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

% ***Date of Decision: 03.10.2023***

\+ O.M.P. (COMM) 405/2023, IA Nos.19196/2023 (Stay) and 19198/2023

BHARAT SANCHAR NIGAM LTD ..... Petitioner

Through: Mr. Dinesh Agnani, Sr. Adv. along with Mr. Puneet Taneja, Mr. Manmohan Singh Narula and Mr. Amit Yadav, Advs.

versus

VIHAAN NETWORKS LTD ..... Respondent

Through: Mr. Rajiv Nayar, Sr. Adv. along with Mr. Abhishek Singh, Mr. Saad Shervani, Mr. Elvin Joshy, Mr. Vikram Singh Dalal, Mr. J. Amal Anand, Mr. Omar Ahmed, Mr. Saurabh Seth, Ms. Alisha Sharma, Mr. Vikram Shah and Mr. Shashwat Tyagi, Advs.

CORAM:
HON'BLE MR. JUSTICE SACHIN DATTA

SACHIN DATTA, J. (Oral)

IA No.19197/2023 (Exemption)

1. Allowed, subject to all just exceptions.

2. Application stands disposed of.

CAV 509/2023

3. Since, learned counsel for the respondent has entered appearance, the caveat stands discharged.

O.M.P. (COMM) 405/2023

4. The present petition under Section 34 of the Arbitration and Conciliation Act, 1996 impugns an arbitral award dated 16.06.2023. The said award has been passed in the background of an NIT dated 13.04.2016 issued by the petitioner in respect of survey, planning, supply, installation, testing, commissioning, integration with existing core network and Operation and Maintenance for five years (extendable by two years) of 2G GSM BSS Network in uncovered villages of Arunachal Pradesh and Karbi Anglong and Dima Haso Districts of Assam alongwithVSAT, HUB and radio backhaul.

5. Pursuant to the above tender, the respondent/claimant's bid was accepted on 25.04.2017 and the respondent/claimant was declared as the successful L1 bidder. It was the case of the respondent/claimant before the learned sole arbitrator that advance pre-planning and preparation was required even in the course of finalization of the bid as the area in which the execution is to be done was not easily accessible.

6. On 01.03.2018, the petitioner is stated to have directed the respondent/claimant to initiate all preparatory actions and to give an unequivocal and unconditional acceptance for field test of live traffic for three months. In response, the respondent/claimant, vide letter dated 15.03.2018, accepted the additional field test requirement and sought issuance of Advance Purchase Order ("APO").

7. Thereafter, APO was issued by the petitioner on 21.03.2018 which is stated to have been unconditionally accepted by the respondent/claimant. The respondent/claimant is stated to have started deployment of resources and performance of project related work as per the requirements of the

tender and the mandate of the petitioner; however, the petitioner did not issue the Purchase Order and ultimately withdrew the APO vide letter dated 10.02.2020.

8. In the above background, being aggrieved with the aforesaid withdrawal of the APO, the respondent raised following claims in the arbitral proceedings :

> *"36. It is the case of the Claimant that the aforesaid illegal withdrawal of APO has resulted in various losses which are suffered by it. On this basis, the following Claims are submitted before the Tribunal.*

Claim No.	*Particulars*	*Amount INR*
I	*Loss of Profit/Loss of Expected Profit/Loss of Anticipated Profit*	*139.51 crore*
II	*Cost incurred towards additional field testing*	*5.28 crore*
III	*Reimbursement of expenses incurred by the Claimant for the Project which is the subject matter of Tender and APO*	
III(A)	*Reimbursement of Salary*	*134.77 crore*
III(B)	*Reimbursement of cost incurred for Purchases,*	*20.03 crore*

	towards advances and commitment amount payable by the Claimant	
III(C)	*Reimbursement of Corporate Expenses and Factory expenses*	*20.64 crore*
III(D)	*TSEC Testing charges*	*0.70 crore*
III(E)	*Depreciation*	*3.07 crore*
III(F)	*Reimbursement of Finance Charges/Interest incurred by the Claimant*	*2.71 crore*
III(G)	*Reimbursement of cost incurred on Technical Knowhow development, customization, improvement, upgradation, modification to comply GR and Tender requirements*	*47.13 crore*
III(H)	*Reimbursement of cost and expenses incurred by the Claimant post-APO withdrawal*	*1.84 crore*
IV	*Loss of Future Earning/Business opportunities*	*35.90 crore*
V	*Loss of*	*100.00*

	Business valuation	*crore*
VI	*Interest*	*18% p.a. on all the above claim amounts – past, pendent lite and future*
VII	*Cost of Arbitration proceedings*	

9. The impugned award, after considering the pleadings of the parties, noted that the following issues arose in the light of the factual context:

> *"i. Whether any Contract came into existence on the acceptance of APO and furnishing of PBG, even in the absence of issuance of Purchase Order?*
>
> *ii. Whether withdrawal of APO by the Respondent vide its letter dated 10.02.2020 is legal and justified?*
>
> *iii. Whether the Claimant undertook any work and incurred expenditure, after the issuance of APO?*
>
> *iv. In the event it is decided that no concluded contract came into existence, whether the Claimant would be entitled to the payment for work allegedly executed by it?"*

10. The learned sole arbitrator found in favour of the petitioner in respect of the issue (i) and (ii) above.

11. With regard to the issue (i) *viz* whether any contract came into existence on the acceptance of APO and furnishing of Performance Bank Guarantee ("PBG") even in the absence of Purchase Order, the learned sole arbitrator held as under :

> *"84. Apart from the fact that APO was only an intention of BSNL to enter into a contract, there is also a specific provision in the instant case, expressing intention of the parties to have a formal contract in the form of issuance of Purchase Order (PO). When such a specific*

mode of entering into a contract is stipulated, contract could be treated as fructified only on the issuance of a Purchase Order. Therefore, the Tribunal holds that an enforceable contract did not come into existence."

