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

% **Reserved on : 9th January, 2023**
Pronounced on: 16th March, 2023

\+ O.M.P. (COMM) 24/2019

BAWANA INFRA DEVELOPMENT PVT. LTD..... Petitioner
Through: Mr.Rajshekhar Rao, Senior Advocate with Mr. Dheeraj P. Deo, Mr.Yasuraj Samant and Mr. A. Peter, Advocates

versus

DELHI STATE INDUSTRIAL & INFRASTRUCTURE DEVELOPMENT CORPORATION LIMITED ("DSIIDC")
..... Respondent
Through: Ms.Anusuya Salwan and Ms.Nikita Salwan, Advocates

CORAM:
HON'BLE MR. JUSTICE CHANDRA DHARI SINGH

J U D G M E N T

CHANDRA DHARI SINGH, J.

1. The instant petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act") has been filed on behalf of the petitioner seeking the following reliefs:

> *"In view of the facts, grounds and circumstances stated above, this Hon'ble Court may graciously be pleased to:*
> *(i) allow the present application and set aside the Impugned Award dated 12.09.2018 passed by the Ld. Sole Arbitrator, received by the Applicant on 19.09.2018 and;*

(ii) pass such other further order or orders as this Hon'ble Court may deem fit and proper in the aforesaid facts and circumstances."

FACTUAL MATRIX

2. The petition has been filed against the impugned Award dated 12th September 2018 passed by Justice R.C. Jain(Retd.), the learned Sole Arbitrator. The Arbitration proceedings in the current matter arose out of Concessionaire Agreement with respect to the re-development, operation, and maintenance of the 'Bawana Industrial Area' (hereinafter referred to as the "Project Area") situated in Delhi.

3. The facts necessary for the disposal of this instant petition are that the petitioner M/s Bawana Infra Development Private Limited, was a special purpose vehicle established after the respondent circulated a tender inviting bid from interested parties on a Public Private Partnership Modality, and Abhudaya Housing and Constructions Pvt. Ltd. and Jyoti Buildtech Pvt. Limited (hereinafter collectively referred to as the "Selected Bidder") were awarded the contract.

4. The respondent is Delhi State Industrial and Infrastructure Development Corporation Ltd. (hereinafter referred to as "DSIIDC"), a Government Company incorporated under the Companies Act.

5. The respondent invited bids *vide* advertisement dated 10th March 2011 for redeveloping, operating and maintaining the infrastructure and utilities of the industrial area of Bawana Industrial Area, Delhi on Public Private Partnership basis. The consortium of the selected bidder submitted its bid on 29th April 2011 and was finally awarded the above-mentioned work *vide* letter of award dated 20th June 2011.

6. The parties, thereafter, proceeded to execute a Concession Agreement dated 20th July 2011 (hereinafter referred to as "the Agreement") whereby it was agreed between the parties that the entire amount towards the re-development of the project was to be invested by the petitioner and an amount of Rs. 7.48 crores would be paid as an annuity to the petitioner every year for a period of 13 years. The total concession period was 15 years out of which 2 years was the construction/ re-development period. The petitioner was also required to operate and maintain the entire industrial area for a period of 13 years and was entitled to recover maintenance charges from the plot owners w.e.f. the Annuity Commencement Date as provided under Clause 9.10 read with Clause 11.4 of the Agreement.

7. According to the Agreement, the petitioner (Concessionaire) was required to re-develop, construct, operate and maintain the Project Area for fifteen years. The first two years of this period were earmarked for the construction of Mandatory Capital Projects, whereas the remaining thirteen years were reserved for maintaining and operating the Project Area. 15th December 2013 was the date set for the completion of the Material Project Facilities.

8. On 14th December 2013, there was a request by the petitioner for the completion certificate. However, instead of the petitioner, the third party issued a “provisional certificate” to the respondent. The respondent further did not issue it to the petitioner claiming the incomplete work of the petitioner. It is alleged by the respondent that the petitioner tried to obtain the completion certificate from the third party without completing the consignment.

9. On the contrary, the petitioner vehemently denies the allegations of the respondent, and claims that the work was complete, and they have received the "Provisional certificate" legitimately from the third-party engineer.

10. The dispute reached the Court requesting the appointment of an Arbitrator. This Court appointed Justice R.C. Jain (Retd.) as the learned Sole Arbitrator to adjudicate upon the matter *vide* order dated 24th August 2016 passed in Arbitration Petition No. 420/2016 titled "Bawana Infra Development Pvt. Ltd. V/s DSIIDC".

11. The Arbitral Tribunal was pleased to make and publish the impugned award on 12th September 2018. A signed copy of the impugned award was made available to the petitioner *via* speed post and the petitioner, aggrieved by the said impugned award, filed the instant petition.

SUBMISSIONS

(On behalf of the petitioner)

12. Learned counsel on behalf of the petitioner submitted that while awarding Claim no.2, the learned Sole Arbitrator committed a grave error while ignoring the terms of the Agreement, specifically Clause 11.4 of the Agreement, which in no manner provides that the petitioner was entitled to collect the maintenance charges from the annuity commencement date and respondent was liable to deposit the said amount in the Escrow Account. The annuity commencement date was determined by the learned Sole Arbitrator as 15th December 2013 and hence in terms of Clause 11.4, the petitioner was entitled to payment of maintenance and other charges from all the plot owners w.e.f. 15th December 2013 itself as

per the rates notified by the respondent *vide* notification dated 25th January 2012. Since the project was awarded by the respondent, therefore, it was their mandatory obligation to ensure that all the plot owners paid the maintenance charges without fail or that otherwise, respondent compensate the petitioner in case of any default.

13. It is submitted that the learned Sole Arbitrator did not only ignore the contractual obligations of the respondent but also the respondent's letter dated 7th December 2011, whereby the respondent had once again assured the petitioner that "in case of non-payment of maintenance charges by the Industrial Plot Owners, DSIIDC owe the responsibility." The said letter could not have been withdrawn on a later date by the respondent and the respondent was barred by the principle of "promissory estoppel".

14. It is further submitted that the respondent promised to take responsibility of payment of maintenance charges *vide* letter dated 7th December 2011, in addition to the promise already expressed in the Concession Agreement. The learned Sole Arbitrator in complete ignorance of the above-mentioned position and without appreciating the acute financial stress being faced by the petitioner left the issue/ dispute open ended, which not only resulted into making the entire Arbitral proceedings a sheer waste of time but also allowed the respondent to take advantage of its own wrong and further delay the contractual entitlements of applicant/petitioner.

15. It is submitted that the learned Sole Arbitrator committed grave error of law by ignoring that the Agreement was a commercial contract between the parties and parties were governed by the terms contained

therein. The petitioner in turn spent a huge amount of approximately Rs. 70 Crores on redevelopment of Bawana Industrial Area and is spending a huge amount towards operating and maintaining the area. Therefore, the petitioner was entitled to payment of maintenance and other charges as per the terms and conditions of Concession Agreement without any undue delay so as to maintain the area properly. It was never the understanding between the parties that payment of maintenance charges to petitioner was dependent upon recovery of the same by the respondent. Therefore, there was no question of petitioner getting paid only if the recovery of the maintenance charges has been made against the plot owners. The respondent has been negligent and in breach of its obligations since the beginning of the contract period, without being concerned about the difficulties being faced by the petitioner. The respondent even after lapse of more than 7 years, failed to issue the notification empowering the petitioner to initiate action against the defaulters and instead issued a letter dated 7th December 2011 promising to compensate the petitioner in case of any such default. Respondent's failure, forced the petitioner to initiate the arbitration proceedings, and by granting further opportunity to the respondent to initiate recovery proceedings against defaulting units, the very purpose of initiating arbitral proceedings was defeated.

16. It is submitted that the respondent had the necessary power and the authority under the Concession Agreement as well as under the Delhi Industrial Development, Operational and Maintenance Act, 2010, to initiate action against the defaulters, however, respondent chose not to act in terms thereof. If the respondent in its own wisdom did not act all

throughout the contract period, the petitioner cannot be left to suffer for such inactions of the respondent.

