AFR

HIGH COURT OF JUDICATURE AT ALLAHABAD

Neutral Citation No. - 2024:AHC:59078
Court No. 1

APPEAL UNDER SECTION 37 OF ARBITRATION AND CONCILIATION ACT 1996 No.389 of 2023

UNION OF INDIA THROUGH GARRISON ENGINEER AF

v.

M/S YAUK ENGINEERS

For the Applicant : Sri Gopal Verma, Advocate
For the Respondent : Sri Sudhir Dixit, Advocate

Last heard on March 19, 2024
Judgement on April 5, 2024

HON'BLE SHEKHAR B. SARAF, J.

1. This is an appeal under Section 37 of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as the 'Act') filed by the Union of India through Garrison Engineer AF (hereinafter referred to as the 'Applicant') against the order dated January 12, 2012 passed by District Judge, Agra in Arbitration Case No. 406 of 2006 under Section 34 of the Act.

FACTS

2. I have laid down the factual matrix leading to the instant appeal below:

a. M/s Yauk Engineers (hereinafter referred to as the 'Respondent') entered into a contract with the Applicant for providing 33KV transformer (Independent Feeder) vide letter dated May 16, 1995 for an amount of Rs.1,00,86,922.26/-. Work was to be completed within 18 months with effect from June 06, 1995. The work order was issued on May 29, 1995. The work was finally completed on August 09, 1997 and completion certificate was issued on August 14, 1997.

b. As per clause 39 and 39.1 of the Contract between the parties and condition 46 of IAFW 2249 General Conditions of Contract (hereinafter referred to as the 'GCC'), entire installation was deemed to be guaranteed by the Respondent for efficient performance for 12 months from the date of completion of work. The Respondent had also given specific undertaking in this regard vide its letter dated October 1, 1997.

c. The Transformer provided by the Respondent became defective in June, 1998 and accordingly, the Respondent was asked by the Applicant to rectify the defects. The Respondent rectified the defects, and claimed reimbursement of Rs.6,28,268/- incurred by it in the rectification of defects. Since, the Applicant contended that based on the guarantee provided by the Respondent it was not liable to reimburse any cost incurred towards rectification of defects, disputes arose between the parties which were referred to arbitration.

d. The Arbitrator vide its award dated July 31, 2006, among other things, awarded a sum of Rs.6,22,268/- along with interest at the rate of 12% p.a. from February 2, 1998 to July 31, 2006 and at the rate of 8% p.a. from August 1, 2006 till the date of actual payment in favour of the Respondent.

e. The arbitral award dated July 31, 2006 was challenged by the Applicant under Section 34 of the Act before the District Judge, Agra (Arbitration Case No. 406 of 2006). Vide its order dated January 12, 2012, the District Judge, Agra dismissed the application filed by the Applicant and upheld the arbitral award dated July 31, 2006 in its entirety.

f. Aggrieved by the order dated January 12, 2012 passed by the District Judge, Agra, the Applicant filed the instant appeal under Section 37 of the Act before this Court on May 4, 2012.

CONTENTIONS OF THE APPLICANT

3. Although several claims that were allowed by the Arbitrator and affirmed by the District Judge are under challenge in this appeal, learned ASG of India has confined his arguments to the reimbursement of Rs.6,22,268/- . The other grounds of appeal have not been pressed by him and are accordingly dismissed in limine. With regards to the claim of reimbursement of Rs.6,22,268/-, Sri Gopal Verma, counsel has made the following arguments:

i. As per clause 39 and 39.1 of the contract between the parties, and condition 46 of IAFW 2249 GCC, entire installation was deemed to be guaranteed by the Respondent for efficient performance for 12 months from the date of completion of work and in case of any default arising during that period, the Respondent was required to rectify/replace the same at its own cost. The Respondent had further specifically given a guarantee vide its letter dated October 1, 1997.

ii. The Arbitrator without considering the oral and written submissions as well as documentary evidence illegally awarded Rs. 6,22,268/- in favour of the Respondent.

iii. The issue regarding the undertaking given by the Respondent for 1 year from August 9, 1996, and further extended vide its letter dated October 1, 1997, in terms of clause 39 of the contract between the parties was specifically raised before the Arbitrator during the arbitration proceedings as well as before the District Judge in proceedings under Section 34 of the Act but no specific finding in this regard has been given either by the Arbitrator or by the District Judge.

iv. The contention of the Respondent that the guarantee given by the manufacturer has expired, does not give it the right to demand the expenses incurred in repair of the transformer in as much as under the terms of the contract, it was the Respondent who had given guarantee as well as undertaking for efficient performance of the transformer from August 8, 1997, and not the manufacturer. As such, the findings given by the Arbitrator as well as the District Judge are beyond jurisdiction in as much as an arbitrator is a creature of contract and it cannot travel beyond it. Reliance is placed in this regard upon the judgments of the Supreme Court in **Indian Oil Corporation Limited v. M/s Shree Ganesh Petroleum** reported in **(2022) 4 SCC 463**, and **MMTC Ltd. v. Vedanta Ltd.** reported in **(2019) 4 SCC 163**.

v. The Arbitrator while allowing the claim of the Respondent has acted without jurisdiction against the terms of contract in as much as the role of the arbitrator is to arbitrate within the terms of contract. If the arbitrator travels beyond the contract, the arbitrator can be said to be acting without jurisdiction. Reliance is placed in this regard upon the judgments of the Supreme Court in **PSA Sical Terminals (P) Ltd. .v. Board of Trustees of V.O. Chidambranar Port Trust Tuticorin** reported in **2021 SCC OnLine SC 508**.

vi. Award given by the arbitrator is contrary to the contractual provisions between the parties and therefore it is patently illegal and liable to be set aside by this court.

vii. In **Delhi Airport Metro Express Private Limited v. Delhi Metro Rail Corporation Limited** reported in **(2022) 1 SCC 131**, it was held by the Supreme Court that a domestic award can be interfered with under Section 34(2A) of the Act on the ground of patent illegality 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 it. Without looking at the aforesaid position of law, the District Judge upheld the award under Section 34 of the Act.

viii. This Court should set aside the order dated January 12, 2012 passed by District Judge, Agra affirming the Arbitral Award dated July 31, 2006.

CONTENTIONS OF THE RESPONDENT

4. Sri Sudhir Dixit, counsel appearing on behalf of the Respondent has advanced the following submissions:

i. A perusal of the grounds taken by the Applicant in proceedings under Section 34 of the Act show that the grounds raised by the Applicant were not within the purview of Section 34(2) of the Act.

ii. The judgment dated January 12, 2012 passed by the District Judge is perfectly legal and valid.

iii. The instant appeal filed under Section 37 of the Act also does not disclose any ground which falls within the parameters of Section 34(2) of the Act.

iv. The District Judge has considered each and every objection raised by Applicant. Therefore, the instant appeal under Section 37 of the Act is devoid of any merits and deserves to be dismissed with cost.

