasonable time extension to complete the project. In return, HSCL agreed to forego its claim for damages for the suspension period. It was out and out a commercial bargain by the parties, keeping their respective economic interests in mind.

101. Even if we assume for argument's sake that there was pressure on HSCL to waive its right to claim damages for the suspension of work, on basis of legal advice received by NOIDA, we find nothing illegitimate in the same. In the words of Chitty - "*Clearly, not all pressure is illegitimate, nor even are all threats illegitimate. In ordinary commercial activity, pressure and even threats are both commonplace and often perfectly proper*".

102. HSCL understood the nuances of giving up its right to price escalation and damages during the period work remained suspended. It knew that it would not mean waiver of its right to claim price escalation prior to suspension of work or post resumption of work but only damages for the suspension period. This is evident from various communications which took place between the parties, post resumption of work:-

(a) On 25.02.2008 HSCL made a claim towards price variation as per Clause 8 of the GCC. It emphasised therein that Supplementary MoU 'prohibits only escalation or any compensation for suspension of work during the period from 22.09.2003 till its recommencement'. Therefore, its claim in relation to price variation be accepted.

(b) It seems that NOIDA vide letter dated 5.02.2008 informed HSCL that 'no escalation payment will be made to you as per term of revised MoU'.

(c) In response, HSCL vide letter dated 10.04.2008 emphasised

that Clause 3 of Supplementary MoU only prohibited ‘escalation or any compensation whatsoever on account of suspension of work during the period from 22.09.2003 till its commencement’. It was further emphasised that the claim for price escalation was submitted excluding the suspension period. ‘The price variation claims have been submitted covering the period from 7.04.2003 to 22.09.2003 i.e. till suspension and after recommencement till date excluding the suspension period. Therefore our price variation bills are fully justified and are tenable in all respect in accordance with Clause 7 of original MoU, Clause 8 of General Conditions of Contract which have neither been superseded nor amended and Clause 3 of Supplementary MoU’.

103. Notably, the work was completed on 30.04.2008. HSCL, neither during course of execution of work, nor after its completion, made any claim towards damages during suspension period being fully conscious of the implications of Clause 3 of Supplementary MoU whereunder it had explicitly agreed not to demand *‘any compensation whatsoever on account of suspension of work during the period from 22.09.2003 till its recommencement’*. The only claim it was making was towards price escalation.

104. However, while giving notice dated 16.02.2009, HSCL invoked the arbitration clause under the contract and submitted a list of disputes and claims to be referred for arbitration. It, inter alia, included a claim of Rs.37.12 crores towards damages for suspension of work under Clause 13 of GCC. It was followed by another letter dated 20.03.2009

to the same effect.

105. Even while making the above claim for liquidated damages during suspension period under Clause 13(ii)(b) of GCC, it never alleged any undue influence, duress or coercion having ever been exercised over it in making it sign the Supplementary MoU.

106. HSCL, when it approached the High Court under Section 11 of the Act for appointment of arbitrator, alleged for the first time that Supplementary MoU was a result of undue influence, coercion and duress upon it. The above chain of events lends full support to the view taken by the court below that the claim in respect of damages for suspension of work was 'afterthought and sham'.

107. Recently the Supreme Court in **NTPC Ltd. Vs. SPML Infra Ltd.**[25], was examining a plea of economic duress set up by SPML Infra Ltd. in a case arising out of Section 11(6) of the Act. In the said case, after issuance of a completion certificate by NTPC and release of final payment, SPML issued no-demand certificate. Till that time, there was no pending claim of any kind of SPML against NTPC. However, while releasing final payment, NTPC withheld the bank guarantees on account of certain pending disputes with regard to other projects between the parties. SPML being aggrieved thereby, preferred a writ petition in the jurisdictional high court for quashing of the order by

25 2023 SCC OnLine SC 389

which the bank guarantees were retained by NTPC. An interim order was passed in the said petition restraining NTPC from invoking the bank guarantees. During pendency of the writ petition, the parties entered into multiple discussions and thereafter arrived at settlement agreement in writing dated 27.5.2020, whereunder NTPC agreed to release the original bank guarantees while SPML agreed not to raise any claim of any nature against NTPC pertaining to the contract. On 30.6.2020, NTPC released the bank guarantees in compliance of the settlement agreement. SPML thereafter withdrew the writ petition. One month later, on 10.10.2020, SPML filed petition under Section 11(6) alleging coercion and economic duress in execution of the settlement agreement. The application was resisted by NTPC on the ground that there were no subsisting disputes between the parties in view of the settlement agreement dated 27.5.2020 and the application for arbitration was an afterthought and abuse of the process of law. The Supreme Court firstly examined the scope of the power of the court to decide the issue of non-arbitrability of a dispute. It relied on its previous decision in **Vidya Drolia & Others v. Durga Trading Corporation**,[26], in holding that the scope of judicial review in such matters is very limited, confined only to weeding out of manifestly *ex facie* non-existent disputes. The important aspect considered in the

26 (2021) 2 SCC 1

judgment, which is relevant for the case in hand, is the issue of economic duress. Whether the allegations of coercion and economic duress in the execution of settlement agreement between the parties was at all made out? The Supreme Court noticed that the execution of the settlement agreement led to the release of the bank guarantees. After reaping the benefits of the settlement agreement, the writ petition was withdrawn. SPML never alleged any economic duress while the settlement agreement was being complied with by the parties. It was only after one month of withdrawal of the writ petition in compliance of the settlement agreement that SPML for the first time, raised the plea of economic duress. In such backdrop, it was held that the plea lacked bonafides and was *ex facie* frivolous and untenable. The relevant observations in this behalf are as follows: -