17. It is the case of petitioner that the learned Sole Arbitrator committed grave error of law while holding that the learned Arbitral Tribunal could not fix the liability of the respondent to reimburse the petitioner with the unrecovered outstanding dues. Such finding is not only contrary to law but also respondent's own undertaking dated 7th December 2011. Respondent's *mala fide* intentions were clearly evident from the fact that they sought to withdraw the aforesaid letter after a lapse of more than 3 years from the date of issuance of the same. It is a well settled law that an Arbitrator cannot ignore the available evidence and is bound by the contract between the parties. It is not open for an Arbitrator to add or amend the contract between the parties in any manner. Therefore, by no authority, the learned Sole Arbitrator could have discarded the said letter dated 7th December 2011.

18. It is submitted that the learned Sole Arbitrator committed grave error of law while rejecting the claim despite concluding that admittedly road restoration work was not part of scope of work awarded to the applicant. The said position was even agreed by the respondent. The learned Sole Arbitrator ignored the evidence available on record and also failed to appreciate that the petitioner placed on record all relevant documents demonstrating the willingness of the respondent to compensate for the road restoration work.

19. The petitioner had placed on record voluminous documents demonstrating the quantum of the work done and the cost incurred towards the abovementioned work, however, despite the said documents

being on record, the learned Sole Arbitrator felt persuaded to arrive at a conclusion that sufficient evidence was not placed on record in support of this claim. Admittedly, the respondent charged a huge sum from all the agencies who were involved in the digging/ damaging the road. Presuming though not admitting that no other evidence except the evidence mentioned above was placed on record, then also, the respondent was liable to pay the petitioner the amount charged by them from various agencies towards road restoration work. No further evidence was required to be placed on record in view of clear admission of the respondent of receiving a huge sum towards the road restoration work. It is further submitted that the learned Sole Arbitrator failed to appreciate that the petitioner incurred a huge cost from its own pocket towards restoring the road in its original form every time after the damage was caused by various agencies and was entitled to the said cost. The petitioner conceded during the Arbitral proceedings to restrict its claim to the amount received by the respondent in this regard and therefore rejection of this claim by the learned Sole Arbitrator is legally not tenable.

20. Learned counsel for the petitioner submitted that the learned Sole Arbitrator committed grave error of law while disposing of this claim by leaving the dispute open ended. The learned Sole Arbitrator failed to appreciate that the rights of the parties were flowing from the Agreement, whereby both the parties agreed to perform their reciprocal promises. It is submitted that Clause 11.4(a)(ii), provides it in no uncertain terms that the petitioner is entitled to payment of Combined Effluent Treatment Plants (hereinafter referred to as "CETP"), Sewerage and water charges

from the appointed date i.e. 15th December 2011. As per Clause 8.1 (v), read with Schedule 10 of the Agreement, respondent was obliged to fix CETP, Water & Sewerage Charges, however, failed to do so even after lapse of more than 7 years. However, the learned Sole Arbitrator decided the present claim applying the same logic as that of Claim No.2 and therefore the impugned award so passed is untenable in law.

21. It is submitted on behalf of the petitioner that the learned Sole Arbitrator committed grave error of law by deferring the decision in respect of this claim. It is no more *res integra* that an Arbitrator is a creature of the contract and is bound by the terms of the contract. An Arbitral Tribunal is mandatorily required to decide the disputes between the parties so as to give a finality to the dispute as per the respective Contractual obligations of the parties. It is beyond his authority to leave a dispute undecided or defer the decision on the happening of an eventuality. In the present case, all the plot owners were required to pay a separate fixed charge towards the capital cost of CETP in terms of the Delhi Common Effluent Treatment Plants Act, 2000 and the rates are already provided in the Act. The respondent was only required to notify such rates in compliance with their obligations under Schedule 10 of the Agreement. However, the respondent even after lapse of more than 7 years failed to notify either the CETP Charges or the fixed charges payable by the plot owners, despite the fact that the petitioner was maintaining the CETP plant since the appointed date i.e. 15th December 2011 and was also incurring huge costs towards the same.

22. It is the case that the learned Sole Arbitrator failed to appreciate that the redevelopment work of Bawana Industrial Area and maintenance

thereof by the petitioner was not a gratuitous act and hence, presuming though not admitting that there was no Agreement between the parties, respondent was liable to compensate the petitioner for the unrecovered charges as claimed under Claim No. 6 under the law of Contract. The learned Sole Arbitrator, therefore, ought to have allowed the claim of the petitioner.

23. It is submitted that the impugned award passed by the learned Sole Arbitrator is *prima facie* erroneous while rejecting Claim No. 7 on the ground that 25% amount withheld by the respondent was for justified reasons. In this respect it is submitted that no deficiency was found against the petitioner as held by the learned Sole Arbitrator, which is evident from the fact that the entire withheld amount was later paid to the petitioner on 12th April 2016. If at all there was any deficiency, the aforesaid amount would not have been paid back by the respondent in its entirety. Therefore, in terms of Clause 1.2(p) and Clause 20.21, respondent was liable to pay interest due to the delay in depositing the aforesaid amount in the Escrow Account.

24. It is submitted that the learned Sole Arbitrator rejected this claim acting beyond the four corners of contract and attempted to rewrite the contract while passing the impugned award.

25. Learned counsel for the petitioner placed reliance on the grounds raised in respect of the Claim No.2 and therefore submitted that while passing the impugned award against Claim No. 9, the learned Sole Arbitrator committed grave error of law and acted beyond the express terms and conditions of the Agreement.

26. It is submitted that the learned Sole Arbitrator failed to appreciate that in terms of Clause 8.1 (vi) rental charges were to be fixed mutually and not arbitrarily by the respondent. The amount therefore, deducted by the respondent was required to be refunded to the petitioner till the time it is agreed between the parties. It is submitted that the petitioner never shied away from its responsibility to pay the rental charges to the respondent, however, the same could not have been decided by the respondent on its own.

27. It is submitted that the learned Sole Arbitrator committed grave error of law while rejecting this claim on the ground that there existed no provision under the Agreement for payment of interest for delay in disbursement of monthly payment. Such finding was completely perverse being contrary to the terms of the Agreement. A bare perusal of Clauses 1.2(p) and 20.21 would establish that respondent was liable to pay interest @SBI PLR plus two percent in case of any delayed payment. However, the learned Sole Arbitrator while awarding interest in terms of Section 31 (7)(a) & 31 (7)(b) of the Act, thereby completely ignoring that Clauses 1.2(p) and 20.21 of the Agreement specifically provided the rate of interest payable to the petitioner in case of any delayed payment. It is a well settled law that an arbitrator has the discretion to fix rate of interest only when there is no Agreement between the parties in this respect. However, in the present case, parties had already agreed in writing that in case there is delay in any payment, respondent would pay interest @ SBI PLR plus two percent.

28. Therefore, it is submitted that the impugned award in respect of rate of interest payable to the petitioner for the delayed payment of

annuity as well as other amounts is liable to be set aside by this Hon'ble Court.

(On behalf of the respondents)

29. *Per Contra*, the learned counsel for the respondent submits that the project was completed within the stipulated period. It is submitted by the learned counsel for the respondent that the test works were incomplete based on the notice of the petitioner dated 30th August 2013 and a report dated 11th December 2013 and not up to the standards specified in the Concessionaire Agreement.

30. It is submitted by the learned counsel for the respondent that the "provisional completion certificate" was never issued to the petitioner, as was ought to be done upon completion by the third-party Engineer in accordance to the Agreement.

31. Further, it is submitted by the learned counsel for the respondent that the letter dated 21st April 2014 showing completion date as 15th March 2014 was issued to the petitioner erroneously and inadvertently as the works were not completed. As per the clarification letter issued within 24 hours period, establishes that the aforesaid letter was issued erroneously.