12. With regard to the issue whether withdrawal of APO by the petitioner was justified or not, it was held as under:

"93. It can be seen that BSNL had genuine reasons to withdraw the APO which are captured in the arguments advanced by BSNL and noted above, as a decision was taken to commission 4G Cellular Services instead of 2G."

13. The aforesaid findings being in favour of the petitioner, no challenge thereto has been made in the present petition. The petitioner is aggrieved with the finding(s)/conclusion(s) rendered by the learned sole arbitrator on issue (iii) and (iv) above.

14. With regard to the issue no. (iii) *viz* whether the claimant undertook any work and incurred expenditure, after the issuance of APO, the impugned award notes the contentions of the respondent/claimant as under:

"96. The Claimant has referred to certain correspondence, meetings and events in order to show that there were clear instructions from BSNL to the Claimant to initiate all preparatory actions and to do testing including Drive Test, followed by field trial with live traffic for at least three months. Reference to these correspondence and meetings etc. is stated in the following tabulated format given by the Claimant.

Date	*Particulars*
26.10.2017	*BSNL vide its letter dated 26.10.2017 conveyed to USOF that BSNL has conveyed to the Bidders to initiate all preparatory actions.*
01.03.2018	*BSNL vide its letters dated 01.03.2018 requested the Claimant to "initiate all preparatory actions" and to give unconditional and unequivocal acceptance for testing with live traffic for 3 (three) months before roll-out at all sites.*
15.03.2018	*The Claimant vide its letter of 15.03.2018 accepted the*

	additional field test requirement and conveyed that they also "look forward to start the roll-out of this Project immediately".
03.04.2018	*The Claimant vide letter dated 03.04.2018 informed BSNL that it has already sent teams in the target area and started preparation for site deployment.*
04.04.2018	*The Claimant responded to BSNL's letter dated 22.03.2018 vide its letter of 04.04.2018 and conveyed that the additional testing requirement impact is being examined.*
03.08.2018	*BSNL convened a meeting on 07.08.2018 for preparation of NE Project roll-out vide letter dated 03.08.2018.*
12.09.2018	*BSNL vide its letter of 12.09.2018 conveyed to the Claimant that USOF vide its letter of 10.09.2018 has conveyed that coverage in quality of service of equipments were found satisfactory during field trial and thus unconditional and unequivocal acceptance of APO with required PBG be done.*
12.09.2018	*A Meeting was held on 12.09.2018 which was chaired by the Secretary, Telecom and attended by CMD, BSNL and the Claimant wherein it was discussed and decided that to avoid further doubts, successful Completion Certificate for Testing would be issued.*
05.10.2018	*BSNL conveyed to the Claimant vide its letter dated 05.10.2018 that USOF vide letter dated 04.10.2018 has conveyed to BSNL that final field trial test report in respect of provision of mobile services in Arunachal Pradesh has been received and accepted by the Competent Authority. The Claimant was asked to thus accept the APO and provide Performance Bank Guarantee.*
10.10.2018	*BSNL vide its letter dated 10.10.2018 conveyed to USOF that although Field Testing requirement was not envisaged in the Tender, yet the same has been completed by the successful Bidders at the instance of USOF.*
24.01.2019, 20.02.2019, 12.03,2019, 29.03.2019 & 17.05.2019	*The Claimant vide repeated letters requested for release of PO and conveyed that it has already incurred substantial expenditure and is investing in the Project for a long period of time (Exh. CW1/26, 36, 27. 28 & 37, Pgs. 175-176, 177,180, 181 & 178 respectively, CD-1).*
20.05.2019	*The Claimant vide its letter dated 20.05.2019 requested*