> 47. The plea of coercion and economic duress must be seen in the context of the execution of the Settlement Agreement not being disputed, and its implementation leading to the release of the Bank Guarantees on 30.06.2020 also not being disputed. Almost three weeks after the release of the Bank Guarantees, a letter of repudiation was issued by SPML on 22.07.2020. This letter was issued about two months after the Settlement Agreement was executed and in fact during the subsistence of the Writ Petition. After reaping the benefits of the Settlement Agreement, the Writ Petition was withdrawn on 21.09.2020. It is thereafter that the present application under Section 11(6) of the Act was filed. The sequence of events leads us to conclude that the letter of repudiation was issued only to wriggle out of the terms of the Settlement Agreement.
>
> 48. The foregoing clarifies beyond doubt that the claims sought to be submitted to arbitration were raised as an afterthought. Further, SPML's allegations of coercion and economic duress in

the execution of the Settlement Agreement lack bona fide. They are liable to be knocked down as ex facie frivolous and untenable.

108. In the instant case also, it has been rightly observed by the court below that HSCL entered into Supplementary MoU after due deliberation. It reaped the benefit of Supplementary MoU on basis whereof the order of suspension of work was withdrawn and HSCL succeeded in completing the project. It did not raise any protest while executing the work in terms of the conditions stipulated in the Supplementary MoU. As noted above, HSCL itself admitted in series of communications that the effect of the Supplementary MoU is only giving up of its right to claim compensation on account of suspension of work. Its claim relating to price escalation for the period when work was not on hold, would remain unaffected. Fully knowing the implications of the fresh bargain between the parties, it completed the project. At that time, the only dispute between the parties was with regard to its claim relating to price escalation which in fact has also been allowed by the tribunal and the court below. However, at no point of time, it ever raised any plea of economic duress in acceding to the demand of NOIDA to give up claims in respect of damages on account of the suspension of work. Almost after an year, it raised the claim for damages under Clause 13 of GCC and which has therefore been rightly held to be afterthought and sham.

109. In the above backdrop, the seminal question is whether there was any meaningful choice available to HSCL or not. It is worthwhile to reiterate that it had the option of foreclosure under Clause 11 of GCC. Now, the said choice was a meaningful choice or not has to be examined. It is contended by counsel for HSCL that at the relevant time, HSCL was not in position to exercise the above options as it would have ruined it financially on account of -

(a) pending unpaid dues of Rs. 8.21 crores;

(b) possibility of denial of extension of time;

(c) lack of option to terminate the contract;

(d) possibility of termination leading to disqualification / blacklisting and costs of balance works being claimed by the NOIDA;

(e) invocation of bank guarantees, and

(f) costs of litigation and loss of reputation.

110. The argument is specious and is to be rejected outright. In case of exercise of option of foreclosure under Clause 11 of GCC, compensation and damages payable to the contractor duly takes into account unpaid dues, price of unused materials lying at the site and in godowns and reasonable compensation for repatriation of contractors' site staff and imported labour to the extent necessary. HSCL also had the advantage of there being in place a prohibition in respect of recovery of dues against mobilization advance. Additionally, NOIDA

would have been under obligation to release retention money. All bank guarantees would have got discharged automatically. Thus, there was no possibility of any financial loss or loss in terms of reputation, nor any possibility of blacklisting, as is tried to be projected. We have no hesitation in accepting the contention of counsel for the respondent that the plea taken in this behalf is non-evidentiary, speculative and without any basis.

111. We also completely agree with the finding of the Commercial Court that had HSCL not agreed to the new deal, NOIDA would not have permitted HSCL to go ahead with the contract. In that event, the only option left with HSCL was to sue for damages. Then, as observed by court below, question would have arisen “why Respondent No. 1 (HSCL herein) waited for a period beyond 120 days and by applying principles of mitigation of damages, Respondent No. 1 (HSCL) would not have been able to get compensation @ Rs. 4 lakhs per day for 928 days. Thus, the intention, the circumstances at the time of signing of Supplementary MoU clearly speaks of the *ad idem* of the parties at that time and the findings of the Learned Arbitrator are contrary to the specifically and expressly agreed, contractual terms between the parties”.

Unjust enrichment:

112. The contention of counsel for NOIDA that raising such a sham claim as above was part of *modus operendi* of HSCL to unjustly enrich itself at the cost of public exchequer, also has considerable force. It is an admitted fact on record that HSCL had entered into a joint venture agreement with M/s Navyug Engineering Company Ltd. (NECL) dated 25.3.2003. Any amount received under the contract was to be shared between HSCL and NECL in proportion of 4.25% to 95.75%. Thus, HSCL was getting hardly Rs. 5 crores under the contract as centage charges and the entire remaining amount was to go to a private entity (NECL). It is not a case where money would transfer hand from one instrumentality of the State to another. It would essentially result in unjust enrichment of NECL at the cost of public exchequer, which would definitely be against public policy of India.