32. Learned counsel for the respondent submits that the learned Sole Arbitrator has acted in accordance with the Concession Agreement signed between the parties. The learned counsel for the respondent submits that as per Clause 11.4(c), for recovery of dues, the petitioner is at liberty to institute prosecution or other proceedings. Further, the learned Arbitral Tribunal has considered the evidence filed by the respondent and came to a finding that the letter dated 7th December 2011 cannot be considered as

there is no provision in Agreement which has been incorporated in terms of mandate of the said letter.

33. It is submitted by the learned counsel for the respondent that the petitioner was not entitled to payment of annuity from 15th December 2013 since the work was incomplete and no provisional completion certificate was issued.

34. Learned counsel for the respondent submits that no such work of road restoration has been executed by the petitioner and that the petitioner *vide* its communication dated 17th April 2014 raised claim for having executed road restoration work. It is submitted that the petitioner was able to provide details for one of the work only vide communication dated 11th February 2015, for which the amount of Rs. 16,71,623/- was released, and gave up other claims for road restoration work.

35. Learned counsel for the respondent submits that the petitioner is not entitled to payment of CETP, sewerage and water charges on account of the fact that the cost could be recovered by the petitioner from 15th December 2013 on the commencement of annuities. However, the petitioner did not carry out the entire work due to which the completion certificate was not handed over.

36. It is submitted by the learned counsel for the respondent that the petitioner is not entitled to raise a claim of Rs. 3,92,19,430/- along with interest against Claim No. 5. Further, it is submitted that under Section 11.4(c) (ii) (aa) of the Concessionaire Agreement, the Concessionaire is authorized to suspend the provision of services being provided pursuant to the Agreement to the defaulting units upon occurrence of a default in

payment of maintenance charges and/or other charges to the concessionaire.

37. Learned counsel for the respondent submits that vide communication dated 8th June 2012, the provisional charges for CETP were fixed at an appropriate rate and actual charges could have been fixed only if the petitioner submitted its audited expenditure.

38. It is submitted by the learned counsel for the respondent that the petitioner/claimant failed to fulfil its obligations under the Agreement, and since September 2016, 10% of the maintenance charges collected from the unit owners were withheld. Additionally, it is submitted that the respondents have released 75% of the maintenance charges on assurance that the petitioner would complete all the works and maintain the service standards as per the Agreement.

39. It is submitted by the learned counsel for the respondent that there is no provision in the Agreement which allows the petitioner to seek reimbursement from the respondent with respect to Claim no. 9.

40. It is submitted by the learned counsel of the respondent that consideration with respect to the calculation of the rent was taken as per CPWD Manual on plinth area rate for commercial usage. Further, the petitioner is not entitled to recover any amount from the respondent.

41. It is submitted by the learned counsel for the respondent that the delay in releasing of payments from the Designated Account to the Escrow account was solely due to the omissions and inaction on part of the petitioner.

42. Learned counsel appearing on behalf of the respondent submitted that in view of the foregoing submissions, the instant petition is liable to be dismissed.

ANALYSIS

43. The petitioner has raised objections against the impugned award on the basis of Claims 2,3,5,6,7,9,10 and 11. In order to properly adjudicate upon the validity of the Award, and properly scrutinise if the impugned award is liable to be set aside as per the provisions given in Section 34 of the Act, it is integral to examine each Claim in their own capacity and apply the test of perversity on them.

Claims 2,5 and 9

44. The Arbitral Tribunal, while adjudicating upon Claim nos. 2, 5, and 9, gave similar reasoning for its decision. Claim no. 2 was regarding the **"amount due arising on account of wilful delay in issuance of completion (with 18% simple interest p.a. calculated till 31st October 2016)"**, and Claim no. 9 was regarding the **"Commercial Units Defaulters in payment of dues (18% simple interest p.a. till 31st October 2016)"**. The petitioner has alleged that the learned Sole Arbitrator has committed a grave error while ignoring the contractual obligations of the respondent while adjudicating upon these claims. Section 11.4 of the Concessionaire Agreement is reproduced herein:

> ***"Section 11.4 Maintenance Charges and Other Charges***
>
> *(a) (i) The Concessionaire shall with effect from the Annuity Commencement Date have the right to collect, and deposit into the Designated Account, and enforce the Maintenance Charges as per charges notified by DSIIDC for the Industrial Estate.*

(ii) The Concessionaire shall have the right and full freedom from the Appointed Date to charge, collect, and deposit into the Designated Account, and enforce charges for water supplied from sources other than DJB by it in the Industrial Estate, at rates determined by the Concessionaire on a cost plus basis, which have been approved and notified by DSIIDC. The Concessionaire shall charge for water supplied by it from DJB sources, at rates specified by the DJB. The Concessionaire shall coordinate with the Existing Unites and New Units to ensure that they all have installed functional meters at their cost, and that reading in the meter is recorded periodically before an invoice is raised for collecting charges in relation to supply of water in the Industrial Estate.

(iii)The Concessionaire shall with effect from the Appointed Date have the right to charge, collect, and deposit into the Designated Account, and enforce charges for sewerage charges, CETP as per charges notified by DSIIDC.

(b) Payment of Revenue to Concessionaire

(iv) DSIIDC shall within fifteen (15) days from the end of each month, transfer into the Escrow Account maintained by the Concessionaire the total amount of money deposited by the Concessionaire into the Designated Account from collection of Maintenance Charges and Other Charges.

(c) Recovery of dues

Any default by an Existing Unit and New Unit, in the payment of ground rent, Maintenance Charge, and/or Other: Charges to the Concessionaire; shall be governed by this Section 11.4(c).

(i) DSIIDC, hereby appoints the Concessionaire as the duly authorized person on behalf of DSIDC to commence prosecution and other proceedings under the Act for recovery of dues, and shall within seven days of the execution of this Concession Agreement, issue a special order in this behalf pursuant to Section 28 of the Act.

> *(ii) Upon the occurrence of a default in payment of ground rent, Maintenance Charge and/or Other Charges to the Concessionaire, the Concessionaire is authorized to undertake the following.*
> *(aa) suspend the provision of services being provided pursuant to this Agreement, to the defaulting Existing Unit, and New Unit;*
> *(bb) commence recovery proceedings pursuant. to the special order in this regard issued by DSIIDC under Section 28 of the Act;*
> *(cc) for the recovery of any dues that cannot be. undertaken under Section 28 of the Act if any DSIIDC shall initiate and pursue recovery proceedings upon an application in this regard made by the Concessionaire, and subject always to sufficient amounts having beer received pursuant to such proceedings shall provide the Concessionaire only such amount from such total recovered amount which is equivalent to the unpaid dues for which recovery proceedings had been initiated. The Parties agree that immediately upon recovery of any dues by DSIIDC, DSIIDC shall specify to the Concessionaire the costs incurred by it in relation to the recovery proceedings, and the Concessionaire shall forthwith deposit such amount into an account specified by DSIIDC.*

45. The Learned Arbitral Tribunal while adjudicating Claim no. 2 reiterated Section 11.4 (c) of the Concessionaire Agreement, which relates to the recovery of dues and makes the provision in case of any default by existing unit and new unit holders, non-payment of ground rent, maintenance charges, and/or other charges. The Learned Arbitral Tribunal further went on to make the following observations, as reiterated for clarity:

> *"104. The Tribunal noticed and which is not in dispute between the parties that there is no provision*

in the CA under which the Concessionaire (Claimant) is entitled to Claim the reimbursement of various charges which remained unrecovered from willful defaulters/existing and new plot owners who had failed to remit such charges after it becomes due. Therefore, strictly speaking, the Claimant is not within its right to Claim any amount or huge amount of more than Rs 64 crores Claimed under this head from the Respondent merely on showing that such amount had accumulated due to non-payment of the said charges by the existing unit holders and new unit holders. At the same time the Claimant cannot be deprived of its legitimate Claims under this head for which the specific provision has been made under Clause (c) of Section 11 of CA (supra).