ANALYSIS

5. I have heard the Learned Counsel appearing for the parties and perused the materials on record.

6. A preliminary issue arises before this Court before it delves into the merits of the instant appeal under Section 37 of the Act.

7. Since the arbitral award in the instant case was rendered in 2006 but the instant appeal is being heard and decided in 2024, the question arises as to the law applicable to the instant proceedings given that the Act underwent multiple amendments between 2006 and 2024.

8. The passage of time often renders legal proceedings complex, especially in cases involving arbitration awards. In the present matter, the temporal gap between the issuance of the arbitral award in 2006 and the current adjudication in 2024 presents a challenge. This temporal disjuncture prompts a crucial examination of legal principles, specifically concerning retrospective application of laws and the temporal scope of legal provisions.

9. In **Commissioner of Income Tax v. Vatika Township** reported in **(2015) 1 SCC 1,** a Constitution Bench of the Supreme Court propounded that a rule or law cannot be applied retrospectively unless there is a clear or manifest intention to the contrary. Relevant paragraphs have been extracted below:

> *"28. Of the various rules guiding how a legislation has to be interpreted, one established rule is that unless a contrary intention*

> *appears, a legislation is presumed not to be intended to have a retrospective operation. The idea behind the rule is that a current law should govern current activities. Law passed today cannot apply to the events of the past. If we do something today, we do it keeping in view the law of today and in force and not tomorrow's backward adjustment of it. Our belief in the nature of the law is founded on the bedrock that every human being is entitled to arrange his affairs by relying on the existing law and should not find that his plans have been retrospectively upset. This principle of law is known as lex prospicit non respicit : law looks forward not backward. As was observed in Phillips v. Eyre [(1870) LR 6 QB 1] , a retrospective legislation is contrary to the general principle that legislation by which the conduct of mankind is to be regulated when introduced for the first time to deal with future acts ought not to change the character of past transactions carried on upon the faith of the then existing law.*
>
> *29. The obvious basis of the principle against retrospectivity is the principle of "fairness", which must be the basis of every legal rule as was observed in L'Office Cherifien des Phosphates v. Yamashita-Shinnihon Steamship Co. Ltd. [(1994) 1 AC 486 : (1994) 2 WLR 39 : (1994) 1 All ER 20 (HL)] Thus, legislations which modified accrued rights or which impose obligations or impose new duties or attach a new disability have to be treated as prospective unless the legislative intent is clearly to give the enactment a retrospective effect; unless the legislation is for purpose of supplying an obvious omission in a former legislation or to explain a former legislation. We need not note the cornucopia of case law available on the subject because aforesaid legal position clearly emerges from the various decisions and this legal position was conceded by the counsel for the parties. In any case, we shall refer to few judgments containing this dicta, a little later."*

10. The principle against retrospective application of laws holds particular significance in the realm of arbitration. Arbitration is founded on the parties' agreement to resolve their disputes outside the traditional court system, relying on the laws as they exist at the time of their arbitration agreement. Retrospective application of laws could disrupt the parties' expectations and undermine the finality and efficiency of arbitration proceedings.

11. Retrospective application of laws to arbitral proceedings could affect the validity of arbitral awards, challenge the jurisdiction of arbitral tribunals,

or introduce procedural requirements that were not in place at the time of arbitration. Retrospective application of laws introduces uncertainty and unpredictability into legal relationships. Parties cannot foresee the legal consequences of their actions if laws can be altered retrospectively. This lack of certainty undermines the confidence in the legal system and erodes the rule of law. Arbitral awards, which are intended to provide parties with a final and binding resolution of disputes, become vulnerable to challenge or reversal based on retrospective legal changes. This prolongs the resolution of disputes, increases litigation costs, and undermines the efficacy of arbitration as an alternative to traditional court proceedings.

12. The grounds for challenge to an arbitral award under Section 34 of the Act underwent a significant change in 2015 with the enactment of the Arbitration and Conciliation (Amendment) Act, 2015 (hereinafter referred to as the 'Amendment Act, 2015'). However, since the arbitral proceedings in the instant case commenced in 2006, that is, prior to the enactment of the Amendment Act of 2015, the said amendment in relation to the substantive provisions in the Amendment Act will not apply to the instant case, given the principle against retrospective applicability of laws, and various pronouncements of the Supreme Court in this regard.

13. Reference can be made to Section 26 of the Amendment Act, 2015 which states that the Amendment Act, 2015 will not apply to arbitral proceedings commenced, in accordance with the provisions of Section 21 of the Act, before the enactment of the Amendment Act, 2015:

> *"**26. Act not to apply to pending arbitral proceedings**.—Nothing contained in this Act shall apply to the arbitral proceedings commenced, in accordance with the provisions of Section 21 of the principal Act, before the commencement of this Act, unless the parties, otherwise agree but this Act shall apply in relation to arbitral proceedings commenced on or after the date of commencement of this Act."*

14. In **Union of India v. Parmar Construction** reported in **(2019) 15 SCC 682**, the Supreme Court held that by virtue of Section 26 of the

Amendment Act, 2015, the said amendments will only apply to those arbitral proceedings which commenced in accordance with Section 21 of the Act on are after October 26, 2015, that is the day on which the Amendment Act, 2015 came into force (hereinafter referred to as 'the effective date'). Relevant paragraphs have been extracted below:

> *"26. The conjoint reading of Section 21 read with Section 26 leaves no manner of doubt that the provisions of the 2015 Amendment Act shall not apply to such of the arbitral proceedings which have commenced in terms of the provisions of Section 21 of the principal Act unless the parties otherwise agree. The effect of Section 21 read with Section 26 of the 2015 Amendment Act has been examined by this Court in Aravali Power Co. (P) Ltd. v. Era Infra Engg. Ltd. and taking note of Section 26 of the 2015 Amendment Act laid down the broad principles as under :*
>
> *27. We are also of the view that the 2015 Amendment Act which came into force i.e. on 23-10-2015, shall not apply to the arbitral proceedings which have commenced in accordance with the provisions of Section 21 of the principal Act, 1996 before the coming into force of the 2015 Amendment Act, unless the parties otherwise agree."*

15. Again in **Union of India v. Pradeep Vinod Construction Co.** reported in **(2020) 2 SCC 464**, the Supreme Court reiterated that the provisions of the Amendment Act, 2015 will not apply if the arbitral proceedings commenced before the effective date:

> *"11. The respondent(s) are registered contractors with the Railways and they are claiming certain payments on account of the work entrusted to them. The request of the respondent(s) for appointment of arbitrator invoking Clause 64 of the contract was declined by the Railways stating that their claims have been settled and the respondent(s) have issued "no claim" certificate and executed supplementary agreement recording "accord and satisfaction" and hence, the matter is not referable to arbitration. Admittedly, the request for referring the dispute was made much prior to the Amendment Act, 2015 which came into force w.e.f. 23-10-2015. Since the request for appointment of arbitrator was made much prior to the Amendment Act, 2015 (w.e.f. 23-10-2015), the provision of the Amendment Act, 2015 shall not apply to the arbitral proceedings in terms of Section 21 of the Act unless the parties otherwise agree. As rightly pointed out by the learned counsel for*