Conclusion :

113. We have no hesitation in upholding the finding of the court below that by allowing Claim No.2, the arbitral tribunal had tried to rewrite the terms of contract between the parties. The court below has also rightly held that the finding of the arbitral tribunal that economic duress had any role in the bargain, was based on conjectures and surmises, without any material on record to sustain such findings, resulting in a patent illegality, warranting interference under Section 34 of the Act.

Consequently, award made in respect of Claim No. 2 has rightly been held by the court below to be unsustainable in law.

Point No. 2

Whether arbitral award can be set aside in part?

114. This leads us to the second crucial question. What would be the effect of turning down Claim No. 2 on the remaining part of the award? Whether there was any impediment in setting aside part of the award and upholding the remaining part which was found to be valid?

115. Section 32 of the Act deals with termination of arbitral proceedings. It reads as follows :-

> **Termination of proceedings.**-- (1) The arbitral proceedings shall be terminated by the final arbitral award or by an order of the arbitral tribunal under sub-section (2).
>
> (2) The arbitral tribunal shall issue an order for the termination of the arbitral proceedings where--
>
> *(a) the claimant withdraws his claim, unless the respondent objects to the order and the arbitral tribunal recognises a legitimate interest on his part in obtaining a final settlement of the dispute;*
> *(b) the parties agree on the termination of the proceedings; or*
> *(c) the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible.*
>
> (3) Subject to Section 33 and sub-section (4) of Section 34, the mandate of the arbitral tribunal shall terminate with the termination of the arbitral proceedings.

116. Thus arbitration proceedings stand terminated with the passing of the final arbitral award or by an an order of the arbitral tribunal under sub-section (2). Sub-section (2) envisages an order by the arbitral tribunal to terminate the proceedings in the circumstances enumerated therein. Sub-section (3) deals with two exceptions where the mandate of the arbitral tribunal survives for limited purposes even after passing of the final award. The first exception is for carrying out correction and interpretation of award or make an additional award. The second exception is provided under Section 34 (4) of the Act.

117. In earlier part of the judgment, we have discussed Section 34(2) and (2-A) which specifies the grounds on which an arbitral award can be set aside by the court. Sub-section (4) enable the arbitral tribunal to eliminate the grounds which may result in an arbitral award, being set aside. It is open to a party to request the court to adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of the arbitral tribunal will eliminate the grounds for setting aside the arbitral award. The said power can be exercised by the court only on an application made by a party and not *suo motu*. As the purpose is to afford opportunity to the arbitral tribunal to eliminate the grounds on which there is possibility of award being set aside, it automatically follows that the stage for

exercising such a power is bestowed before the award is set aside and not afterwards.

118. The power is not to be confused with an order of remand, as understood in legal parlance, where a higher court after setting aside/quashing the order under challenge, remands the matter back to the court/tribunal to decide the proceedings afresh or in the light of the observations made in the remand order. In clear distinction to an order of remand *sensu stricto,* the power conferred by sub-section (4) of Section 34 is with the purpose of permitting parties to take measures which can eliminate the grounds for setting aside the arbitral award by the court. In **Kinnari Mullick and another vs. Ghanshyam Das Damini**[27], the Supreme Court has lucidly explained the scope of Section 34(4) as follows:-

> 15. On a bare reading of this provision, it is amply clear that the Court can defer the hearing of the application filed under Section 34 for setting aside the award on a written request made by a party to the arbitration proceedings to facilitate the Arbitral Tribunal by resuming the arbitral proceedings or to take such other action as in the opinion of Arbitral Tribunal will eliminate the grounds for setting aside the arbitral award. The quintessence for exercising power under this provision is that the arbitral award has not been set aside. Further, the challenge to the said award has been set up under Section 34 about the deficiencies in the arbitral award which may be curable by allowing the Arbitral Tribunal to take such measures which can eliminate the grounds for setting aside the arbitral award. No power has been invested by the Parliament in the Court to remand the matter to the Arbitral Tribunal except to

27 (2018) 11 SCC 328

adjourn the proceedings for the limited purpose mentioned in sub-section 4 of Section 34. This legal position has been expounded in the case of McDermott International Inc. (supra). In paragraph 8 of the said decision, the Court observed thus:

> "8…..parliament has not conferred any power of remand to the Court to remit the matter to the arbitral tribunal except to adjourn the proceedings as provided under sub-section (4) of Section 34 of the Act. The object of sub-section (4) of Section 34 of the Act is to give an opportunity to the arbitral tribunal to resume the arbitral proceedings or to enable it to take such other action which will eliminate the grounds for setting aside the arbitral award."

16. In any case, the limited discretion available to the Court under Section 34 can be exercised only upon a written application made in that behalf by a party to the arbitration proceedings. It is crystal clear that the Court cannot exercise this limited power of deferring the proceedings before it suo moto. Moreover, before formally setting aside the award, if the party to the arbitration proceedings fails to request the Court to defer the proceedings pending before it, then it is not open to the party to move an application under Section 34 (4) of the Act. For, consequent to disposal of the main proceedings under Section 34 of the Act by the Court, it would become functus officio. In other words, the limited remedy available under Section 34 (4) is required to be invoked by the party to the arbitral proceedings before the award is set aside by the Court.

119. Chapter VIII comprises of two sections only. Section 35 attaches finality to an arbitral award and Section 36 provides that after expiry of time for making an application to set aside arbitral award under Section 34 or subject to provisions of sub-section (2) of Section 34, the arbitral award would be enforced in accordance with the provisions of the Code of Civil Procedure, 1908, in the same manner as if it were a decree of court.