XXXXXX

106. The Claimant faced with this situation repeatedly requested the Respondent to issue requisite authorization/delegation of powers in favour of the Claimant to commence recovery proceedings, pursuant to the Special Order in that regard to be issued by DSIIDC under Section 28 of the Delhi Industrial Development Operation and Maintenance Act, 201 0 but the Respondent failed to issue such a Special Order in favour of the Claimant for taking necessary action. Clause 3(c) supra, enjoins upon DSIIDC to initiate and pursue recovery proceedings, upon an application of the Concessionaire, which action has not been· taken by DSIIDC/Respondent so far. During the course of hearing, a senior representative of the Respondent DSIIDC informed the Tribunal that the process in that behalf has been initiated and may be completed within a short span of time. Without going into such representation, the tribunal is of the view that it is the obligation of the Respondent under the CA to ensure the recovery of the pending dues from the defaulting plot owners so that the due amount is collected and disbursed to the

Claimant, else how the Claimant who is expected to maintain such a big project for 13 years ·would be able to carry out its obligations under the CA.

107. Attention of the Tribunal has also been drawn to a letter dated7.12.2011 issued by the Chief Project Director of DSIIDC, wherein it is stated that in case of non-payment of maintenance charges by industrial plot owners, DSIIDC owe the responsibility for the same. The issuance of this letter is not denied by the Respondent but it is sought to be explained that the same was issued by a certain rogue officer of the Respondent in connivance with the Claimant and against whom disciplinary action has been taken by the Respondent/DSIIDC. In any case the said letter cannot alter or modify the CA and has not been incorporated by any modification in the CA. The Tribunal would not go into this aspect whether the said letter was issued without authority but the fact remains that such a stand of the Respondent has not been incorporated in the CA which is the only document from which the terms and conditions can be derived. The Tribunal accordingly discards the said letter and cannot fix the liability of the Respondent to reimburse the Claimant with the unrecovered outstanding dues.

108. With the above discussion, the Tribunal holds that the Claimant is not entitled to recover the Claimed amount from the Respondent but at the same time, the Claimant cannot be left in the position it is reeling presently due to the non-collection of the maintenance and other charges from the defaulting unit holders. The Tribunal, therefore, is of the view that Respondent should take all necessary actions which are enjoined upon them under the provisions of Section 11 (c) and (cc) so as to ensure the recovery of the dues from the defaulting unit holders.

> *Therefore; the Tribunal directs the Respondent/ DSIIDC to take following actions within a period of 60 days from the date of the Award:*
> *(i) To issue requisite notices notification and delegation of power as provided under Clauses (b),(c) and (cc) and all other enabling provisions of Section 11 of the CA;*
> *(ii) To issue Special Order / Notification as envisaged under Section 28 of Delhi Industrial Development, Operation and Maintenance Act, 201 0; and*
> *(iii) Initiate action for recovery of the pending dues towards different charges in terms of the provisions of CA and 2010Act.*
> *109. The Tribunal makes it clear that in case of failure of Respondent/DSIIDC to take the requisite action within the stipulated period, the Claim of the Claimant shall stand revived and it would be open to the Claimant to pursue the said Claim in accordance with law. Claim No.2 is answered accordingly."*

46. Upon bare reading of the aforementioned reasoning given by the learned Sole Arbitrator in the impugned award, it is perfectly candid that the learned Sole Arbitrator had very well considered the Concessionaire Agreement and the evidence placed on record to adjudicate upon this specific claim.

47. The Impugned Award with respect to Claim 2 is well-reasoned and does not mandate the interference of this Court.

48. While adjudication of the issue regarding Claim no. 9, the Learned Arbitral Tribunal held that this issue is also covered by the discussion held under Claim no. 2. The Learned Arbitral Tribunal held that it is the petitioner's obligation to collect charges from the unit owners, and despite notices and orders issued by the respondent to such entities, they have

failed to make the payment of maintenance and other charges. The respondent has thus directed to further pursue the matter with such defaulting entities so as to ensure that they make the payments in accordance with the terms of the Agreement or by use of the process of recovery as contemplated by Section 28 of the Delhi Industrial Development Operation and Maintenance Act (hereinafter referred to as "DIDOM Act"). The relevant section is reproduced herein:

> *"**28. Authority for Prosecution:***
> *Unless otherwise expressly provided, no Court shall take cognizance of any offence relating to property belonging to, or vested by or under this Act in, the Corporation, punishable under this Act, except on the complaint of, or upon information received from, the Corporation or some person authorized by the Corporation by general or special order in this behalf. "*

49. Since the reasoning for adjudicating Claim no. 9 is the same as that of Claim no. 2, no interference is required in the award regarding Claim no. 9.

50. Claim no. 5 was for the **"Reimbursement of unpaid CETP/ Sewerage Charges and water charges (18% simple interest p.a. calculated till 31st October 2016)".** The petitioner submitted that learned Sole Arbitrator committed a grave error or law, and failed to appreciate that the rights of the parties were flowing from the Agreement, whereby both the parties agreed to perform their reciprocal promises. The petitioner relied upon Section 11.4 (a) (ii) of the Concessionaire Agreement to substantiate his claim. In this claim, the learned Arbitral Tribunal directed that the order and direction as laid down in Claim no. 2

shall *mutatis mutandis* apply to the recovery of the unpaid CETP/Sewerage and Water charges.

51. The learned Arbitral Tribunal has carefully considered the provisions of the Concessionaire Agreement along with the provisions of law as per this Act, as well as the principles of jurisprudence to adjudicate upon these claims.

52. When ample emphasis is given to the Agreement and provisions of law, then there is no scope for the interference of the Court in such an Award. In this instant matter, the learned Sole Arbitrator has considered the "Concessionaire Agreement" and given due prominence to the fact that there has been no provision stipulated in the Agreement that allows an amendment to the Agreement by means of a letter duly issued. This vitiates the petitioner's reliance on the letter dated 7th December 2011, to substantiate his claims for payment by the respondent when there is a default by third-party plot/unit owners from whom, as per the Agreement, the petitioner is supposed to recover the amount due to him.

53. In the instant case, the Arbitral Tribunal is a creature of contract, and the contract is the only basis on which the learned Arbitral Tribunal should adjudicate, apart from the general provisions of law and jurisprudence. In this instant case, the learned Sole Arbitrator would have erred had he considered the letter dated 7th December 2011 and given it the status of a contract to allow the petitioner's claims.

54. It must be duly noted that the learned Sole Arbitrator upheld the principles of natural justice and warranted that the petitioner is granted relief, though not to the degree as claimed.

55. As a creature of contract, upholding the contract and adjudicating on the lines drawn by it, is the learned Sole Arbitrator's responsibility. The *onus* of the rightful interpretation of the contract is also on the learned Sole Arbitrator.

56. In the case of ***Foo Jong Peng and others v Phua Kiah Mai and another*** **[2012] 4 SLR 1267**, the Hon'ble Supreme Court of Singapore delved into the interpretation of contracts by the learned Arbitrator during the arbitral process. The relevant portion of the judgment is reproduced below:-

> *"36. In summary, although the process of the implication of terms does involve the concept of interpretation, it entails a specific form or conception of interpretation which is separate and distinct from the more general process of interpretation (in particular, interpretation of the express terms of a particular document). Indeed, the process of the implication of terms necessarily involves a situation where it is precisely because the express term(s) are missing that the court is compelled to ascertain the presumed intention of the parties via the "business efficacy" and the "officious bystander" tests (both of which are premised on the concept of necessity). In this context, terms will not be implied easily or lightly. Neither does the court imply terms based on its idea of what it thinks ought to be the Contractual relationship between the Contracting parties. The court is concerned only with the presumed intention of the Contracting parties because it can ascertain the subjective intention of the Contracting parties only through the objective evidence which is available before it in the case concerned. In our view, therefore, although the Belize test is helpful in reminding us of the importance of the general concept of interpretation (and its accompanying emphasis on the need for objective evidence), we would respectfully reject that test in so far as it suggests that*

> *the traditional "business efficacy" and "officious bystander" tests are not central to the implication of terms. On the contrary, both these tests (premised as they are on the concept of necessity) are an integral as well as indispensable part of the law relating to implied terms in Singapore."*