	BSNL to immediately issue the PO and conveyed that Claimant has made significant preparations and committed huge investments. It was also informed that INR 225 – 250 Crore liability has already been incurred. Other details of the work done were also recorded.
24.05.2019	*BSNL vide its letter of 24.05.2019 (Exh. CW1/23, Pgs. 168-169, CD-1) conveyed to USOF that there is a legal contract in force between BSNL and successful Vendor (Claimant) and Claimant has incurred about INR 225 – 250 Crore against the Project. BSNL has also stated that the APO has been unconditionally accepted by Claimant.*
25.10.2019	*BSNL vide its letter dated 25.10.2019 (Exh. CW1/32, Pg. 215, CD-1) stated that Claimant has already installed 05 sites and nearly 1000 subscribers availing mobile voice and data services and it is requested that clear directions be issued regarding the operations of these sites and expenditures incurred till date. An undertaking was also sought that all Claims and charges will be borne by USOF.*
29.01.2020	*BSNL vide its letter dated 29.01.2020 (Exh. CW1/32, Pgs. 216 - 218, CD-1) conveyed to USOF that it had conveyed the final go ahead to roll-out the Project and after received of go ahead, BSNL started the process to place PO on Claimant.* *BSNL asserted that it has incurred substantial expenditure and final claim will be submitted. BSNL also asserted that the Claimant has submitted a consideration commitment and liability has been created by the Claimant and letter dated 20.05.2019 (Exh. RW1/6) was enclosed to the said letter.*
24.05.2020	*BSNL vide its letter dated 24.05.2020, (CW1/64, Page 166, CD-55), instructed the Claimant to withdraw field testing sites.*

97. The Claimant states that it carried out these tests and activities and informed BSNL about the same on 19.03.2018. Thereafter, APO dated 21.03.2018 was issued. Again, in the meeting for preparation to roll out of North-East Project in Arunachal Pradesh on 07.08.2018, the Claimant was asked to prepare for the said roll out which had been specifically approved by BSNL. Such approval was also given by USOF, and this was communicated to the Claimant by BSNL. It was argued that on multiple occasions, BSNL had asked the Claimant to

prepare for roll out of the Project stressing that it was time sensitive. The Claimant has also referred to the following deposition of CW-1 in this behalf, which, according to the Claimant, has not been rebutted."

15. While noting the contention of the petitioner as aforesaid, the impugned award also notes that the petitioner "has not denied that the claimant had undertaken the aforesaid task". It was further noted that the various letters and meetings referred to by the claimant whereby the claimant was asked to do the aforesaid tasks, stand admitted by the petitioner.

16. Taking into account the pleadings and evidence on record, including the deposition of CW-1, the impugned award concludes as under :

"99. The record reflects that the works undertaken/performed by the Claimant fall in two categories as under:
(i) xx xx xx
(ii) Even before the issuance of APO, the Claimant was asked to initiate preparatory action. APO was issued on 21.03.2018 and immediately thereafter, the Claimant had informed BSNL vide letters dated 03.04.2018 and 04.04.2018 that it had already sent teams in the target area and started preparation for site deployment and was examining additional testing requirement. The expenditure on this account, thus, was incurred at the instance of BSNL and in various communication, the Claimant informed BSNL about the same. BSNL even acknowledged this fact in its letter dated 24.05.2019 addressed to USOF....."

17. In Para 102 of the award, the impugned award again summarizes its factual findings to the effect that, in fact, work had been undertaken by the respondent/claimant at the instance and on the specific instructions of the petitioner.

18. With regard to the issue no. (iv), *viz.* whether the claimant was entitled to any payment notwithstanding that no concluded contract had

come into existence, the impugned award, relying upon Section 70 of the Indian Contract Act, 1872 holds as under:

> *"111. Thus, the Tribunal finds force in the submission of the Respondent that the field testing and testing of BTS and equipment work was undertaken by the Claimant to comply with the provisions of Clause 9 as it was a part of qualification criteria for the issuance of Purchase Order. Any expenditure incurred by a bidder to make itself eligible for bidding is not reimbursable. It appears that the Claimant was conscious of this and therefore, it willingly undertook to do this work without expecting any remuneration/compensation for the same. No doubt, it is harsh on the Claimant that the Claimant had to do the field trial, etc. with high expectation to get the Purchase Order which was, ultimately, not issued. In such a circumstance, when no concluded contract has come into existence and the Tribunal is considering as to whether the Claimant would be entitled to reimbursement of the expenditure on the application of the doctrine of quantum meruit, the Tribunal finds it difficult to award cost in respect of field testing incurred by the Claimant.*
>
> *112. Insofar as the expenditure falling in category II above is concerned, position is different. Here, the work is carried out by the Claimant after the issuance of APO. As discussed in detail in the preceding paragraph, the Claimant had undertaken this work at the instance of BSNL as USOF had issued instructions to roll out the Project. The fact that the Claimant was doing this work was not only within the knowledge of BSNL, BSNL even acknowledged the same time and again. In fact, at that stage, BSNL had been even writing to USOF for issuance of Purchase Order. On these facts, when the Purchase Order is ultimately not issued for BSNL's own reasons, (which may be justified), the other side of the coin which cannot be overlooked is that the Claimant had agreed to undertake the aforesaid work only for the reason that the Claimant was supposed to get the Purchase Order of the aforesaid magnitude. Had the Claimant been awarded the work by issuing PO, it could have, in all probability, recovered the cost incurred in respect of these additional/preparatory works undertaken by it. It needs to be borne in mind that withdrawal of APO is not due to any lapse/failure on the part of the Claimant.*
>
> *113. In the aforesaid scenario, the expenditure undertaken by the Claimant needs to be compensated and BSNL cannot wish away the same on the ground that no concluded contract came into existence or that BSNL did not derive any benefit or advantage from the Claimant.*

114. It is highlighted at the cost of repetition that works in question had been undertaken by the Claimant for which it has incurred the expenditure. This was done at the instance of USOF/BSNL. Had the work been finally awarded, the Claimant would have recovered the amount of expenditure. Since that is not done, the Claimant would be entitled to the expenditure incurred in view of the provisions of Section 70 of the Contract Act, which reads as under:

> *"70. Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered."*

115. This provision incorporates the doctrine Quantum Meruit. According to contract law, quantum meruit is a doctrine that states there is an inferred promise to pay a fair amount for work and the materials provided, even without a lawful, enforceable agreement between the parties. A party who carries out a worthwhile service for another party normally participates in a written, legally binding agreement or contract before fulfilling the service, especially when the party providing the service is in the business of executing that service."