> *the appellant, the request by the respondent(s) contractors is to be examined in accordance with the principal Act, 1996 without taking resort to the Amendment Act, 2015."*

16. Finally, in **Ratnam Sudesh Iyer v. Jackie Kakubhai Shroff** reported in **(2022) 4 SCC 206**, the Supreme Court espoused that on a conjoint reading of Section 21 of the Act and Section 26 of the Amendment Act, 2015 it becomes apparent that unless the parties otherwise agree, provisions of 2015 Amendment Act will not apply to arbitral proceedings which commenced in accordance with Section 21 of the Act before the effective date. Relevant paragraphs have been extracted below:

> *"21. In BCCI v. Kochi Cricket (P) Ltd. [BCCI v. Kochi Cricket (P) Ltd., (2018) 6 SCC 287 : (2018) 3 SCC (Civ) 534] a reference was made to Section 26 of the 2015 Amendment Act which had bifurcated proceedings into arbitral proceedings and court proceedings. The said provision reads as under:*
>
> > *"26. Act not to apply to pending arbitral proceedings.— Nothing contained in this Act shall apply to the arbitral proceedings commenced, in accordance with the provisions of Section 21 of the principal Act, before the commencement of this Act, unless the parties, otherwise agree but this Act shall apply in relation to arbitral proceedings commenced on or after the date of commencement of this Act."*
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> *22. It was clearly elucidated in para 39 of the judgment that the reason behind the first part of Section 26 of the 2015 Amendment Act being couched in the negative was only to state that the Amendment Act will apply even to arbitral proceedings commenced before the amendment if the parties otherwise agree. This is not so in the second part. The judgment derived that the intention of the legislature was to mean that the 2015 Amendment Act is prospective in nature and will apply to those arbitral proceedings that are commenced, as understood by Section 21 of the said Act, on or after the 2015 Amendment Act, and to court proceedings which had commenced on or after the 2015 Amendment Act came into force.*
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> *23. The applicability of Section 34(2-A) was further elucidated in Ssangyong Engg. & Construction Co. Ltd. V. NHAI [Ssangyong Engg. & Construction Co. Ltd. V. NHAI, (2019) 15 SCC 131 : (2020) 2 SCC (Civ) 213] , **where the SC categorically opined that Section 34 as amended will apply only to Section 34 applications that have been made to the Court on or after 23-10-2015,***

> ***irrespective of the fact that the arbitration proceedings may have commenced prior to that date.***
>
> *24. In the subsequent judgment of Hindustan Construction Co. Ltd. V. Union of India [Hindustan Construction Co. Ltd. V. Union of India, (2020) 17 SCC 324 : (2021) 4 SCC (Civ) 373] , it was observed in para 60 that the result of the BCCI [BCCI v. Kochi Cricket (P) Ltd., (2018) 6 SCC 287 : (2018) 3 SCC (Civ) 534] judgment was that salutary amendments made by the 2015 Amendment Act would apply to all court proceedings initiated after 23-10-2015."*
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> **(Emphasis Added)**

17. In **West Bengal Housing Board v. Abhisek Construction** reported in **2023 SCC OnLine Cal 827**, while dealing with a similar issue, I had concluded that the Amendment Act, 2015, will not apply to arbitral proceedings that have commenced prior to the effective date. Relevant paragraph thereof reads thus:

> *" 23. Therefore, it becomes manifestly clear that Section 26 of the 2015 Amendment Act is the position of law on this subject whereas Section 87 in the principal Act is no longer in existence. While interpreting a particular statutory provision, the Court has to accord significance to every word, space, and character in that provision. Post BCCI v. Kochi (supra) interpretation of Section 26 of the 2015 Amendment Act, it is crystal clear that the applicability of 2015 Amendment Act is prospective in nature, and will apply to those arbitral proceedings that have commenced, in accordance with Section 21 of the Act, on or after the effective date, and also to court proceedings which have commenced on or after the effective date."*

18. It is clear from the aforesaid principals and judicial pronouncements that Section 34 of Act, as it existed prior to the Amendment Act, 2015, will apply in the instant case and the award in the instant case will have to stand the test of principles governing the setting aside of arbitral awards as they existed in 2006.

19. Section 34 of the Act as it stood before the Amendment Act, 2015 came into force is reproduced below:

> ***"1. 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 subsection (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. -****Without prejudice to the generality of sub-clause (ii), it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81.*
>
> ***(3)*** *An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal:*
>
> *Provided that if the court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.*
>
> *(4) On receipt of an application under sub-section (1), the court may, where it is appropriate and it is so requested by a party, 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 arbitral tribunal will eliminate the grounds for setting aside the arbitral award."*

20. Section 34 of the Act, as it stood in its original form, provided that an award could be set aside, among other things, on the ground that it is against the public policy of India.

21. Public policy, encompasses a broad spectrum of principles, including principles of justice, equity, and morality. In the context of arbitration, the invocation of public policy aims to safeguard against arbitral awards that contravene these core principles, thereby preserving the integrity of the legal system. However, it is important to recognize the inherent complexity and subjectivity associated with the application of public policy in arbitration proceedings. The determination of what constitutes public policy is

inherently contextual and may vary depending on the specific circumstances of each case. Consequently, courts must exercise caution and discretion in applying this ground for setting aside arbitral awards, balancing the need to uphold public policy with the principles of party autonomy and finality of arbitration.

22. Public policy as a ground for challenging arbitral awards poses significant challenges due to its inherent complexity and subjectivity. Unlike other grounds for setting aside arbitral awards, public policy is a nebulous and multifaceted concept that defies precise definition. One of the primary difficulties in applying the ground of public policy is the lack of clear and objective criteria for its assessment. Unlike legal principles that are codified in statutes or judicial precedents, public policy is often amorphous and open to interpretation. What may be considered contrary to public policy in one jurisdiction or at one point in time may be deemed acceptable in another. Furthermore, the subjective nature of public policy leaves ample room for judicial discretion, which can result in divergent interpretations and outcomes.

23. Moreover, the broad and elastic nature of public policy allows courts considerable latitude in exercising judicial review over arbitral awards. While this flexibility can be beneficial in addressing egregious cases where awards contravene fundamental principles of justice or morality, it also opens the door to judicial intervention based on vague or ill-defined notions of public policy. Another challenge associated with the ground of public policy is its potential for abuse or misuse by parties seeking to challenge unfavorable awards. Parties may attempt to invoke the ground of public policy as a pretext for re-litigating the merits of their case or for circumventing the binding nature of arbitration.

24. Despite these challenges, the ground of public policy plays a crucial role in safeguarding the integrity and legitimacy of the arbitration process. It serves as a bulwark against arbitral awards that shock the conscience of the

courts or undermine fundamental principles of justice. However, to mitigate the risks associated with its application, courts must adopt a cautious and a principled approach to determining whether an arbitral award conflicts with public policy.