120. Under the scheme of the Act, after passing of a final arbitral award, only following possibilities are contemplated:-

(a) correction of computation errors, clerical or typographical errors or errors of a similar nature [Section 33(1)(a)];

(b) give an interpretation of a specific point or part of the award [Section 33(1)(b)];

(c) make an additional award as to claims presented in the arbitral proceedings but omitted from the arbitral award, on request of a party [Section 33(4)];

(d) give arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action, as in the opinion of the arbitral tribunal, will eliminate the grounds for setting aside the arbitral award [Section 34(4)];

(e) setting aside of an award by a Court [Section 34(2)(2-A)] or in an appeal [Section 37];

(f) commencement of fresh arbitration proceedings in cases where an arbitral award is set aside, subject to limitation [Section 43(4)].

121. It is noteworthy that under the new Arbitration Act, the court has not been conferred with any explicit power to modify arbitral award or to remit it to the arbitrator unlike Sections 15 and 16 of the Arbitration

Act, 1940 (hereinafter referred to as 'the old Act'). This has been purposely done to minimize judicial interference by the courts in arbitral awards. The courts have been given only supervisory role to ensure fairness and strike at arbitrariness, violation of public policy of India, patent illegalities appearing on the face of record, jurisdictional error and the like (Section 34 (2) and (3)).

122. In **McDermott International Inc.** (supra), the Supreme Court after comparing the provisions of the old Act with the new one held as follows:-

> 52. The 1996 Act makes provision for the supervisory role of courts, for the review of the arbitral award only to ensure fairness. Intervention of the court is envisaged in few circumstances only, like, in case of fraud or bias by the arbitrators, violation of natural justice, etc. The court cannot correct errors of the arbitrators. It can only quash the award leaving the parties free to begin the arbitration again if it is desired. So, scheme of the provision aims at keeping the supervisory role of the court at minimum level and this can be justified as parties to the agreement make a conscious decision to exclude the court's jurisdiction by opting for arbitration as they prefer the expediency and finality offered by it.

123. The departure from the scheme of the old Act has been further elaborated in **Project Director, National Highways No.45 E and 220 National Highways Authority of India Vs. M. Hakeem and another**[28] as under:-

> 19. The statutory scheme under Section 34 of the

28 (2021) 9 SCC 1

Arbitration Act, 1996 is in keeping with the UNCITRAL Model Law and the legislative policy of minimal judicial interference in arbitral awards.

20. By way of contrast, under Sections 15 and 16 of the Arbitration Act, 1940, the court is given the power to modify or correct an award in the circumstances mentioned in Section 15, apart from a power to remit the award under Section 16 as follows: -

> "15. Power of Court to modify award.- The Court may by order modify or correct an award-
> (a) where it appears that a part of, the award is upon a matter not referred to arbitration and such part can be separated from the other part and does not affect the decision on the matter referred; or
> (b) where the award is imperfect in form, or contains any obvious error which can be amended without affecting such decision; or
> (c) where the award contains a clerical mistake or an error arising from an accidental slip or omission.
> 16. Power to remit award.- (1) The Court may from time to time remit the award or any matter referred to arbitration to the arbitrators or umpire for reconsideration upon such terms as it thinks fit-
> (a) where the award has left undetermined any of the matters referred to arbitration, or where it determines any matter not referred to arbitration and such matter cannot be separated without affecting the determination of the matters referred; or
> (b) where the award is so indefinite as to be incapable of execution; or
> (c) where an objection to the legality of the award is apparent upon the face of it., (2) Where an award is remitted under sub- section (1) the Court shall fix the time within which the arbitrator or umpire shall submit his decision to the Court:
> Provided that any time so fixed may be extended by subsequent order of the Court.
> (3) An award remitted under sub- section (1) shall become void on the failure of the arbitrator or umpire to reconsider it and submit his decision within the time fixed."

21. As a result therefore, a judgment in terms of the award is given under Section 17 of the 1940 Act which reads as

follows: -

> “17. Judgment in terms of award.- Where the Court sees no cause to remit the award or any of the matters referred to arbitration for reconsideration or to set aside the award, the Court shall, after the time for making an application to set aside the award has expired, or such application having been made, after refusing it, proceed to pronounce judgment according to the award, and upon the judgment so pronounced a decree shall follow and no appeal shall lie from such decree except on the ground that it is in excess of, or not otherwise in accordance with, the award.”

22. Thus, under the scheme of the old Act, an award may be remitted, modified or otherwise set aside given the grounds contained in Section 30 of the 1940 Act, which are broader than the grounds contained in Section 34 of the 1996 Act.

124. The dictum in **McDermott International Inc.** (supra) quoted above, was relied upon in holding that the court under Section 34 of the new Act does not have power to modify an award. It has been held that there would also be no power vested in the court to remit the matter to the arbitrator except within the limited scope of sub-section (4) of Section 34. It would be useful to take note of the relevant observations made in this behalf:-

> 30. ……. Further, if the power to remit the matter to the arbitrator is read into Section 34, it would render inexplicable the deliberate omission by Parliament of a provision analogous to Section 16 of the Arbitration Act, 1940 in the present Act. Section 16 of the 1940 Act specifically armed courts with the power to remit the matter to arbitration. Noticeably, the scope of remission under the present Act is confined to that prescribed in sub-section (4) of Section 34. .....
>
> 31. Thus, there can be no doubt that given the law laid down by this Court, Section 34 of the Arbitration Act, 1996

> cannot be held to include within it a power to modify an award. .....