57. In the case of ***Ssangyong Engineering & Construction Co. Ltd. v. NHAI,* (2019) 15 SCC 131**, the Hon'ble Supreme Court made the following pertinent observations:

> *"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, 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).*
> *XXXXXX*
> *76. However, when it comes to the public policy of India, argument based upon "most basic notions of justice", it is clear that this ground can be attracted only in very exceptional circumstances when the conscience of the Court is shocked by infraction of fundamental notions or principles of justice. It can be seen that the formula that was applied by the Agreement continued to be applied till February 2013 — in short, it is not correct to say that the formula under the Agreement could not be applied in view of the Ministry's change in the base indices from 1993-1994 to 2004-2005. Further, in order to apply a linking factor, a Circular, unilaterally issued by one party, cannot possibly bind the other party to the Agreement without that other party's consent. Indeed, the*

> *Circular itself expressly stipulates that it cannot apply unless the Contractors furnish an undertaking/affidavit that the price adjustment under the Circular is acceptable to them. We have seen how the appellant gave such undertaking only conditionally and without prejudice to its argument that the Circular does not and cannot apply. This being the case, it is clear that the majority Award has created a new Contract for the parties by applying the said unilateral Circular and by substituting a workable formula under the Agreement by another formula dehors the Agreement. This being the case, a fundamental principle of justice has been breached, namely, that a unilateral addition or alteration of a Contract can never be foisted upon an unwilling party, nor can a party to the Agreement be liable to perform a bargain not entered into with the other party. Clearly, such a course of conduct would be contrary to fundamental principles of justice as followed in this country, and shocks the conscience of this Court. However, we repeat that this ground is available only in very exceptional circumstances, such as the fact situation in the present case. Under no circumstance can any court interfere with an arbitral Award on the ground that justice has not been done in the opinion of the Court. That would be an entry into the merits of the dispute which, as we have seen, is contrary to the ethos of Section 34 of the 1996 Act, as has been noted earlier in this judgment."*

58. It is evident from the aforementioned judgments that the learned Arbitral Tribunal cannot steer away from the contract. They should consider accessory pieces of evidence to base their decisions, but the pulp of the award should depend entirely upon the contract and the interpretation that the learned Arbitral Tribunal gives it in accordance with the general principles that govern such interpretations.

59. The impugned award with respect to claim no. 5 is well-reasoned and does not mandate the interference of this Court.

Claim no. 3

60. Claim no. 3 was "**Towards additional expenses incurred by the Claimant on Road Restoration works (18% simple interest p.a. calculated till 31st October 2016)"**. The petitioner submits that the learned Sole Arbitrator committed a grave error of law while rejecting the claim, despite concluding that admittedly the road restoration work was not part of the scope of work awarded to the petitioner. They further submitted that the learned Sole Arbitrator failed to appreciate the evidence on record.

61. The relevant portion of the impugned award is reproduced hereinafter to analyse unambiguously whether the submission of the petitioner has any substance.

> *"110. The basis of this Claim is that a large number of plot owners did not raise constructions within the prescribed period as stipulated in the lease documents and made constructions subsequently, leading to road cutting, digging of drains at numerous places for the purpose of laying cables and pipes. Besides various agencies like Delhi Jal Board, MTNL, NDPL, Reliance communications and others also dug up and cut the roads and drains at various places in order to provide their services. In order to restore the dug up portions of the roads etc., the Claimant had to incur additional expenditure to the tune of Rs.3,19,12,829/- which the Respondent-DSIIDC is liable to reimburse in that behalf. In this regard, the case of the Respondent-DSIIDC is that it is not liable to pay additional expenses, if any, incurred by the Claimant for the restoration work; firstly on the ground that no sanction was obtained by the*

Claimant to do such work and in any case the Claimant has failed to submit the details of the work executed and expenditure incurred by it along with documentary proof for consideration of the Respondent-DSIIDC. There exists lot of correspondence exchanged between the parties on record which would undoubtedly show that certain agencies like DJB, MTNL, NDPL, Infotel, Reliance Communications had to cut portions of roads and drains at various placed in order to lay down their cables, pipes etc., in order to provide water, sewerage, electricity and telephone connections etc. to the unit holders of Bawana Industrial Area. The permission to cut roads etc was granted to the above named agencies to execute the work subject to payment of road restoration charges by the said agencies. Vide Annexure P-68, the Claimant had submitted detailed estimate of the road restoration work in the sum of Rs.l,ll,07,760/- in respect of the road cutting done by the four agencies namely M/s Reliance Jio Inforcom Ltd., M/s Dhingra Developers (P) Ltd., MTNL and Delhi Jal Board. In this regard it must be noted that vide communication dated 27.8.2014 (Exh.P-71)the Superintending Engineer of the Respondent-DSIIDC referred to the discussion held in the chamber of Chief Engineer-VI called upon the Claimant to submit the measurements of the work done duly test checked by Respondent-DSIIDC and Third Party Engineer at the earliest so that reimbursement of road restoration charges of the work done by the Claimant may be reimbursed. The Claimant, however, failed to furnish the above referred documents and proof to the Respondent-DSIIDC and instead wrote a letter dated 24.9.2014(Annexure P-72) reiterating its demand for reimbursement of the additional expenses incurred by· it in connection with the road restoration work which was beyond the scope of the work. On15.11.2014 a bill in the amount of Rs.8,35,110/- was submitted towards road restoration, for laying all underground cables, PRD0521/00092. Vide communication dated 11.2.2015

(Annexure P-76) the Claimant informed the Respondent-DSIIDC that due to non-availability of documentary evidence it is prepared to forego the Claim raised for road restoration against the work done for M/s Reliance Jio Infocom Ltd in the sum ofRs.l,07,455/-, M/s Dhingra Developers forRs.2,68,896/- and M/s Reliance Jio Ltd for Rs.l,65,568. However, at the same time requesting the Respondent-DSIIDC to pay the bill for road restoration against Delhi Jal Board. This means that the Claim remained only in respect of rest of agencies.

111. Although the Respondent did not dispute its liability to treat road restoration work as additional work and even showed their willingness to reimburse the Claimant to the extent of actual expenditure incurred by it in the process but it appears that the reimbursement could not be made to the Claimant as the Claimant failed to furnish the requisite documentary proof of the expenditure incurred in that connection along with certification of the work done by the Respondent-Engineer and the Third Party Engineer. In the absence of requisite proof as demanded by the Respondent, the Respondent could not have paid the bills raised by the Claimant in that behalf. It is an admitted case of the parties that the Claimant has also been paid a sum of Rs. l6, 7.1,623/- for which the Claimant had produced requisite proof to the satisfaction of the Respondent-DSIIDC. The Tribunal accordingly holds that the Claimant is not entitled to any further amount under this Claim."

62. A plain reading of the aforementioned portion of the impugned award makes it clear that the learned Arbitral Tribunal has considered the necessary facets of the Concessionaire Agreement along with the evidence present on the record. Learned Sole Arbitrator does not have the power to adjudicate and allow a claim when there is no evidence to

support it. The decision of the learned Arbitral Tribunal must be on the basis of the evidence placed on record.

63. The Impugned Award with respect to Claim no. 3 is well-reasoned and does not mandate the interference of this Court.

Claim no. 6

64. Claim no. 6 is regarding **"Reimbursement of CETP Fixed Charges (with 18% simple interest p.a. till 31.10.2016)".** The learned Arbitral Tribunal vide the impugned award granted additional time to the respondents to notify the CETP Charges or the fixed charges payable by the plot owners. This decision is being objected to by the petitioner and he submits that huge costs are being incurred by the petitioner towards maintaining the industrial area in question, and granting the respondents further time in such a situation is unjustified.