25. Before the Amendment Act, 2015 came into force, the Supreme Court had propounded on the scope of public policy under Section 34 of the Act in its judgment in **Oil & Natural Gas Corporation Ltd. v. Saw Pipes Ltd.** reported in **(2003) 5 SCC 705**. The Supreme Court espoused that the phrase "public policy of India" must be accorded a wider and not a narrower meaning. Furthermore, the Supreme Court also outlined the grounds on which a court can set aside an arbitral award under Section 34 of the Act. Relevant paragraphs have been extracted below:

> *"28. From this discussion it would be clear that the phrase "public policy of India" is not required to be given a narrower meaning. As stated earlier, the said term is susceptible of narrower or wider meaning depending upon the object and purpose of the legislation. Hence, the award which is passed in contravention of Sections 24, 28 or 31 could be set aside. In addition to Section 34, Section 13(5) of the Act also provides that constitution of the Arbitral Tribunal could also be challenged by a party. Similarly, Section 16 provides that a party aggrieved by the decision of the Arbitral Tribunal with regard to its jurisdiction could challenge such arbitral award under Section 34. In any case, it is for Parliament to provide for limited or wider jurisdiction to the court in case where award is challenged. But in such cases, there is no reason to give narrower meaning to the term "public policy of India" as contended by learned Senior Counsel Mr Dave. In our view, wider meaning is required to be given so as to prevent frustration of legislation and justice. This Court in Rattan Chand Hira Chand v. Askar Nawaz Jung [(1991) 3 SCC 67] observed thus: (SCC pp. 76-77, para 17)*
>
> > *"17. ... It cannot be disputed that a contract which has a tendency to injure public interests or public welfare is one against public policy. What constitutes an injury to public interests or welfare would depend upon the times and climes. ... The legislature often fails to keep pace with the changing needs and values nor is it realistic to expect that it will have provided for all contingencies and eventualities. It is, therefore, not only necessary but obligatory on the courts to*

step in to fill the lacuna. When courts perform this function undoubtedly they legislate judicially. But that is a kind of legislation which stands implicitly delegated to them to further the object of the legislation and to promote the goals of the society. Or to put it negatively, to prevent the frustration of the legislation or perversion of the goals and values of the society."

(emphasis supplied)

29. Learned Senior Counsel Mr Dave submitted that the purpose of giving limited jurisdiction to the court is obvious and is to see that the disputes are resolved at the earliest by giving finality to the award passed by the forum chosen by the parties. As against this, learned Senior Counsel Mr Desai submitted that in the present system even the arbitral proceedings are delayed on one or the other ground including the ground that the arbitrator is not free and the matters are not disposed of for months together. He submitted that the legislature has not provided any time-limit for passing of the award and this indicates that the contention raised by the learned counsel for the respondent has no bearing in interpreting Section 34.

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31. Therefore, in our view, the phrase "public policy of India" used in Section 34 in context is required to be given a wider meaning. It can be stated that the concept of public policy connotes some matter which concerns public good and the public interest. What is for public good or in public interest or what would be injurious or harmful to the public good or public interest has varied from time to time. However, the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice. Hence, in our view in addition to narrower meaning given to the term "public policy" in Renusagar case [1994 Supp (1) SCC 644] it is required to be held that the award could be set aside if it is patently illegal. The result would be — award could be set aside if it is contrary to:

(a) fundamental policy of Indian law; or

(b) the interest of India; or

(c) justice or morality, or

(d) in addition, if it is patently illegal.

> ***Illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy.*** *Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court. Such award is opposed to public policy and is required to be adjudged void."*
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> **(Emphasis Added)**

26. The Supreme Court in **ONGC v. Saw Pipes (supra)** also held that contravention of provisions of the Act including Section 28(3) of the Act which before the Amendment Act, 2015 provided that the arbitrator at all times shall decide in accordance with the terms of the contract, would make an award liable to be set aside on the ground of public policy. Relevant paragraphs have been extracted:

> *"22. The aforesaid submission of the learned Senior Counsel requires to be accepted. From the judgments discussed above, it can be held that the term "public policy of India" is required to be interpreted in the context of the jurisdiction of the court where the validity of award is challenged before it becomes final and executable. The concept of enforcement of the award after it becomes final is different and the jurisdiction of the court at that stage could be limited. Similar is the position with regard to the execution of a decree. It is settled law as well as it is provided under the Code of Civil Procedure that once the decree has attained finality, in an execution proceeding, it may be challenged only on limited grounds such as the decree being without jurisdiction or a nullity. But in a case where the judgment and decree is challenged before the appellate court or the court exercising revisional jurisdiction, the jurisdiction of such court would be wider. Therefore, in a case where the validity of award is challenged, there is no necessity of giving a narrower meaning to the term "public policy of India". On the contrary, wider meaning is required to be given so that the "patently illegal award" passed by the Arbitral Tribunal could be set aside. If narrow meaning as contended by the learned Senior Counsel Mr Dave is given, some of the provisions of the Arbitration Act would become nugatory. Take for illustration a case wherein there is a specific provision in the contract that for delayed payment of the amount due and payable, no interest would be payable, still however, if the arbitrator has passed an award granting interest, it would be against the terms of the contract and thereby against the provision of Section 28(3) of the Act which*

> *specifically provides that "Arbitral Tribunal shall decide in accordance with the terms of the contract". Further, where there is a specific usage of the trade that if the payment is made beyond a period of one month, then the party would be required to pay the said amount with interest at the rate of 15 per cent. Despite the evidence being produced on record for such usage, if the arbitrator refuses to grant such interest on the ground of equity, such award would also be in violation of sub-sections (2) and (3) of Section 28.* ***Section 28(2) specifically provides that the arbitrator shall decide ex aequo et bono (according to what is just and good) only if the parties have expressly authorised him to do so.*** *Similarly, if the award is patently against the statutory provisions of substantive law which is in force in India or is passed without giving an opportunity of hearing to the parties as provided under Section 24 or without giving any reason in a case where parties have not agreed that no reasons are to be recorded, it would be against the statutory provisions. In all such cases, the award is required to be set aside on the ground of "patent illegality"*
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> **(Emphasis Added)**

27. In **Associate Builders v. DDA** reported in **(2015) 3 SCC 49**, the Supreme Court propounded on the meaning of patent illegality and regarded it as the fourth head of public policy. The Supreme Court also held that any contravention of the provisions of the Act itself would amount to patent illegality. Relevant paragraphs are extracted below:

> *"Patent Illegality*
>
> *40. We now come to the fourth head of public policy, namely, patent illegality. It must be remembered that under the Explanation to Section 34(2)(b), an award is said to be in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption. This ground is perhaps the earliest ground on which courts in England set aside awards under English law. Added to this ground (in 1802) is the ground that an arbitral award would be set aside if there were an error of law by the arbitrator. This is explained by Denning, L.J. in R. v. Northumberland Compensation Appeal Tribunal, ex p Shaw [(1952) 1 All ER 122 : (1952) 1 KB 338 (CA)] : (All ER p. 130 D-E : KB p. 351)*
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> > *"Leaving now the statutory tribunals, I turn to the awards of the arbitrators. The Court of King's Bench never interfered by certiorari with the award of an arbitrator, because it was*

a private tribunal and not subject to the prerogative writs. If the award was not made a rule of court, the only course available to an aggrieved party was to resist an action on the award or to file a bill in equity. If the award was made a rule of court, a motion could be made to the court to set it aside for misconduct of the arbitrator on the ground that it was procured by corruption or other undue means (see Statutes 9 and 10 Will. III, C. 15). At one time an award could not be upset on the ground of error of law by the arbitrator because that could not be said to be misconduct or undue means, but ultimately it was held in Kent v. Elstob [(1802) 3 East 18 : 102 ER 502] , that an award could be set aside for error of law on the face of it. This was regretted by Williams, J., in Hodgkinson v. Fernie [(1857) 3 CB (NS) 189 : 140 ER 712] , but is now well established."

41. This, in turn, led to the famous principle laid down in Champsey Bhara Co. v. Jivraj Balloo Spg. and Wvg. Co. Ltd. [AIR 1923 PC 66 : (1922-23) 50 IA 324 : 1923 AC 480 : 1923 All ER Rep 235 (PC)] , where the Privy Council referred to Hodgkinson [(1857) 3 CB (NS) 189 : 140 ER 712] and then laid down:

"The law on the subject has never been more clearly stated than by Williams, J. in Hodgkinson v. Fernie [(1857) 3 CB (NS) 189 : 140 ER 712] : [CB(NS) p. 202 : ER p. 717]

'The law has for many years been settled, and remains so at this day, that, where a cause or matters in difference are referred to an arbitrator, whether a lawyer or a layman, he is constituted the sole and final Judge of all questions both of law and of fact. ... The only exceptions to that rule are cases where the award is the result of corruption or fraud, and one other, which, though it is to be regretted, is now, I think firmly established viz. where the question of law necessarily arises on the face of the award or upon some paper accompanying and forming part of the award. Though the propriety of this latter may very well be doubted, I think it may be considered as established.'

***

Now the regret expressed by Williams, J. in Hodgkinson v. Fernie [(1857) 3 CB (NS) 189 : 140 ER 712] has been repeated by more than one learned Judge, and it is certainly not to be desired that the

exception should be in any way extended. An error in law on the face of the award means, in Their Lordships' view, that you can find in the award or a document actually incorporated thereto, as for instance, a note appended by the arbitrator stating the reasons for his judgment, some legal proposition which is the basis of the award and which you can then say is erroneous. It does not mean that if in a narrative a reference is made to a contention of one party that opens the door to seeing first what that contention is, and then going to the contract on which the parties' rights depend to see if that contention is sound. Here it is impossible to say, from what is shown on the face of the award, what mistake the arbitrators made. The only way that the learned Judges have arrived at finding what the mistake was is by saying: 'Inasmuch as the arbitrators awarded so and so, and inasmuch as the letter shows that the buyer rejected the cotton, the arbitrators can only have arrived at that result by totally misinterpreting Rule 52.' But they were entitled to give their own interpretation to Rule 52 or any other article, and the award will stand unless, on the face of it they have tied themselves down to some special legal proposition which then, when examined, appears to be unsound. Upon this point, therefore, Their Lordships think that the judgment of Pratt, J. was right and the conclusion of the learned Judges of the Court of Appeal [Jivraj Baloo Spg. and Wvg. Co. Ltd. v. Champsey Bhara and Co., ILR (1920) 44 Bom 780. The judgment of Pratt, J. may be referred to at ILR p. 787.] erroneous."

This judgment has been consistently followed in India to test awards under Section 30 of the Arbitration Act, 1940.

42. In the 1996 Act, this principle is substituted by the "patent illegality" principle which, in turn, contains three subheads:

42.1. (a) A contravention of the substantive law of India would result in the death knell of an arbitral award. This must be understood in the sense that such illegality must go to the root of the matter and cannot be of a trivial nature. This again is really a contravention of Section 28(1)(a) of the Act, which reads as under:

> *"28.Rules applicable to substance of dispute.—(1) Where the place of arbitration is situated in India—*
>
> *(a) in an arbitration other than an international commercial arbitration, the Arbitral Tribunal shall decide the dispute submitted to arbitration in accordance with the substantive law for the time being in force in India;"*
>
> *42.2. (b) A contravention of the Arbitration Act itself would be regarded as a patent illegality — for example if an arbitrator gives no reasons for an award in contravention of Section 31(3) of the Act, such award will be liable to be set aside.*
>
> *42.3. (c) Equally, the third subhead of patent illegality is really a contravention of Section 28(3) of the Arbitration Act, which reads as under:*
>
> > *"28.Rules applicable to substance of dispute.—(1)-(2)****
> >
> > *(3) In all cases, the Arbitral Tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction."*
>
> *This last contravention must be understood with a caveat. An Arbitral Tribunal must decide in accordance with the terms of the contract, but if an arbitrator construes a term of the contract in a reasonable manner, it will not mean that the award can be set aside on this ground. Construction of the terms of a contract is primarily for an arbitrator to decide unless the arbitrator construes the contract in such a way that it could be said to be something that no fair-minded or reasonable person could do."*

28. The phrasing of Section 28(3) of the Act underwent a significant change when the Amendment Act, 2015 came into force wherein instead of Section 28(3) of the Act mandating the arbitrator to decide in accordance with the terms of the contract, it provided that the Arbitrator shall "take into account" the terms of the contract, thereby allowing some flexibility.

29. In any case, as discussed above, the law as it existed prior to the Amendment Act, 2015 will apply to the instant case. However, the legislative intent behind Section 28(3) of the Act remains the same.

Arbitrator is a creature of contract and must operate within its confines at all times. At the heart of arbitration lies the principle of party autonomy, wherein the parties have the freedom to shape the arbitration process according to their needs and preferences. Central to this principle is the notion that the arbitral tribunal must operate within the confines of the agreement entered into by the parties. Venturing beyond the terms of the contract not only undermines the autonomy of the parties but also risks eroding the legitimacy and enforceability of the arbitral award. Therefore, it is imperative that the arbitral tribunal always decides in accordance with the terms of the contract between the parties and refrains from exceeding its jurisdiction. After all, arbitral proceedings are not cricket matches, where hitting beyond the boundary is usually rewarded.