125. Again, in **National Highways Authority of India Vs P. Nagaraju @ Cheluvaiah and another**[29], it has been reiterated that the court in proceedings emanating from Section 34 does not have power to modify the award; the only option would be to set aside the award-

> 26. Under the scheme of the Act 1996 it would not be permissible to modify the award passed by the learned Arbitrator to enhance or reduce the compensation based on the material available on record in proceeding emanating from Section 34 of Act, 1996. The option would be to set aside the award and remand the matter. ...

126. We now come to **Dakshin Haryana Bijli Vitran Nigam Ltd.** (supra) on which reliance has been placed by the court below in holding that the law mandates that an arbitral award cannot be upheld in part while setting aside the remaining part. In the said case, the main issue before the Supreme Court was regarding the date from which period of limitation for filing a petition under Section 34 of the Act would commence. Would it be the date on which the draft award was circulated to the parties or the date on which the signed copy of the award was provided? The Supreme Court answered the said question holding that the limitation for filing objections under Section 34 would be reckoned from the date on which signed copy of the award was made available to the parties. While arriving at the said conclusion, the

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29 2022 SCC OnLine SC 864

Supreme Court also observed that where the court set-asides the award, the dispute between the parties has to be decided afresh, as there is no power to modify an arbitral award. The relevant extract is quoted below:-

> "In law, where the Court sets aside the award passed by the majority members of the tribunal, the underlying disputes would require to be decided afresh in an appropriate proceeding. Under Section 34 of the Arbitration Act, the Court may either dismiss the objections filed, and uphold the award, or set aside the award if the grounds contained in sub-sections (2) and (2A) are made out. There is no power to modify an arbitral award."

127. None of the above judgments cited by Sri Manish Goyal, learned Senior Counsel appearing for the respondent – NOIDA deals with sevarability of award, but with power of the court to modify an arbitral award. As discussed, that power is definitely not conferred on the arbitral tribunal, unlike under the old Act.

128. Before we proceed further, we would like to take notice of few more provisions of the Act which are relevant for deciding the controversy.

129. As already noted, Section 34 defines the limited terrain in which the court can exercise its supervisory role in setting aside an arbitral award. It is crucial to understand the meaning of word 'award' under the Act. As per Section 2(c), an award is an umbrella term that encompasses a final award as well as an interim award. An interim

award is also a final award on matters covered thereby, but made at an interim stage. This has been explained in **McDermott International Inc.** (supra) as follows:-

> 68. The 1996 Act does not use the expression "partial award". It uses interim award or final award. An award has been defined under Section 2 (c) to include an interim award. Sub-section (6) of Section 31 contemplates an interim award. An interim award in terms of the said provision is not one in respect of which a final award can be made, but it may be a final award on the matters covered thereby, but made at an interim stage.

130. Then there can be an additional award as to claims presented in the arbitral proceedings but omitted from the arbitral award [Section 33 (4)]. Sub-section (7) of Section 33 extends the provisions of Section 31 to an additional award. Thus, an additional award has to strictly conform to all the requirements of an 'arbitral award'. There is no manner of doubt, keeping in view the scheme of the new Act, that an award whether interim, final or additional, is subject to challenge before a court of law only by an application and in the manner contemplated under Section 34. Thus, in a given case, there could be multiple awards. By way of illustration, we may gainfully refer to **McDermott International Inc.** (supra) where there was an additional award, a partial (interim) award and a final award. It is open to a party to take recourse to independent proceedings under Section 34 in challenging each award. Thus, there can be as many number of

challenges under Section 34 as are the awards in a particular case. It is also possible in a given case that one or more of these awards may go in favour of a particular party and the remaining against it. Resultantly, the party may prefer objections under Section 34 only against the award which goes against it and may not challenge the other award(s) which is/are in its favour. There is no provision under the Act which mandates a party to advance a challenge to all the awards. Can the Court in such a situation reject the objection under Section 34 holding it to be not maintainable as all awards have not been challenged or while considering challenge to only one of the awards also proceed to set aside the remaining awards which are not under challenge before it?

131. In contrast, there can be a situation where the arbitral tribunal deals with number of distinct and independent claims by passing a single composite award. In such a case, there is also a possibility that certain claims are allowed while the others are rejected. The party, some of whose claims have been rejected, may challenge part of the award by filing objections under Section 34 of the Act. Again, can the court in such a case decline to examine the challenge on the ground that the entire award being not under challenge, the objections would not be maintainable as it is not having power to set aside only part of the award? There can also be a case where several and distinct claims arise out of the same contract at different point in time. This can give rise to

more than one reference, there being no impediment in this regard. Resultantly, it would result in multiple awards and which could give rise to multiple challenges under Section 34 of the Act. In such a case, it could result in some award(s) being upheld while other(s) being set aside. The same fact situation can give rise to one reference, where a party waits till the completion of contract and seeks reference combining all the claims. In such a scenario, there may be one final award dealing with separate and distinct claims. If we apply the law as interpreted by the court below, it would result in apparent anomalies in the ultimate outcome, dependent upon the fact situation. While in the first case, where there are multiple awards and proceedings under Section 34 of the Act arising out of same contract, the court under Section 34 may set aside one of the awards while upholding the other which is/are separate award(s). In the latter situation, as there is one composite award, then notwithstanding that only part of the award pertaining to one or more independent claims alone is under challenge, the entire award would have to be set aside, as has been done in the instant case.