19. Having dealt with the aforesaid issues, the learned sole arbitrator considered the claims raised by the respondent and rejected most of the said claims. The summary of the award on the various claims, as set out in the award itself is reproduced as under:-

"I SUMMARY OF THE AWARD

Claim No.	*Particulars*	*Amount INR*	*Tribunal's decisions*
I	*Loss of Profit/Loss of Expected Profit/Loss of Anticipated Profit*	*139.51 crore*	*Rejected*
II	*Cost incurred towards additional field testing*	*5.28 crore*	*Rejected*

III	*Reimbursement of expenses incurred by the Claimant for the Project which is the subject matter of Tender and APO under following heads:*		
III(A)	*Reimbursement of Salary*	*134.77 crore*	*Allowed in the sum of INR 33. 69 crore*
III(B)	*Reimbursement of cost incurred for Purchases, towards advances and commitment amount payable by the Claimant*	*20.03 crore*	*Allowed in the sum of INR 9.83 crore*
III(C)	*Reimbursement of Corporate Expenses and Factory expenses*	*20.64 crore*	*Rejected*
III(D)	*TSEC Testing charges*	*0.70 crore*	*Rejected*
III(E)	*Depreciation*	*3.07 crore*	*Rejected*
III(F)	*Reimbursement of Finance Charges/ Interest incurred by the Claimant*	*2.71 crore*	*Rejected*
III(G)	*Reimbursement of cost incurred on Technical Knowhow development, customization,improvement, upgradation, modification to comply GR and Tender requirements*	*47.13 crore*	*Rejected*
III(H)	*Reimbursement of cost and expenses incurred by the Claimant post-APO withdrawal*	*1.84 crore*	*Rejected*
IV	*Loss of Future Earning/Business opportunities*	*35.90 crore*	*Rejected*

V	*Loss of Business valuation*	*100.00 crore*	*Rejected*
VI	*Interest*	*18% p.a. on all the above claim amounts – Past, pendente lite and future ,*	*Interest on the sums awarded in respect of Claims III(A) and III(B) @10% per annum from 31.08.2020 till the date of Award and future interest @ 10% per annum from the date of Award till payment.*
VII	*Cost of Arbitration proceedings*		*Rejected*

20. In the above conspectus, learned senior counsel for the petitioner has primarily raised two contentions:

i. Firstly, it is submitted that the factual findings rendered in the impugned award to the effect that the work carried out by the respondent pursuant to the APOs issued by the petitioner was at the behest of and on the specific instructions of the petitioner, are perverse and not borne out by the arbitral record.

ii. Secondly, it is contended that the impugned award errs in law granting reimbursement of certain alleged expenditure undertaken by the respondent despite finding that no concluded contract had come into existence between the parties.

21. Both the aforesaid contentions are misconceived.

22. The law is well settled that in proceedings under Section 34 of the Arbitration and Conciliation Act, 1996, it is impermissible to embark upon the arena of re-appreciation of factual findings rendered by the Ld. Sole Arbitrator.

23. In the present case, the impugned award, after copiously considering the voluminous correspondence exchanged between the parties, arrives at the conclusion that considerable work was done by the respondent at the instance of and on the specific instructions of the petitioner after issuance of the APO. A detailed factual analysis has been undertaken by the Ld. Sole Arbitrator. The various correspondence/communication exchanged between the parties which impelled the learned Sole Arbitrator to arrive at the aforesaid conclusion, have been explicitly set out and quoted in the impugned award itself. It would be completely beyond the scope of these proceedings under Section 34 of the Arbitration and Conciliation Act, 1996 to embark upon the exercise of re-appreciation / re-appraisal of the aforesaid finding of fact.

24. The law in this regard is well settled and has been reiterated time and again by the Supreme Court. Reference in this regard is apposite to the recent pronouncement of the Supreme Court in ***Reliance Infrastructure Ltd. v. State of Goa***, 2023 SCC OnLine SC 604, which takes notes of the judgements in the case of ***MMTC Limited* v. *Vedanta Limited***, (2019) 4 SCC 163, ***Ssangyong Engineering and Construction Co. Ltd.* v. *NHAI,*** (2019) 15 SCC 131, ***PSA SICAL Terminals (P) Ltd.* v. *Board of Trustees of V.O. Chidambranar Port Trust Tuticorin***, 2021 SCC OnLine SC 508, ***UHL Power Company Limited v. State of Himachal Pradesh***, (2022) 4 SCC 116, ***Delhi Airport***