65. To negate ambiguity, the relevant portion of the impugned award is reproduced hereinunder:

> *"119. The Respondent-DSIIDC has denied its liability to pay these amounts and it is pointed that Respondent-DSIIDC had fixed provisional charges@ Rs.3/- per sq.mtr per month for non-polluting units and Rs. 51- per sq.mtr per month for polluting units. Fixation of CETP charges is to be done as per Schedule-II and Rule 3(xii) of the CETP Act. As per the said Schedule, various inputs were required from the Claimant to fix the said charges but due to non-availability of the requisite information in accordance with CETP Act, the CETP charges could not be worked out in accordance with the formula given in the said Act.*
>
> *120. In this regard reference has been invited to the various answers given by CW-1 Mr Arora in response to the question put forth by the counsel for the Respondent which would show that all the requisite details necessary*

> *to fix the charges as per formula have not yet been supplied and this appears to be the reason for non-fixation of the CETP and Sewerage Charges.*
> *121. During the course of the Respondent informed that a committee has already been constituted for the purpose of fixation of these charges which is seized of the matter. With this position, the Tribunal defers the decision on this Claim till such time the Committee has completed its task and Respondent takes action with regard to fixation of these charges in accordance with Schedule of CETP Act, if after such fixation there remains any dispute, the Claimant would be within its right to raise the same in accordance with the terms of CA and law."*

66. The impugned award with respect to Claim no. 6 is well-reasoned and does not mandate the interference of this Court.

Claim no. 10

67. Claim no. 10 is regarding the **"Claim on account of excess rental charges of office complex".** The relevant portion of the impugned award is reproduced below:

> *"125. This Claim is on account of excess renewal charges fixed and recovered by the Respondent-DSIIDC. As per the terms of the CA, the rental has to be fixed by the Respondent-DSIIDC in consultation with the Claimant but it appears that the Respondent has fixed the rent without any such consultation which action of the Respondent is untenable and arbitrary. The Respondent is, therefore, directed to fix the rent of the office premises used by the Claimant in consultation with the Claimant, having regard to the position that the office space is not being used for any commercial purpose by the Claimant and is primarily used as site office in order to maintain the huge Bawana industrial complex. The exercise of fixation of rent with consultation of the Claimant should*

> *be completed within two months from the date of the Award."*

68. Thus, the grant of additional time to the respondent to fulfil their contractual obligation is unambiguously validated by the learned Sole Arbitrator. The learned Sole Arbitrator, while adjudicating upon claims, must also be well aware of the impact of the decision on both parties. If it so necessitates that the learned Sole Arbitrator takes an unconventional approach to ensure that there is a conclusive solution to the issue, the learned Arbitral Tribunal may do so, provided the approach is not contrary to the Public Policy of India or Patently Illegal.

69. The impugned award with respect to Claim no.10 is well-reasoned, and not contrary to the Public Policy of India, and does not mandate the interference of this Court.

Claim no. 7

70. Claim no. 7 is regarding the **"Interest on withheld 25% maintenance charges (18% p.a. till 31st October 2016)"**. The relevant portion of the impugned award is reiterated below:

> *"122. According to the Claimant, the Respondent released only 75% and withheld 25% maintenance charges without any justification. The Claimant is entitled to interest on the withheld 25%) amount. The Respondent has satisfactorily explained that 25o/o maintenance charges were withheld with effect from April, 2014 to October, 2015 as the Claimant has not adhered to service level standard as contained at page 423 of the Respondent's documents, despite Respondent having pointed out continuously the defects and deficiencies in the work. In view of this the Tribunal is of the view that the Claimant is not entitled to interest on*

> *the withheld amount because the amount was withheld for just and sufficient reasons."*

71. In ***Rajasthan State Mines and Minerals Limited v. Eastern Engineering Enterprises and Another*, (1999) 9 SCC 283**, the Hon'ble Supreme Court held that,

> *"44. From the resume of the aforesaid decisions, it can be stated that:*
> *(a) It is not open to the Court to speculate, where no reasons are given by the Arbitrator, as to what impelled Arbitrator to arrive at his conclusion.*
> *(b) It is not open to the Court to admit to probe the mental process by which the Arbitrator has reached his conclusion where it is not disclosed by the terms of the Award.*
> *(c) If the Arbitrator has committed a mere error of fact or law in reaching his conclusion on the disputed question submitted for his adjudication then the Court cannot interfere.*
> *(d) If no specific question of law is referred, the decision of the Arbitrator on that question is not final, however much it may be within his jurisdiction and indeed essential for him to decide the question incidentally. In a case where specific question of law touching upon the jurisdiction of the Arbitrator was referred for the decision of the Arbitrator by the parties, then the finding of the Arbitrator on the said question between the parties may be binding.*
> *(e) In a case of non-speaking Award, the jurisdiction of the Court is limited. The Award can be set aside if the Arbitrator acts beyond his jurisdiction.*
> *(f) To find out whether the Arbitrator has travelled beyond his jurisdiction, it would be necessary to consider the Agreement between the parties containing the Arbitration clause. Arbitrator acting beyond his jurisdiction is a different ground from the error apparent on the face of the Award.*

(g) In order to determine whether Arbitrator has acted in excess of his jurisdiction what has to be seen is whether the Claimant could raise a particular Claim before the Arbitrator. If there is a specific term in the Contract or the law which does not permit or give the Arbitrator the power to decide the dispute raised by the Claimant or there is a specific bar in the Contract to the raising of the particular Claim then the Award passed by the Arbitrator in respect thereof would be in excess of jurisdiction.

(h) The Award made by the Arbitrator disregarding the terms of the reference or the Arbitration Agreement or the terms of the Contract would be a jurisdictional error which requires ultimately to be decided by the Court. He cannot Award an amount which is ruled out or prohibited by the terms of the Agreement. Because of specific bar stipulated by the parties in the Agreement, that Claim could not be raised. Even if it is raised and referred to Arbitration because of wider Arbitration clause such Claim amount cannot be Awarded as Agreement is binding between the parties and the Arbitrator has to adjudicate as per the Agreement. This aspect is absolutely made clear in Continental Construction Co. Ltd.(supra) by relying upon the following passage from M/s. Alopi Parshad Vs. Union of India [1960] 2 SCR 703 which is to the following effect: - There it was observed that a Contract is not frustrated merely because the circumstances in which the Contract was made, altered. The Contract Act does not enable a party to a Contract to ignore the express covenants thereof, and to Claim payment of consideration for performance of the Contract at rates different from the stipulated rates, on some vague plea of equity. The parties to an executory Contract are often faced, in the course of carrying it out, with a turn of event which they did not at all anticipate, a wholly abnormal rise or fall in prices, a sudden depreciation of currency, an unexpected obstacle to execution, or the like. There is no general

liberty reserved to the courts to absolve a party from liability to perform his part of the Contract merely because on account of an uncontemplated turn of events, the performance of the Contract may become onerous.

(i) The Arbitrator could not act arbitrarily, irrationally, capriciously or independently of the Contract. A deliberate departure or conscious disregard of the Contract not only manifests the disregard of his authority or misconduct on his part but it may tantamount to mala fide action.

(j) *The Arbitrator is not a conciliator and cannot ignore the law or misapply it in order to do what he thinks just and reasonable; the Arbitrator is a tribunal selected by the parties to decide the disputes according to law."*

72. Further in ***Union of India vs. D. Khosla and Company,*** **2022 SCC OnLine J&K 356,** the High Court of Jammu and Kashmir held that,

"28. By ignoring Clause 12 and 21 of the Contract and acting in derogation thereof, the Arbitrator has admittedly travelled beyond his jurisdiction and has acted contrary to the terms and conditions of the Contract of which he was a creature. I am aware that interpretation of a particular clause by the Arbitrator may not be open to scrutiny by this Court, however, instant case is not of interpretation to any clause but is a apparent case of ignoring clause-12 and 21 of the Contract Agreement. As per Clause-12 and 21, no Claim could have been raised by the Contractor on account of extra expenditure incurred due to change in the site of foundation and adjudicated upon by the Arbitrator in his favour.