132. The above paradox can be resolved if we keep in mind the scheme of the Act noted above. In cases where there are separate and distinct claims, not related or dependent upon other claims, then irrespective of whether they are decided by the arbitral tribunal by an

interim award(s), final award or additional award, the decision of the arbitral tribunal in respect of each such claim is an independent award in the eyes of law. Thus, a final award can be an amalgamation or a bundle of several awards given in respect of separate and distinct claims. When Section 34 confers power in the court to set aside an award, the power could be exercised to set aside any or all such awards, whether composite, interim, final or additional. We cannot loose sight of the fact that the new Act was enacted with the object of giving the parties freedom to decide the forum through which they want their disputes to be decided so as to facilitate ease of doing business. Albeit, the Act prescribes timelines for various proceedings but it is matter of common knowledge that the said object has not been achieved and it takes long in getting the dispute decided even through the arbitral tribunal. In case the view taken by the court below is upheld and claims which have been found to be valid and enforceable, are set at naught on misconception of law that the award has to be set aside as a whole, it would result in grave injustice to such party apart from forcing the parties to another round of litigation. Such an interpretation if given, would be a complete antithesis to the objectives of the Act.

133. The view taken by the court below, if taken to its logical conclusion, would result in a situation not contemplated under law. Some of the claims allowed by the arbitral tribunal, have also been

upheld by the court below. There is no occasion for this court to interfere with the findings recorded in respect of these issues. These claims are not dependent for their survival on the findings in respect of claim relating to damages during the period of suspension of work (Clause No.2 - Issue No. 14). Now if we are to uphold the operative part of the order of the court below setting aside the entire award while upholding the findings on various claims with which the court below has not interfered and assuming a fact situation where the appellant, subject to law of limitation, starts fresh arbitration proceedings, will the arbitral tribunal be competent to record contrary findings in respect of these issues. The principles of issue estopple will preclude the parties from raising the issues already decided. Similarly, the principles of *res judicata* will bind the arbitral tribunal to the finding recorded in the initial round of litigation.

134. The Supreme Court in **Secretary to Govt. Department of Education (Primary) and others Vs. Bheemesh Alias Bheemappa**[30], while interpreting a scheme of compassionate appointment of the Bank, held that “a rule of interpretation which produces different results, depending upon what the individuals do or do not do, is inconceivable.”

135. The golden rule of interpretation is to take a view which advances the object of the Act, harmonises every provision of the statute and

30 2022 AIR (SC 402

does not result in any inconsistency or absurdity. The view taken by us that the award in the instant case is an amalgamation or bundle of several awards in respect of separate and distinct claims rules out all possibilities of inconsistencies and contradictions and also efficiently achieves the object of the Act.

136. Thus there would be no difficulty in case a party prefers to assail only a particular award and not the other one in a case where there are more than one award or files objection only against part of the award pertaining to an independent and separate claim which is severable from the others, without affecting the decision in respect of the remaining claims.

137. This would bring us the doctrine of severability, which in our opinion is not foreign to the new Act. One such situation is contemplated under the proviso to Section 34(2)(a)(iv) which provides that if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside.

138. The contention of counsel for the respondent that the doctrine of severability is applicable only to the cases falling under the proviso does not appeal to us. The situation contemplated under the proviso is only an instance where the doctrine of severability has been explicitly

made applicable by the legislature. It rather reinforces an interpretation that power to sever bad from good, which inheres in every court invested with power of judicial review, would also be available to a court dealing with objections under Section 34 of the Act. The mere fact that such a power is not specifically paraphrased in other clauses of sub-section (2) and (2-A) of Section 34, will not detract from the legal position noted above. We find support in our view in a number of precedents which we note herein after.

139. The first case is precisely concerning the issue relating to applicability of doctrine of severability of an arbitral award emanating from a challenge under Section 34 of the Act. A Full Bench of Bombay High Court is **R.S. Jiwani (M/s.) Mumbai Vs. Ircone International Ltd. Mumbai**[31], after a detailed consideration of doctrine of severability, held that the new Act does not in any manner prohibit the court to apply the said doctrine. The relevant observations are as follows :-

> 30. If the principles of severability can be applied to a contract on one hand and even to a statute on the other hand, we fail to see any reason why it cannot be applied to a judgment or an award containing resolution of the disputes of the parties providing them such relief as they may be entitled to in the facts of the case. It will be more so, when there is no statutory prohibition to apply principle of severability.
>
> We are unable to contribute to the view that the power vested in the Court under Section 34 (1) and (2) should be

31 2009 SCC OnLine Bom 2021

construed rigidly and restrictedly so that the Court would have no power to set aside an award partially. The word "set aside" cannot be construed as to `only to set aside an award wholly', as it will neither be permissible nor proper for the Court to add these words to the language of Section which had vested discretion in the Court. Absence of a specific language further supported by the fact that the very purpose and object of the Act is expeditious disposal of the arbitration cases by not delaying the proceedings before the Court would support our view otherwise the object of Arbitration Act would stand defeated and frustrated.