Metro Express Pvt. Ltd. v. Delhi Metro Rail Corporation Ltd., (2022) 1 SCC 131 *and* ***Haryana Tourism Ltd. v. Kandhari Beverages Ltd.,*** (2022) 3 SCC 237, and holds as under:

> ***"The scope of challenge to an arbitral award under Section 34 and the scope of appeal under Section 37 of the Act***
> *47. Having regard to the contentions urged and the issues raised, it shall also be apposite to take note of the principles enunciated by this Court in some of the relevant decisions cited by the parties on the scope of challenge to an arbitral award under Section 34 and the scope of appeal under Section 37 of the Act of 1996.*
> *48. In MMTC Limited (supra), this Court took note of various decisions including that in the case of Associate Builders (supra) and exposited on the limited scope of interference under Section 34 and further narrower scope of appeal under Section 37 of the Act of 1996, particularly when dealing with the concurrent findings (of the Arbitrator and then of the Court). This Court, inter alia, held as under:—*
>
> > *"11. As far as Section 34 is concerned, the position is well-settled by now that the Court does not sit in appeal over the arbitral award and may interfere on merits on the limited ground provided under Section 34(2)(b)(ii) i.e. if the award is against the public policy of India. As per the legal position clarified through decisions of this Court prior to the amendments to the 1996 Act in 2015, a violation of Indian public policy, in turn, includes a violation of the fundamental policy of Indian law, a violation of the interest of India, conflict with justice or morality, and the existence of patent illegality in the arbitral award. Additionally, the concept of the "fundamental policy of Indian law" would cover compliance with statutes and judicial precedents, adopting a judicial approach, compliance with the principles of natural justice, and Wednesbury [Associated Provincial Picture Houses v. Wednesbury Corpn., [1948] 1 K.B. 223 (CA)] reasonableness. Furthermore, "patent illegality" itself has been held to mean contravention of the substantive law of India, contravention of the 1996 Act, and contravention of the terms of the contract.*
> > *12. It is only if one of these conditions is met that the Court may interfere with an arbitral award in terms of Section 34(2)(b)(ii), but such interference does not entail a review of the merits of the dispute, and is limited to situations where the findings of the arbitrator are arbitrary, capricious or perverse, or when the conscience of the Court is shocked, or when the illegality is not trivial but goes to the root of the matter. An arbitral award may not be interfered with if the view taken by the arbitrator is a possible view based on facts. (See Associate Builders v. DDA [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2*

SCC (Civ) 204]. Also see ONGC Ltd. v. Saw Pipes Ltd. [ONGC Ltd. v. Saw Pipes Ltd., (2003) 5 SCC 705]; Hindustan Zinc Ltd. v. Friends Coal Carbonisation [Hindustan Zinc Ltd. v. Friends Coal Carbonisation, (2006) 4 SCC 445]; and McDermott International Inc. v. Burn Standard Co. Ltd. [McDermott International Inc. v. Burn Standard Co. Ltd., (2006) 11 SCC 181])

13. It is relevant to note that after the 2015 Amendment to Section 34, the above position stands somewhat modified. Pursuant to the insertion of Explanation 1 to Section 34(2), the scope of contravention of Indian public policy has been modified to the extent that it now means fraud or corruption in the making of the award, violation of Section 75 or Section 81 of the Act, contravention of the fundamental policy of Indian law, and conflict with the most basic notions of justice or morality. Additionally, sub-section (2-A) has been inserted in Section 34, which provides that in case of domestic arbitrations, violation of Indian public policy also includes patent illegality appearing on the face of the award. The proviso to the same states that an award shall not be set aside merely on the ground of an erroneous application of the law or by reappreciation of evidence.

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

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

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

38. Secondly, it is also made clear that reappreciation of evidence, which is what an appellate court is permitted to do, cannot be permitted under the ground of patent illegality appearing on the face of the award.

39. To elucidate, para 42.1 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204], namely, a mere contravention of the substantive law of India, by itself, is no longer a ground available to set aside an arbitral award. Para 42.2 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204], however, would remain, for if an arbitrator gives no reasons for an award and contravenes Section 31(3) of the 1996 Act, that would certainly amount to a patent illegality on the face of the award.

40. The change made in Section 28(3) by the Amendment Act really follows what is stated in paras 42.3 to 45 in Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204], namely, that the construction of the terms of a contract is primarily for an arbitrator to decide, unless the arbitrator construes the contract in a manner that no fair-minded or reasonable person would; in short, that the arbitrator's view is not even a possible view to take. Also, if the arbitrator wanders outside the contract and deals with matters not allotted to him, he commits an error of jurisdiction. This ground of challenge will now fall within the new ground added under Section 34(2-A).

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

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

"43. It will thus appear to be a more than settled legal position, that in an application under Section 34, the court is not expected to act as an appellate court and reappreciate the evidence. The scope of interference would be limited to grounds provided under Section 34 of the Arbitration Act. The interference would be so warranted when the award is in violation of "public policy of India", which has been held to mean "the fundamental policy of Indian law". A judicial intervention on account of interfering on the merits of the award would not be permissible. However, the principles of natural justice as contained in Section 18 and 34(2)(a)(iii) of the Arbitration Act would continue to be the grounds of challenge of an award. The ground for interference on the basis that the award is in conflict with justice or morality is now to be

understood as a conflict with the "most basic notions of morality or justice". It is only such arbitral awards that shock the conscience of the court, that can be set aside on the said ground. An award would be set aside on the ground of patent illegality appearing on the face of the award and as such, which goes to the roots of the matter. However, an illegality with regard to a mere erroneous application of law would not be a ground for interference. Equally, reappreciation of evidence would not be permissible on the ground of patent illegality appearing on the face of the award.