XXXXXX

30. The Arbitrator appears to have ignored the terms and conditions of the Contract Agreement and Awarded the Claim in favour of the Contractor. Claim was, thus,

> *not sustainable and therefore, wrongly upheld by the Court below.*
> *XXXXXX*
> *47. Be that as it may, in view of the discussion made above, I am of the considered view that the Arbitrator has clearly exceeded his jurisdiction and has Awarded most of the items of Claims by either ignoring the terms and conditions of the Contract or acting in derogation thereof."*

73. This Hon'ble Supreme Court had earlier held in ***Associate Engineering Company v. Govt. of Andhra Pradesh and others,*** **(1991) 4 SCC 93**, that the Arbitrator cannot simply overlook the provisions in the Contract. The relevant paragraphs are reiterated below:

> *"24. The Arbitrator cannot act arbitrarily, irrationally, capriciously or independently of the Contract. His sole function is to arbitrate in terms of the Contract. He has no power apart from what the parties have given him under the Contract. If he has travelled outside the bounds of the Contract, he has acted without jurisdiction. But if he has remained inside the parameters of the Contract and has construed the provisions of the Contract; his Award cannot be interfered with unless he has given reasons for the Award disclosing an error apparent on the face of it.*
> *25. An Arbitrator who acts in manifest disregard of the Contract acts without jurisdiction. His authority is derived from the Contract and is governed by the Arbitration Act which embodies principles derived from a specialised branch of the law of agency (see Mustill & Boyd's Commercial Arbitration, Second Edition, p. 641). He commits misconduct if by his Award he decides matters excluded by the Agreement (see Halsbury's Laws of England, Volume II, Fourth Edition, Para 622). A deliberate departure from Contract amounts to not only manifest disregard of his authority or a misconduct on*

> *his part, but it may tantamount to a mala fide action. A conscious disregard of the law or the provisions of the Contract from which he has derived his authority vitiates the Award."*

74. In ***Indian Oil Corpn. Ltd. v. Shree Ganesh Petroleum,*** **(2022) 4 SCC 463,** the Hon'ble Supreme Court has reiterated that the Arbitrator is a creature of the contract. The relevant paragraphs are reproduced below:

> *"43. An Arbitral Tribunal being a creature of Contract, is bound to act in terms of the Contract under which it is constituted. An Award can be said to be patently illegal where the Arbitral Tribunal has failed to act in terms of the Contract or has ignored the specific terms of a Contract.*
> *44. However, a distinction has to be drawn between failure to act in terms of a Contract and an erroneous interpretation of the terms of a Contract. An Arbitral Tribunal is entitled to interpret the terms and conditions of a Contract, while adjudicating a dispute. An error in interpretation of a Contract in a case where there is valid and lawful submission of arbitral disputes to an Arbitral Tribunal is an error within jurisdiction.*
> *45. The Court does not sit in appeal over the Award made by an Arbitral Tribunal. The Court does not ordinarily interfere with interpretation made by the Arbitral Tribunal of a Contractual provision, unless such interpretation is patently unreasonable or perverse. Where a Contractual provision is ambiguous or is capable of being interpreted in more ways than one, the Court cannot interfere with the arbitral Award, only because the Court is of the opinion that another possible interpretation would have been a better one.*
> *46. In Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , this Court held that an Award ignoring the terms of a Contract would not be in public interest. In the instant case, the Award in respect of the lease rent and the lease term is*

in patent disregard of the terms and conditions of the lease Agreement and thus against public policy. Furthermore, in Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] the jurisdiction of the Arbitral Tribunal to adjudicate a dispute itself was not in issue. The Court was dealing with the circumstances in which a court could look into the merits of an Award.

47. In this case, as observed above, the Impugned Award insofar as it pertains to lease rent and lease period is patently beyond the scope of the competence of the Arbitrator appointed in terms of the dealership Agreement by the Director (Marketing) of the appellant.

48. The lease Agreement which was in force for a period of 29 years with effect from 15-4-2005 specifically provided for monthly lease rent of Rs 1750 per month for the said plot of land on which the retail outlet had been set up. It is well settled that an Arbitral Tribunal, or for that matter, the Court cannot alter the terms and conditions of a valid Contract executed between the parties with their eyes open.

49. In Ssangyong Engg. & Construction Co. Ltd. v. NHAI [Ssangyong Engg. & Construction Co. Ltd. v. NHAI, (2019) 15 SCC 131 : (2020) 2 SCC (Civ) 213] , this Court held : (SCC pp. 199-200, para 76)

"76. However, when it comes to the public policy of India, argument based upon "most basic notions of justice", it is clear that this ground can be attracted only in very exceptional circumstances when the conscience of the Court is shocked by infraction of fundamental notions or principles of justice. It can be seen that the formula that was applied by the Agreement continued to be applied till February 2013 — in short, it is not correct to say that the formula under the Agreement could not be applied in view of the Ministry's change in the base indices from 1993-1994 to 2004-2005. Further, in order to apply a linking factor,

a circular, unilaterally issued by one party, cannot possibly bind the other party to the Agreement without that other party's consent. Indeed, the circular itself expressly stipulates that it cannot apply unless the Contractors furnish an undertaking/affidavit that the price adjustment under the circular is acceptable to them. We have seen how the appellant gave such undertaking only conditionally and without prejudice to its argument that the Circular does not and cannot apply. This being the case, it is clear that the majority Award has created a new Contract for the parties by applying the said unilateral circular and by substituting a workable formula under the Agreement by another formula dehors the Agreement. This being the case, a fundamental principle of justice has been breached, namely, that a unilateral addition or alteration of a Contract can never be foisted upon an unwilling party, nor can a party to the Agreement be liable to perform a bargain not entered into with the other party. Clearly, such a course of conduct would be contrary to fundamental principles of justice as followed in this country, and shocks the conscience of this Court. However, we repeat that this ground is available only in very exceptional circumstances, such as the fact situation in the present case. Under no circumstance can any court interfere with an arbitral Award on the ground that justice has not been done in the opinion of the Court. That would be an entry into the merits of the dispute which, as we have seen, is contrary to the ethos of Section 34 of the 1996 Act, as has been noted earlier in this judgment."

50. In PSA Sical Terminals (P) Ltd. v. V.O. Chidambranar Port Trust [PSA Sical Terminals (P) Ltd. v. V.O. Chidambranar Port Trust, (2021) 18 SCC 716 : 2021 SCC OnLine SC 508] this Court referred to and relied upon Ssangyong Engg. & Construction [Ssangyong Engg. & Construction Co. Ltd. v. NHAI, (2019) 15 SCC 131 : (2020) 2 SCC (Civ) 213] and held

: (PSA Sical Terminals case [PSA Sical Terminals (P) Ltd. v. V.O. Chidambranar Port Trust, (2021) 18 SCC 716 : 2021 SCC OnLine SC 508] , SCC para 85)

"85. As such, as held by this Court in Ssangyong Engg. & Construction [Ssangyong Engg. & Construction Co. Ltd. v. NHAI, (2019) 15 SCC 131 : (2020) 2 SCC (Civ) 213] , the fundamental principle of justice has been breached, namely, that a unilateral addition or alteration of a Contract has been foisted upon an unwilling party. This Court has further held that a party to the Agreement cannot be made liable to perform something for which it has not entered into a Contract. In our view, re-writing a Contract for the parties would be breach of fundamental principles of justice entitling a court to interfere since such case would be one which shocks the conscience of the Court and as such, would fall in the exceptional category."

51. In PSA Sical Terminals [PSA Sical Terminals (P) Ltd. v. V.O. Chidambranar Port Trust, (2021) 18 SCC 716 : 2021 SCC OnLine SC 508] this Court clearly held that the role of the Arbitrator was to arbitrate within the terms of the Contract. He had no power apart from what the parties had given him under the Contract. If he has travelled beyond the Contract, he would be acting without jurisdiction.

52. In PSA Sical Terminals [PSA Sical Terminals (P) Ltd. v. V.O. Chidambranar Port Trust, (2021) 18 SCC 716 : 2021 SCC OnLine SC 508] this Court referred to and relied upon the earlier judgment of this Court in Army Welfare Housing Organisation v. Sumangal Services (P) Ltd. [Army Welfare Housing Organisation v. Sumangal Services (P) Ltd., (2004) 9 SCC 619] and held that an Arbitral Tribunal is not a court of law. It cannot exercise its power ex debito justitiae.