31. Rival submissions have been made before us with regard to operation and effect of proviso to sub-clause (iv) of clause (a) of Section 34. According to the appellants the proviso applies to the entire section while according to the respondent, its operation is limited to sub-clause (iv) alone. There seems to be some merit in the contention of the respondent inasmuch as the language of the proviso is directly referable to the section itself and, thus, must take its colour from the principal section viz. 34(2)(iv). A reading of the proviso shows that where severability is possible, the court in the class of the cases falling under sub-clause (iv) is expected to set aside the award partially. In other words, a greater obligation is placed upon the court to adopt such an approach when the case in hand is covered under the provisions of sub-clause (iv). This contention will not have any adverse effect on the interpretation and scope of Section 34 as a whole. It is a settled rule of interpretation that the statutory provision should be read as a whole to find out the real legislative intent and that provision should be read by keeping in mind the scheme of the Act as well as the object which is sought to be achieved by the Legislation while enacting such a law.

There is nothing in the proviso or in the language of Section 34 which has an impact or effect to restrict the power of the court as contemplated under Section 34 (1) read with the opening words of sub-sections (2) and (4) of Section 34 the Act. Est boni judicis ampliare jurisdictionem is a settled canon of law courts should expand and amplify jurisdiction to achieve the ends of justice and not unnecessarily restrict its discretion particularly when the

> later approach would lead to frustrate the very object of the Act.
> 32. The cases or illustrations indicated in the proviso in fact, should be read to construe that in such other cases where it is so necessary the court should exercise its discretion and apply the principle of severability rather than compel the parties to undergo the entire arbitration proceedings all over again or be satisfied with the rejection of their claim despite the fact that the Arbitral Tribunal has upon due appreciation of evidence and in accordance with law has granted relief to them. It will not only be appropriate but even permissible to read the proviso to add to the discretion and power of the court vested in it by the Legislature by using the expression "may".

140. The Full Bench while taking the above view, duly took into account the judgement of the Supreme Court in **McDermott International Inc.** (supra) as well as the provisions of the Old Act and observed as under :-

> “35. The Supreme Court was primarily stating the principles which have been kept in mind by the courts while interfering with the award of the Arbitral Tribunal that it was to outline the supervisory role of the courts within the ambit and scope of section 34. It is true that the court like a court of appeal cannot correct the errors of arbitrator. It can set aside the award wholly or partially in its discretion depending on the facts of a given case and can even invoke its power under section 34(4). It is not expected of a party to make a separate application under section 34(4) as the provisions open with the language "on receipt of application under sub-section (1), the court may....." which obviously means that application would be one for setting aside the arbitral award to be made under section 34(1)on the grounds of reasons stated in section 34(2) and has to be filed within the period of limitation as stated as reply under section 34(3). The court may if it deems appropriate can pass orders as required under section 34(4). In other words, the provisions of section 34(4) have

> to be read with section 34(1) and 34(2) to enlarge the jurisdiction of the court in order to do justice between the parties and to ensure that the proceedings before the Arbitral Tribunal or before the award are not prolonged for unnecessarily. In our humble view, the Division Bench appears to have placed entire reliance on para 52 by reading the same out of the context and findings which have been recorded by the Supreme Court in subsequent paragraphs. It is also true that there are no *pari materia* provisions like sections 15 and 16of the Act of 1940 in the 1996 Act but still the provisions of section 34 read together, sufficiently indicate vesting of vast powers in the court to set aside an award and even to adjourn a matter and such acts and deeds by the Arbitral Tribunal at the instance of the party which would help in removing the grounds of attack for setting aside the arbitral award. We see no reason as to why these powers vested in the court should be construed so strictly which it would practically frustrate the very object of the Act. Thus, in our view, the principle of law stated by the Division Bench is not in line with the legislative intent which seeks to achieve the object of the Act and also not in line with accepted norms of interpretation of statute."

141. The Full Bench also considered the issue from the aspect of hardship and inconvenience to the parties and observed thus :-

> 37. The interpretation put forward by the respondents is bound to cause greater hardship, inconvenience and even injustice to some extent to the parties. The process of arbitration even under 1996 Act encumbersome process which concludes after considerable lapse of time. To compel the parties, particularly a party who had succeeded to undergo the arbitral process all over again does not appear to be in conformity with the scheme of the Act. The provisions of section 34 are quite pari materia to the provisions of Article 34 of the Model Law except that the proviso and explanation have been added to section 34(2)(iv). The attempt under the Model Law and the Indian Law appears to circumscribe the jurisdiction of the court to set aside an award. There is nothing in the provisions of the Act and for that matter absolutely nothing in the Model Law which can debar the court from applying the principle of

> severability provided it is otherwise called for in the facts and circumstances of the case and in accordance with law. The courts will not get into the merits of the dispute. Thus, the interpretation which should be accepted by the court should be the one which will tilt in favour of the Model Laws, scheme of the Act and the objects sought to be achieved by the Act of 1996.

142. The Full Bench concluded as follows :-

> 1. The judicial discretion vested in the court in terms of the provisions of section 34 of the Arbitration and Conciliation Act, 1996 takes within its ambit power to set aside an award partly or wholly depending on the facts and circumstances of the given case. In our view, the provisions of section 34 read as a whole and in particular section 34(2) do not admit of interpretation which will divest the court of competent jurisdiction to apply the principle of severability to the award of the Arbitral Tribunal, legality of which is questioned before the court.
>
> The Legislature has vested wide discretion in the court to set aside an award wholly or partly, of course, within the strict limitations stated in the said provisions. The scheme of the Act, the language of the provisions and the legislative intent does not support the view that judicial discretion of the court is intended to be whittled down by these provisions.