44. A decision which is perverse, though would not be a ground for challenge under "public policy of India", would certainly amount to a patent illegality appearing on the face of the award. However, a finding based on no evidence at all or an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside on the ground of patent illegality.

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

> *"31. The third juristic principle is that a decision which is perverse or so irrational that no reasonable person would have arrived at the same is important and requires some degree of explanation. It is settled law that where:*
>
> *(i) a finding is based on no evidence, or(ii) an Arbitral Tribunal takes into account something irrelevant to the decision which it arrives at; or(iii) ignores vital evidence in arriving at its decision, such decision would necessarily be perverse.*
>
> *32. A good working test of perversity is contained in two judgments. In Excise and Taxation Officer-cum-Assessing Authority v. Gopi Nath & Sons [1992 Supp (2) SCC 312], it was held : (SCC p. 317, para 7)*
>
> *"7. ... It is, no doubt, true that if a finding of fact is arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant material or if the finding so outrageously defies logic as to suffer from the vice of irrationality incurring the blame of being perverse, then, the finding is rendered infirm in law.""*

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

"26. A cumulative reading of the UNCITRAL Model Law and Rules, the legislative intent with which the 1996 Act is made, Section 5 and Section 34 of the 1996 Act would make it clear that judicial interference with the arbitral awards is limited to the grounds in Section 34. While deciding applications filed under Section 34 of the Act, Courts are mandated to strictly act in accordance with and within the confines of Section 34, refraining from appreciation or reappreciation of matters of fact as well as law. (See Uttarakhand Purv Sainik Kalyan Nigam Ltd. v. Northern Coal Field Ltd. [Uttarakhand Purv Sainik Kalyan Nigam Ltd. v. Northern Coal Field Ltd., (2020) 2 SCC 455 : (2020) 1 SCC (Civ) 570], Bhaven Construction v. Sardar Sarovar Narmada Nigam Ltd. [Bhaven Construction v. Sardar Sarovar Narmada Nigam Ltd., (2022) 1 SCC 75] and Rashtriya Ispat Nigam Ltd. v. Dewan Chand Ram Saran [Rashtriya Ispat Nigam Ltd. v. Dewan Chand Ram Saran, (2012) 5 SCC 306].)

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28. This Court has in several other judgments interpreted Section 34 of the 1996 Act to stress on the restraint to be shown by Courts while examining the validity of the arbitral awards. The limited grounds available to Courts for annulment of arbitral awards are well known to legally trained minds. However, the difficulty arises in applying the well-established principles for interference to the facts of each case that come up before the Courts. There is a disturbing tendency of Courts setting aside arbitral awards, after dissecting and reassessing factual aspects of the cases to come to a conclusion that the award needs intervention and thereafter, dubbing the award to be vitiated by either perversity or patent illegality, apart from the other grounds available for annulment of the award. This approach would lead to corrosion of the object of the 1996 Act and the endeavours made to preserve this object, which is minimal judicial interference with arbitral awards. That apart, several judicial pronouncements of this Court would become a dead letter if arbitral awards are set aside by categorising them as perverse or patently illegal without appreciating the contours of the said expressions.

29. Patent illegality should be illegality which goes to the root of the matter. In other words, every error of law committed by the Arbitral Tribunal would not fall within the expression "patent illegality". Likewise, erroneous application of law cannot be categorised as patent illegality. In addition, contravention of law not linked to public policy or public interest is beyond the scope of the expression "patent illegality". ***What is prohibited is for Courts to reappreciate evidence to conclude that the award suffers from patent illegality appearing on the face of the award, as Courts do not sit in appeal against the arbitral award.*** *The permissible grounds for interference with a domestic award under Section 34(2-A) on the ground of patent illegality is when the arbitrator takes a view which is not even a possible one, or interprets a*

clause in the contract in such a manner which no fair-minded or reasonable person would, or if the arbitrator commits an error of jurisdiction by wandering outside the contract and dealing with matters not allotted to them. An arbitral award stating no reasons for its findings would make itself susceptible to challenge on this account. The conclusions of the arbitrator which are based on no evidence or have been arrived at by ignoring vital evidence are perverse and can be set aside on the ground of patent illegality. Also, consideration of documents which are not supplied to the other party is a facet of perversity falling within the expression "patent illegality".