30. The sanctity of the parties' agreement lies at the core of arbitration. When parties choose arbitration to resolve their disputes, they do so with the understanding that the arbitral tribunal will adjudicate based on the terms that they have mutually agreed upon. These terms delineate the scope of the arbitral tribunal's authority, the rules governing the proceedings, and the substantive rights and obligations of the parties. Departing from these contractual parameters not only disregards the parties' intention but also risks imposing outcomes that are contrary to their expectations. Moreover, upholding the terms of the contract promotes predictability and certainty in arbitral proceedings. Parties rely on the clarity and specificity of their contractual arrangements to guide their behaviour and expectations. By adhering to the contract, the arbitral tribunal provides parties with a sense of assurance that their rights and obligations will be respected and enforced as agreed upon. Beyond considerations of efficiency and predictability, adhering to the terms of the contract is essential for maintaining the legitimacy and enforceability of arbitral awards. Arbitral awards derive their authority and validity from the consent of the parties as expressed in their agreement to arbitrate. When the arbitral tribunal exceeds its jurisdiction by

deciding matters beyond the scope of the contract, it renders an award that is vulnerable to challenge and is non-enforceable.

31. Despite the importance of adhering to the contract, arbitrators may encounter situations where the terms of the contract are ambiguous or silent on a particular issue. In such cases, arbitral tribunal is tasked with interpreting the contract in accordance with the principles of contractual interpretation. This involves examining the language of the contract, the intentions of the parties, the surrounding circumstances, and any applicable trade usages or practices. The goal is to give effect to the parties' intentions and to resolve any ambiguities or gaps in the contract in a manner consistent with their reasonable expectations.

32. The instant case before me is not one where there are any ambiguous contractual terms leaving room for arbitral tribunal to exercise its discretion. It was explicitly clear from the contractual terms between the parties that the efficient performance of the transformer was guaranteed by the Respondent. Clause 39 of the contract between the parties is extracted below:

> *"The entire installations (after satisfactory completion of all test specified in the contract documents and taking over) shall be deemed to be guaranteed by the contractor for efficient performance for 12 months from the certified date of completion of work. In case of any fault arising during this period the contractor will do all the rectifications/replace the defective parts as the case may be at its own expense. The defect liability period referred to in condition 33 of IAFW -2249 (General Condition of Contract) for purpose of this contract shall be deemed to be the period covered by the guarantee given by the contractor."*

33. Hence, the claim of the Respondent amounting to Rs.6,22,268/- on account of costs incurred towards repairing of the transformer (which malfunctioned in June, 1998) during the subsistence of the guarantee period as extended by the undertaking given by the Respondent dated October 1, 1997 stood on a foundationless ground as it was beyond the terms of the contract entered between the parties. As such there was no cogent rationale behind the Arbitrator's decision to award the said claim in favour of the

Respondent. The Arbitrator's decision is fundamentally flawed and cannot be sustained. The award of the aforesaid claim is unreasonable as it overlooks the unequivocal guarantee provided by the Respondent.

34. The arbitrator's decision appears to have disregarded the clear and unambiguous language of the contract, which unequivocally places the responsibility for rectifying any faults or defects during the guarantee period squarely on the shoulders of the Respondent. By awarding the claim in favour of the Respondent, the Arbitrator has effectively relieved the Respondent of its contractual obligations and imposed an unwarranted financial burden on the Applicant, contrary to and *de hors* the terms of the contract. Awarding this claim is definitely within the four corners of 'patent illegality' as espoused in the **ONGC v Saw Pipes (supra)** by the Supreme Court. This deviation from contractual framework not only contradicts the explicit terms of the contract but also undermines the principle of *pacta sunt servanda*, which means that parties must honor their obligations under the contract.

35. Arbitrator's decision also shocks the conscious of the court due to its unjust and inequitable nature. By awarding the claim of Rs. 6,22,268/- in favour of the Respondent, the Arbitrator has also set a dangerous precedent that undermines the sanctity of contracts and erodes trust in the arbitration process. If arbitrators are allowed to disregard contractual terms and impose arbitrary and unjustified outcomes, parties will lose confidence in the efficacy of arbitration as a means of dispute resolution. This erosion of trust not only undermines the effectiveness of arbitration but also undermines the rule of law and the integrity of the legal system. As such, it cannot be sustained and warrants careful reconsideration to ensure that justice is served.

36. The District Judge, Agra ought to have corrected this jurisdictional and fundamental error in proceedings under Section 34 of the Act. The District Judge in failing to set aside the arbitral award, compounded the error inherent in the Arbitrator's decision and overlooked the fundamental

principles governing the review of an arbitral award under Section 34 of the Act.

37. While Section 34 of the Act indeed imposes limitation on the court's interference with arbitral awards, it does not absolve the court of its duty to correct errors that are fundamental in nature, such as jurisdictional errors or decisions that shock the conscience of the court. Moreover, while interference on factual grounds is generally prohibited under Section 34 of the Act, courts are empowered to intervene when the Arbitrator's findings are completely contrary to the materials on record.

38. The District Judge's failure to correct the jurisdictional and fundamental errors in the Arbitrator's decision represents a dereliction of duty. Section 34 of the Act empowers the court to set aside an arbitral award if it is found to be in conflict with the public policy of India. The Arbitrator's decision clearly falls within this category since it exceeds the scope of contractual agreement between the parties. If courts are unwilling to correct manifestly unjust decisions made by arbitrators, parties will lose confidence in the efficacy of arbitration as a means of dispute resolution.

39. Supreme Court in **ONGC v Saw Pipes (supra)**, underscored the importance of upholding the sanctity of contracts and ensuring that arbitrators abide my terms thereof. Section 28(3) of the Act, as it stood before the Amendment Act, 2015 mandated that arbitrators should decide in accordance with the terms of the contract. Any deviation from these terms, such as awarding claims beyond the contractual scope, constitutes a violation of Section 28(3) of the Act. The District Judge under Section 34 of the Act, ought to have examined the Arbitrator's award of the claim of Rs. 6,22,268/- in light of the aforesaid principle as propounded in **Saw Pipes (supra)**. The District Judge's failure to correct the Arbitrator's decision also represents a serious miscarriage of justice and therefore, the District Judge's decision must be revisited and corrected.

SEVERABILITY OF ARBITRAL AWARDS

40. Since only a portion of the arbitral award with respect to the award of Rs. 6,22,268/- in favour of the Respondent on account of costs incurred towards repairing the defects in the transformer is being interfered with and set aside by this Court, while the rest of the award is being upheld, I feel it is pertinent to discuss the principle of severability of arbitral awards.

41. Principle of severability holds immense significance since it provides a mechanism for courts to partially set aside an award when certain issues within it are found to be flawed or invalid. Severing and setting aside only those issues suffering from infirmity allows the rest of the award to stand, thereby preserving the valid and enforceable aspects. This approach aligns with the objectives of arbitration, which prioritizes efficiency and finality.

42. From a commercial standpoint, severability makes eminent sense. In the complex world of business transactions, disputes are often multifaceted and involve numerous issues. It is not uncommon for an arbitral award to address multiple claims or issues raised by the parties. In such cases, severability provides a practical solution for resolving disputes without causing undue disruption to ongoing business relationships or transactions. Rather than invalidating the entire award due to the flaws in certain aspects, severability allows courts to salvage the valid portions of the award, thereby minimizing the potential for further disputes or litigation.