143. In **J.G. Engineers Pvt. Ltd. Vs. Union of India and another**[32] the Supreme Court applied the doctrine of severability and upheld some of the claims which were separate and distinct and did not suffer from any infirmity while setting aside the remaining part of the award. The relevant part is quoted below :-

> It is now well- settled that if an award deals with and decides several claims separately and distinctly, even if the court finds that the award in regard to some items is bad,

32 (2011) 5 SCC 758,

> the court will segregate the award on items which did not suffer from any infirmity and uphold the award to that extent. As the awards on items 2, 4, 6, 7, 8 and 9 were upheld by the civil court and as the High Court in appeal did not find any infirmity in regard to the award on those claims, the judgment of the High Court setting aside the award in regard to claims 2,4,6,7,8 and 9 of the appellant, cannot be sustained. The judgment to that extent is liable to be set aside and the award has to be upheld in regard to claims 2, 4, 6, 7, 8 and 9.

144. The Bombay High Court in **National Highways Authority of India Vs. The Additional Commissioner, Nagpur and others**[33], reiterated that the doctrine of severability can be applied to an award while dealing with the objections under Section 34 of the Act. Reliance has also been placed on the judgement of the Supreme Court in **J.G. Engineers Pvt. Ltd.** (supra). The relevant observation is as follows :-

> (22) Thus, it becomes clear that in a given case, the Court, while exercising power under Section 34 of the Act of 1996, can set aside an Award partly, depending upon the facts and circumstances of the case. In this context, reference can also be made to the judgment of the Supreme Court in the case of J.G. Engineers Pvt. Ltd. Vs. Union of India and another (2011) 5 SCC 758. (23) In the said case also, the doctrine of severability was invoked and it was held that when the Award deals with several claims that can be said to be separate and distinct, the Court can segregate the Award on items that do not suffer from any infirmity and uphold the Award to that extent. Thus, it becomes clear that the contention raised on behalf of the appellants in the present case, that the PDJ ought to have set aside the arbitral Award in its entirety, is not justified.

145. Once again in **John Peter Fernandes Vs. Saraswati**

33 2022(5) AIR Bom R 562

Ramchandra Ghanate and others[34] the Bombay High Court relying on Full Bench judgement in **R.S. Jiwani (M/s) Mumbai** (supra) applied the principle of severability to an arbitral award in segregating bad part from good part. It has been held as follows :-

> 16. Thus, the rival contentions need to be decided on the touchstone of jurisdiction clarified as above. It is also relevant to refer to the Full Bench judgement of this Court in the case of R. S. Jiwani Vs. Ircon International Limited (supra), for the reason that the respondents have specifically invoked the position of law clarified therein, to claim that the impugned award can be partly set aside, restricted to the second direction issued to the respondents for refunding specific amount with interest. It is submitted that the first finding or direction in the impugned award rejecting the prayer for specific performance made by Mr. Fernandes deserves to be confirmed and sustained. The Full Bench of this Court in the case of R. S. Jiwani Vs. Ircon International Limited (supra) took into consideration judgement of the Supreme Court in the case of McDermott International Inc. Vs. Burn Standard Company Limited and others, (2006) 11 SCC 181, wherein it was laid down that a court under Section 34 of the said Act can only quash an award, leaving the parties free to begin arbitration again, if they so desire. But the Full Bench of this Court in the said Judgement found that the principle of severability could certainly apply to arbitral awards, so long as the objectionable part could be segregated. This Court is convinced that the respondents are justified in invoking the said principle and contending that if their contentions are accepted, the impugned award could be partially set aside. This would not amount to modification or correction of errors of the learned arbitrator. In this backdrop, the arbitral award needs to be examined in the light of the contentions raised on behalf of the rival parties.

146. We have thus, no hesitation in holding that scheme of the Act does not put any limitation on power of the court to apply the doctrine

34 2023 SCC OnLine Bom 676

of severability to an arbitral award while considering the objections under Section 34 of the Act. It is well within the power of court to segregate, severe and set aside part of the award and uphold the remaining part. The only restriction is (i) that while exercising the power, the court cannot proceed to modify the findings returned on any of the issues decided by the arbitral tribunal and (ii) the remaining part is capable of surviving on its own.

147. Coming to the facts of the instant case, we find that Claim No. 2 of Rs.35.92 crores towards liquidated damages under Clause No. 13(ii) (b) of GCC which has been held to be unsustainable, is separate and distinct from the remaining claims found to be valid and lawful. The claims found to be valid are capable of surviving on their own strength, without in any manner getting affected by severance of Claim No.2 towards liquidated damages. Therefore, applying the doctrine of severability, the award in respect of liquidated damages (Claim No. 2) alone is set aside. Resultantly, the award of *pendenti lite* and future interest in respect of Claim No. 2 would also stand set aside, leaving the remaining award intact.

148. As a result, the appeal stands allowed in part.

149. No order as to costs.

Order Date :- 22.09.2023
SL/Jaideep/skv

(Vikram D. Chauhan, J.) (Manoj Kumar Gupta, J.)