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

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42. The Division Bench referred to various factors leading to the termination notice, to conclude that the award shocks the conscience of the court. The discussion in SCC OnLine Del para 103 of the impugned judgment [DMRC v. Delhi Airport Metro Express (P) Ltd., 2019 SCC OnLine Del 6562] amounts to appreciation or reappreciation of the facts which is not permissible under Section 34 of the 1996 Act. The Division Bench further held [DMRC v. Delhi Airport Metro Express (P) Ltd., 2019 SCC OnLine Del 6562] that the fact of AMEL being operated without any adverse event for a period of more than four years since the date of issuance of the CMRS certificate, was not given due importance by the Arbitral Tribunal. ***As the arbitrator is the sole Judge of the quality as well as the quantity of the evidence, the task of being a Judge on the evidence before the Tribunal does not fall upon the Court in exercise of its jurisdiction under Section 34****. [State of Rajasthan v. Puri Construction Co. Ltd., (1994) 6 SCC 485] On the basis of the issues submitted by the parties, the Arbitral Tribunal framed issues for consideration and answered the said issues. Subsequent events need not be taken into account."*

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

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

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

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

> *"15. This Court also accepts as correct, the view expressed by the appellate court that the learned Single Judge committed a gross error in reappreciating the findings returned by the Arbitral Tribunal and taking an entirely different view in respect of the interpretation of the relevant clauses of the implementation agreement governing the parties inasmuch as it was not open to the said court to do so in proceedings under Section 34 of the Arbitration Act, by virtually acting as a court of appeal.*
>
> *16. As it is, the jurisdiction conferred on courts under Section 34 of the Arbitration Act is fairly narrow, when it comes to the scope of an appeal under Section 37 of the Arbitration Act, the jurisdiction of an appellate court in examining an order, setting aside or refusing to set aside an award, is all the more circumscribed."*

54. The learned Attorney General has referred to another 3-Judge Bench decision of this Court in the case of Sal Udyog Private Limited (supra), wherein this Court indeed interfered with the award in question when the same was found suffering from non-consideration of a relevant contractual clause. In the said decision too, the principles aforesaid in Delhi Airport Metro Express, Ssangyong Engineering and other cases were referred to and thereafter, this Court applied

the principles to the facts of that case. We shall refer to the said decision later at an appropriate juncture.
55. Keeping in view the aforementioned principles enunciated by this Court with regard to the limited scope of interference in an arbitral award by a Court in the exercise of its jurisdiction under Section 34 of the Act, which is all the more circumscribed in an appeal under Section 37, we may examine the rival submissions of the parties in relation to the matters dealt with by the High Court." *(emphasis supplied)*

25. The Supreme Court in ***Hindustan Construction Co. Ltd. v. National Highways Authority of India,*** 2023 SCC OnLine SC 1063, has held as under:

> **"***26. The prevailing view about the standard of scrutiny- not judicial review, of an award, by persons of the disputants' choice being that of their decisions to stand-and not interfered with, [save a small area where it is established that such a view is premised on patent illegality or their interpretation of the facts or terms, perverse, as to qualify for interference, courts have to necessarily chose the path of least interference, except when absolutely necessary]. By training, inclination and experience, judges tend to adopt a corrective lens; usually, commended for appellate review. However, that lens is unavailable when exercising jurisdiction under Section 34 of the Act. Courts cannot, through process of primary contract interpretation, thus, create pathways to the kind of review which is forbidden under Section 34. So viewed, the Division Bench's approach, of appellate review, twice removed, so to say [under Section 37], and conclusions drawn by it, resulted in displacing the majority view of the tribunal, and in many cases, the unanimous view, of other tribunals, and substitution of another view. As long as the view adopted by the majority was plausible-and this court finds no reason to hold otherwise (because concededly the work was completed and the finished embankment was made of composite, compacted matter, comprising both soil and fly ash), such a substitution was impermissible."*

26. Further, this Court in ***Mellenium Realtech (P) Ltd. v. Opaque Infrastucture*** **(P) Ltd**., 2023 SCC OnLine Del 4891 has held as under:

> *"31. The limited scope of interference under Section 34 of the A&C Act, 1996 has been oft reiterated in a catena of judgments. In Ssangyong Engg. & Construction Co. Ltd. v. NHAI, (2019) 15 SCC 131, the Supreme Court has held that contravention of any Statute not linked to public policy or*

> *public interest, cannot be said to be subsumed within the scope of "fundamental policy of Indian law" so as to warrant any interference with an arbitral award. It was also clarified by the Supreme Court that patent illegality as referred to in Section 34(2A) of the A&C Act refers to such illegality as goes to the root of the matter but it does not amount to mere erroneous application of the law. It was reiterated that re-appreciation of evidence, which is what an appellate court is permitted to do, is impermissible under Section 34. Further, construction of the terms of the contract falls within the domain of the arbitrator, unless the contract is construed in a manner that no fair minded or reasonable person would, and the arbitrator's view is not even a possible view to take.*
>
> *Xxx xxx xxx*
>
> *33. In the factual backdrop of the present case, it is evident that the contentions sought to be raised by the petitioner/owner, tantamount to seeking a factual reappraisal and a merit based review of the award which is clearly beyond the scope of Section 34."*

27. As such, it would be wholly unwarranted for this Court to interfere with the finding of fact rendered in the impugned award that the work carried out by the respondent pursuant to the APOs issued by the petitioner was at the behest of and on the specific instructions of the petitioner. This finding has been rendered based on an appreciation of the material and evidence on record; it cannot be said to be an impossible or even an implausible view, nor can it be said to be based on no evidence.