43. It is however important to note that severability does not amount to modification, which is prohibited. Severability involves setting aside only those portions of an award that are found to be flawed or invalid, without altering the substance of the decision as a whole. This approach allows courts to address specific issues within an award while respecting the finality and integrity of the arbitration process.

44. In **R.S. Jiwani v. Ircon International Ltd.** reported in **2009 SCC OnLine Bom 2021**, a full bench of the Bombay High Court exhaustively

examined the scope of the law on severability of arbitral awards. Relevant portions have been extracted below:

> *"17. The argument raised before us is that sub-clauses (i) to (iii) and (v) of clause (a) of sub-section (2) of section 34 are the grounds where it is mandatory for the Court to set aside the whole award and there is no other choice before the Court. It is only in the class of cases falling under section 34(2)(a)(iv) that with the aid of the proviso to that subsection, the Court can apply principle of severability. In that case, if the matter submitted to the arbitration can be separated from the one not submitted then the Court may set aside that part of the award alone which is not submitted to arbitration. This argument is founded on the Division Bench judgment of this Court in the case of Mrs. Pushpa P. Mulchandani v. Admiral Radhakrishin Tahiliani, 2008(7) LJ Soft, 161, and which was relied upon by the respondents for inviting the decision against the Appellant. Thus, we have to examine the provision of section 34 of the 1996 Act to find whether it permit of any other interpretation than the one put forward by the respondents. Sub-clauses (i), (ii), (iii) and (v) of clause (a) of sub-section (2) of section 34 deal with certain situations which may require the Court to set aside an award of the arbitral tribunal. These may be the cases where the party was under incapacity, the agreement is not valid under the law in force, where proper notice was not given to the party or otherwise enable to present his case, and the composition of arbitral tribunal or procedure was not in accordance with the agreement between the parties and lastly the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force. Explanation to section 34(2) which is in the nature of a declaration further explains that when an award is in conflict with the public policy of India when the award was induced or affected by (i) fraud or (ii) by corruption; or (iii) was in violation of section 75 or 81 of the Act. It is difficult for this Court to hold that under all these categories it would be inevitable for the Court to set aside the entire award. It may not be very true that even under these categories, it would be absolutely essential for the Court to set aside an award. It is true that where a party was under incapacity or was not served with the notice at all and the arbitration agreement itself was not valid that an award may have to be set aside in its entirety. But even within these clauses, there is possibility of a situation where it may not be necessary for the Court to set aside the entire award. Let us take an example that where a party is given a notice has participated in the proceedings before the arbitral tribunal but was unable to lead evidence or present himself or submit his counter*

claim. Would it be fair for the Court to set aside an award of the arbitral tribunal in its entirety in this situation? A party who participated in the arbitral proceeding even led evidence and cross-examined the witnesses of the claimants in relation to the claims but for any reason was not able to place his evidence on record in relation to the counter claims or he was not granted sufficient opportunity to present his case or for some reason was unable to present his case before the arbitral tribunal, would it not be just, fair, equitable and in line with the object of the Act of 1996 to consider setting aside award only regarding counter claim.

Is such a party which has succeeded in the claims made by it, which are otherwise lawful and not hit by any of the stated circumstances, should be awarded his reliefs while either rejecting or even altering the award with regard to the counter claim filed by the aggrieved party before the Arbitrator. Situation may be different where arbitration agreement is not valid. In other words, where claim is unlawful the Supreme Court in the case of Karnail Singh v. State of Haryana, 1995 Supp (3) SCC 376 held that not valid would mean unlawful and equated it to void.

> *"8. 'Void' dictionarily means, ineffectual, nugatory; having no legal force or binding effect, unable in law to support the purpose for which it was intended; nugatory and ineffectual so that nothing can cure it; not valid. In Words and Phrases (American), Vol. 44, published by West Publishing Co., at page 319 it is stated thus:*
>
> *"A 'void' thing is nothing; it has no legal effect whatsoever; and no rights whatever can be obtained under it or grow out of it. In law it is the same thing as if the void thing had never existed."*

What was declared void was election. That is the process which led to choosing or selecting appellant as a member was invalid. The legal effect of declaration granted by the Tribunal was that the election of the appellant became nonexistent resulting automatically in nullifying the earlier declaration. The declaration did not operate from the date it was granted but it related back to the date when election was held. The legislative provision being clear and the Tribunal being vested only with power of declaring election to be void the entire controversy about voidable and void was unnecessary. The appellant could not therefore, claim any pension under section 7A of the 1975 Act."

* * *

20. The cases would be different where it is not possible or permissible to sever the award. In other words, where the bad part of the award was intermingled and interdependent upon the good parts of the award there it is practically not possible to sever the award as the illegality may affect the award as a whole. In such cases, it may not be possible to set aside the award partially. However, there appears to be no bar in law in applying the doctrine of severability to the awards which are severable. In the case of Messrs. Basant Lal Banarsi Lal v. Bansi Lal Dagdulal, AIR 1961 SC 823, though the Supreme Court was dealing with an application for setting aside an award passed by the Bombay City Civil Court, contending that forward contract in groundnuts were illegal as making of such contracts was prohibited by Oil Seeds (Forward Contract Prohibition) Order, 1943 and hence arbitration clause contained in the forward contracts in groundnuts between the parties was null and void, where it was found as a matter of fact that it was not possible to segregate the dispute under the various contracts as there was direct link between them. The Supreme Court held as under:

> *'It would follow that the arbitration clause contained in that contract was of no effect. It has therefore to be held that the award made under that arbitration clause is a nullity and has been rightly set aside. The award, it will have been noticed, was however in respect of disputes under several contracts one of which we have found to be void. But as the award was one and is not severable in respect of the different disputes covered by it, some of which may have been legally and validly referred, the whole award was rightly set aside.'*

* * *

24. Now a further question that falls for consideration of this Court is as to whether there is anything contained in 1996 Act which prohibits in law the Court from adopting the approach applicable under the 1940 Act or prohibits applicability of principle of severability to the awards under 1996 Act. We are unable to see any prohibition much less an absolute bar in the provisions of section 34 of 1996 Act to that effect. There could be instances falling under section 34(2)(a), sub-sections (iii) and (v) where the principle of severability can safely be applied. These provisions do not specifically or impliedly convey legislative intent which prohibits the Courts from applying this principle to the awards under the 1996 Act. Again for example, an Arbitral Tribunal might have adopted a procedure at a particular stage of proceeding which may be held to

be violative of principles of natural justice or impermissible in law or the procedure was not in accordance with the agreement between the parties but the parties waived such an objection and participate in the arbitration proceedings without protest, in that event it will be difficult for the Court to hold that the good part of the award cannot be segregated from the bad part.

* * *

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 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.