28. Likewise, the conclusion that the respondent/claimant was entitled to reimbursement of expenses incurred by it notwithstanding absence of a concluded contract was predicated upon Section 70 of the Contract Act which incorporates the doctrine of quantum meruit. The said view is not liable to be interfered, particularly on the touchstone of Section 34 of the A & C Act, 1996.

29. In applying the principle, the impugned award takes note of judgments of the Supreme Court in ***Food Corporation of India v. Vikas Majdoor Kamdar Sahkari Mandli Ltd.***, (2007) 13 SCC 544, ***Puran Lal***

Sah v. State of U.P., (1971) 1 SCC 424 and also the judgment of British Court in ***British Steel Corp v. Cleveland Bridge and Engineering Co Ltd.***, [1984] 1 All ER 504.

30. Taking into account the legal position as enunciated in these judgments, the impugned award holds that the absence of a contract would not deprive the respondent/contractor from a reasonable remuneration for the work performed. The view taken in the impugned award is plausible, and based on an application of law laid down in the judgements referred to therein. Reference is also apposite to the judgment of a co-ordinate bench of this Court in ***M.C.D. v. Ravi Kumar***, (2017) SCC OnLine Del 11902, where this Court had occasioned to specifically consider an identical issue, *viz* :-

> *"(i) Whether in absence of a formal agreement/contract awarding additional works to the respondent, the respondent is entitled to make a claim for such work?"*

31. As regards the above issue, this court held as under :-

> ***"12.*** *Interpreting the said provision, Supreme Court in case of Mulamchand v. State of Madhya Pradesh AIR 1968 SC 1218, held that in the absence of a formal contract between Dominion of India and a private individual not in the form required by Section 175(3) of the Government of India Act, 1935, the same was void and cannot be enforced, however, at the same time, if money is deposited and goods are supplied or if services are rendered in terms of the void contract, the provisions of Section 70 of the Indian Contract Act may be applicable and where a person has lawfully done something for other not intending it to be done gratuitously and the other person enjoys the benefit thereof then such other person shall become liable to make compensation to the former in respect of, or to restore, the things so done or delivered.*
> ***13.*** *In V.R. Subramanyam v. B. Thayappa AIR 1966 SC 1034, it was held as under:—*
>
> > *"5) Counsel for the appellant submitted that as in the view of the High Court the respondent failed to prove the oral agreement pleaded by him, the suit should have been dismissed, and they should not have awarded compensation quantum merit which was not claimed. It was urged that the respondent must succeed or fail*

> *on the case pleaded by him, and not on a cause of action not pleaded. In our view, there is no substance in this contention. As we have already observed, in respect of the additional work done by the respondent, both the parties set up conflicting oral agreements. These were not accepted by the High Court. If a party to a contract rendered service to the other not intending to do so gratuitously and the other person has obtained some benefit, the former is entitled to compensation for the value of the services rendered by him. Evidently, the respondent made additional constructions to the building and they were not done gratuitously. He was therefore entitled to receive compensation for the work done which was not covered by the agreement. The respondent claimed under an oral agreement compensation at prevailing market rates for work done by him: even if he failed to prove an express agreement in that behalf, the court may still award him compensation under s. 70 of the Contract Act. By awarding a decree for compensation under the Statute and not under the oral contract pleaded, there was in the circumstances of this case no substantial departure from the claim made by the respondent."*
>
> *Xxx xxx xxx*
>
> ***17.** In the present case, as discussed above, the claim of the petitioner was allowed relying upon the principles of Section 70 of the Indian Contract Act and in exercise of my limited jurisdiction under Section 34 of the Act, I find the same to be in accordance with law."*

32. The above observations are also squarely applicable to the facts of the present case. The impugned award inasmuch as it relies upon Section 70 of the Contract Act to assess the amount to which the respondent was entitled in respect of work performed by the respondent, cannot be faulted with.

33. Lastly, it has been sought to be submitted that the quantum of amount awarded to the respondent is excessive and/or without basis. Again, the contention is misconceived. It is noticed that while assessing the amount to which the respondent was entitled under the head "reimbursement of salary", the impugned award notices that the claimant had filed documents showing deployment of staff for the work in question, which included the appointment/transfer letters of the employees to the subject project, their

salary slips, proof of payment and other similar documents. The learned sole arbitrator, after appreciating and analyzing the material placed on record, deemed it fit to award only 25% of the amount claimed to the respondent.

34. Likewise, substantial evidence and material was also filed by the respondent in respect of cost incurred towards purchases, advances and other amount(s) incurred by the respondent/claimant in connection with the work. Again, the learned sole arbitrator after analysing and appreciating evidence and material on record, deemed it fit to award only 50% of the cost allegedly incurred by the respondent under these heads. The learned sole arbitrator acted well within his jurisdiction to confine the claim/s of the respondent to the extent awarded.

35. In the aforesaid conspectus, there is no ground to interfere with the impugned award under Section 34 of the Arbitration and Conciliation Act, 1996. The present petition is accordingly dismissed.

36. All pending applications also stands disposed of.

SACHIN DATTA, J

OCTOBER 3, 2023
rp/hg