* * *

33. It must be understood that the scope of judicial intervention under section 34 is very limited and cannot be equated to the powers of a civil appellate Court. The award can be set aside on the grounds stated in these provisions and that is what is emphasized by the use of expression 'only'. The Supreme Court in the case of Mc Dermott International Inc. v. Burnt Standard Co. Ltd., (2006) 11 SCC 181 has discussed in some elaboration the cases where the Court can interfere with the awards and/or set aside the award. Mere appreciation of evidence or an error simpliciter in appreciation of fact or law may not essentially fall within the class of cases which may be covered within the ambit and scope of section 34 of the Act. We will shortly proceed to discuss this aspect of law but only insofar as it is relevant for answering the question posed before the larger Bench.

* * *

> *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 16 of 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."*

45. The principle on severability of arbitral awards was reiterated by the Supreme Court in **J.G. Engineers (P) Ltd. v. Union of India** reported in **(2011) 5 SCC 758:**

> *"25. 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, the court will segregate*

> *the award on items which did not suffer from any infirmity and uphold the award to that extent. As the award on Items 2, 4, 6, 7, 8 and 9 was 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."*

46. In **Damodar Valley Corporation v. Reliance Infrastructure Limited** reported in **2023 SCC OnLine Cal 3307,** I had dealt with the severability of arbitral awards. Relevant portions have been extracted below:

> *"57. It is a well-established principle that the Courts under Section 34 of the Act have the power to severe and partly set aside the award. A doctor treating a poisoned leg would prefer to cut the poisoned leg off to prevent the poison from spreading across the entire body. Afterall, you would not kill off the entire body just because the leg is poisoned. Similarly, in an arbitral award, there might be some issues suffering from infirmity, which would invite the Courts to exercise their powers under Section 34 of the Act. In such a case, it would be preferable to severe and set aside only those issues, rather than setting aside the arbitral award in its entirety. This also makes commercial sense.*
>
> ***
>
> *60. The principle which emerges is that while severing an arbitral award is a delicate procedure, insofar as, the severed/perverse part of the award is not in any way connected to the legally sound part of the award, the Courts under Section 34 are empowered to set aside only that portion of the award which suffers from some infirmity. In my opinion, such a practice should be encouraged also, as rather than setting aside the entire arbitral award, it will be more prudent to separate the good and the bad. It is better to take out the rotten apple, instead of throwing the entire basket out."*

47. In light of the aforesaid judicial pronouncements, it can be concluded that power of severing an arbitral award is a part and parcel of the court's power under Section 34 and Section 37 of the Act. However, severability can only be applied if the part of the award which is to be severed does not relate with the part of the award that is to be upheld in any manner whatsoever.

PRINCIPLES

48. The principles that emerge from the aforesaid discussion have been highlighted below:

a. Laws or rules will not have retrospective applicability unless and until there is a clear indication to the contrary. Especially in arbitration cases, retrospective application of laws may introduce uncertainty and unpredictability. One cannot hold someone liable for doing something, which although was not a forbidden act at the time it was committed but became a forbidden act later. Parties, especially in arbitration, cannot be expected to walk on eggshells and be subjected to unpredictability.

b. The Amendment Act, 2015 which introduced among other things, amended grounds for challenge to an arbitral award under Section 34 of the Act, will only apply to those arbitration proceedings, which commenced in accordance with Section 21 of the Act on or before the Amendment Act, 2015 came into force.

c. Public policy as a ground under Section 34 of the Act must be invoked with certain caution since the broad and subjective nature of public policy can lead to excessive judicial interference with arbitral awards.

d. An award can be interfered with on the ground of public policy when it is in contravention of substantive provisions of the Act itself. Any award passed against the statutory or constitutional principles goes against the public policy of India.

e. The contract between the parties outlines the boundaries within which an arbitral tribunal can act. Any act or decision of the

arbitral tribunal beyond clearly defined contractual provisions is patently illegal and unsustainable.

f. While the principle of minimal judicial interference must be kept in mind while dealing with challenges to an arbitral award, Courts are duty bound to ensure that arbitral tribunal has not acted in a manner contrary to the contractual provisions between the parties.

g. Under Section 34 and Section 37 of the Act, courts have the authority to partially set aside an arbitral award. If certain issues within the award are unsustainable and can be separated from the remaining issues, it is better to set aside only those specific parts of the award.

EPILOGUE

49. The case at hand, where the arbitral award was rendered in 2006 but the challenge is being finally dismissed in 2024, underscores a glaring issue in the arbitration landscape of India: the inordinate delays that plague the arbitration. While arbitration is often hailed as a faster and more efficient alternative to traditional litigation, the reality in India frequently falls short of this ideal due to systemic challenges. Arbitration was envisioned as a means to provide parties with a quicker and more cost-effective method of resolving disputes, bypassing the lengthy court procedures associated with litigation. However, the prolonged duration of this case highlights a significant discrepancy between the theory and practice of arbitration in India. One of the primary reasons for the delay in the resolution of arbitration cases in India is the extensive backlog of cases in the judicial system. Despite efforts to promote arbitration and streamline dispute resolution processes, the Indian judiciary continues to grapple with a staggering caseload, resulting in delays at various stages of the arbitration process, including challenges to arbitral awards. In the case under consideration, the fact that it took nearly two decades for the challenge to the

arbitral award to be finally dismissed raises concerns about the efficiency and effectiveness of the arbitration mechanism. Such delays not only undermine the perceived advantages of arbitration but also erode confidence in the efficacy of alternative dispute resolution mechanisms.

50. The challenges associated with delay in arbitration proceedings are multifaceted and require a comprehensive approach to address. One of the key areas that warrant attention is the need for reforms aimed to expediting the arbitration process and reducing the backlog of cases. This may involve measures such as the establishment of specialized arbitration divisions in courts, and the implementation of procedural reforms to streamline the arbitration process. In conclusion, the case under discussion serves as a stark reminder of the challenges and shortcomings inherent in the arbitration landscape of India. While arbitration holds immense potential as a faster and more efficient alternative to litigation, the prevalence of inordinate delays underscores the urgent need for reforms and corrective measures. By addressing the systemic issues contributing to delays in arbitration proceedings and promoting a culture of timely and effective dispute resolution, India can unlock the full potential of arbitration and ensure access to justice for all parties involved.

CONCLUSION AND DIRECTION

51. In light of the same, it is apparent that the award of Rs.6,22,268/- along with interest in favour of the Respondent on account of repairing of defects in transformer was in violation of Section 28(3) of the Act as it stood before the Amendment Act, 2015. Since the award of the claim was against the clear provisions of the contract, therefore, this Court in exercise of its power under Section 37 of the Act, sets aside the order dated January 12, 2012, passed by the District Judge, Agra, in Arbitration Case No. 406 of 2006, under Section 34 of the Act only to the extent that upholds the award of Rs.6,22,268/- along with interest to the Respondent on account of costs incurred towards repairing the defects in the transformer. Consequently, the

arbitral award dated July 31, 2006, is also set aside to that limited extent. I make it clear that the rest of the arbitral award stands as it is.

52. The instant arbitration appeal is disposed of on the aforesaid terms.

53. There shall be no order as to the costs.

Date: 05.04.2024
Kuldeep

(Shekhar B. Saraf, J.)