53. In Satyanarayana Construction Co. v. Union of India [Satyanarayana Construction Co. v. Union of India, (2011) 15 SCC 101 : (2014) 2 SCC (Civ) 252] , a Bench of this Court of coordinate strength held that

> *once a rate had been fixed in a Contract, it was not open to the Arbitrator to rewrite the terms of the Contract and Award a higher rate. Where an Arbitrator had in effect rewritten the Contract and Awarded a rate, higher than that agreed in the Contract, the High Court was held not to commit any error in setting aside the Award.*

75. The learned Arbitral Tribunal has evidently erred in adjudicating upon the aforementioned claim. The Arbitral Tribunal is bound to adjudicate on the lines of the Contract and in this instant clause, the learned Arbitrator has deviated from the contract. There is no contractual provision that authorises the respondent to withhold the amount of maintenance and other charges. Withholding interest in the absence of express provisions permitting the same is a breach of contract.

76. The learned Sole Arbitrator has clearly been ignorant of the contractual provisions and evidence placed on record. The impugned award with respect to the direction on Claim no.7 is liable to be set aside for being unreasoned. There is an apparent perversity with regard to the decision of the learned Sole Arbitrator while adjudicating upon the aforementioned claim.

Claim no. 11

77. Claim no. 11 is regarding the **"Interest due to delay in disbursement of monthly payment (18% simple interest p.a. calculated till 31st October 2016)".** A key ground of perversity raised by the petitioner is that though there exists a Concessionaire Agreement, the learned Arbitral Tribunal had awarded an interest rate that is contrary to the provisions of the Agreement.

78. It is pertinent to discuss the provisions relating to the grant of the rate of interest in the Arbitral award as per the Act, 1996:

> ***"31. Form and contents of arbitral Award.***
> *(7) (a) Unless otherwise agreed by the parties, where and in so far as an arbitral Award is for the payment of money, the Arbitral Tribunal may include in the sum for which the Award is made interest, at such rate as it deems reasonable, on the whole or any part of the money, for the whole or any part of the period between the date on which the cause of action arose and the date on which the Award is made."*
> *[(b) A sum directed to be paid by an arbitral Award shall, unless the Award otherwise directs, carry interest at the rate of two per cent. higher than the current rate of interest prevalent on the date of Award, from the date of Award to the date of payment.*
> *Explanation.—The expression "current rate of interest" shall have the same meaning as assigned to it under clause (b) of section 2 of the Interest Act, 1978 (14 of 1978).]"*

79. A bare reading of Section 31 (7) (a) makes it evident that the Section applies only where there is no previous Agreement as to the rate of interest to be awarded. It is as plain as a pikestaff that the learned Arbitral Tribunal has gone beyond the contract and awarded an interest rate that is quite clearly not the rate the parties had previously agreed upon.

80. The powers of an Arbitral Tribunal are those conferred upon it by the parties within the limits allowed by the applicable law, together with any additional powers that may be conferred automatically by the operation of law. The Hon'ble Supreme Court has held that there is the

primacy of Agreement over the powers of the Arbitral Tribunal regarding the rate of interest of an Arbitral Award.

81. The Hon'ble Supreme Court in ***State of Haryana v. S.L. Arora & Co.*, (2010) 3 SCC 690** says as under:

> *"34. Thus it is clear that Section 31(7) merely authorises the Arbitral Tribunal to Award interest in accordance with the Contract and in the absence of any prohibition in the Contract and in the absence of specific provision relating to interest in the Contract, to Award simple interest at such rates as it deems fit from the date on which the cause of action arose till the date of payment. It also provides that if the Award is silent about interest from the date of Award till the date of payment, the person in whose favour the Award is made will be entitled to interest at 18% per annum on the principal amount Awarded, from the date of Award till the date of payment. The calculation that was made in the execution petition as originally filed was correct and the modification by the respondent increasing the amount due under the Award was contrary to the Award."*

82. In ***Morgan Securities and Credits Pvt. Ltd. v Videocon Industries Ltd.*,(2023) 1 SCC 602** the Court has interpreted Section 31(7)(b) with respect to two phrases - *first*, the expression "sum"; and *second*, "unless the award otherwise directs". It was held that the Arbitrator must exercise the discretion in good faith, must take into account relevant and not irrelevant considerations, and must act reasonably and rationally taking cognizance of the surrounding circumstances.

> *"20. The interpretation of Section 31(7)(b) has to focus on the meaning of two phrases — first, the expression "sum"; and second, "unless the Award otherwise directs". The phrase "sum" has been interpreted in the opinion of Bobde, J. and in the concurring opinion of*

*Sapre, J. in Hyder Consulting [**Hyder Consulting (UK) Ltd. v. State of Orissa, (2015) 2 SCC 189 : (2015) 2 SCC (Civ) 38**] to mean the amount directed to be paid by an arbitral Award as arrived in Section 31(7)(a), which would include the aggregate of the principal and the pre-Award interest. While Sapre, J. was of the view that the Arbitrator only has the discretion to determine the rate of post-Award interest, Bobde, J. did not expressly discuss the ambit of discretion of the Arbitrator while granting post-Award interest. In Bobde, J.'s opinion, there was no discussion on whether the Arbitrator had the discretion to order post-Award interest on a part of the "sum" that was arrived at under Section 31(7)(a).*

21. On the interpretation of the words "unless the Award otherwise directs", Sapre, J. interpreted them to mean that post-Award interest is a statutory mandate and that the Arbitrator only has the discretion to determine the rate of interest to be Awarded. Bobde, J. did not specifically interpret the phrase "unless the Award otherwise directs". The Learned Judge made a passing reference to the phrase in para 7 of the judgment, where he observed that : (Hyder Consulting case [Hyder Consulting (UK) Ltd. v. State of Orissa, (2015) 2 SCC 189 : (2015) 2 SCC (Civ) 38] , SCC p. 201)

> *"7. ... In other words, what clause (b) of sub-section (7) of Section 31 of the Act directs is that the "sum", which is directed to be paid by the Award, whether inclusive or exclusive of interest, shall carry interest at the rate of eighteen per cent per annum for the post-Award period, unless otherwise ordered."*

However, in para 13 of the judgment, the Learned Judge observed : (Hyder Consulting case [Hyder Consulting (UK) Ltd. v. State of Orissa, (2015) 2 SCC 189 : (2015) 2 SCC (Civ) 38] , SCC p. 202)

> *"13. ... Thereupon, the Arbitral Tribunal may direct interest to be paid on such "sum" for the post-Award period vide clause (b) of sub-section (7) of Section 31 of the Act, at which stage the amount would be the*

> *sum arrived at after the merging of interest with the principal; the two components having lost their separate identities."*

83. According to Section 31(7)(b), if the Arbitrator does not grant post-award interest, the award-holder is entitled to post-award interest at eighteen per cent; the award of the learned Sole Arbitrator granting post-award interest on the principal amount does not suffer from an error apparent. The Court may only interfere where the learned Sole Arbitrator has failed in adopting a judicial approach during the arbitration proceedings, analysis of the contract, and thus while giving the award. Where it is evident that the learned Sole Arbitrator had worked well within his limits and there has not been any arbitrary exercise of power, there is no scope of interference of this Court with respect to the change in the rate of interest of an award.

84. Further, in ***Executive Engineer v. Gokul Chandra Kanungo*, 2022 SCC OnLine SC 1336,** the Hon'ble Supreme Court held that if the Arbitral Tribunal has the discretion to award a rate of interest, it must be reasonable. The relevant paragraph is reiterated hereinunder:

> *"10. The provisions of Section 31(7)(a) of the 1996 Act fell for consideration before this Court in many cases including in the cases of Hyder Consulting (UK) Limited (supra) and Delhi Airport Metro Express Private Limited v. Delhi Metro Rail Corporation5. A perusal of clause (a) of subsection (7) of Section 31 of the 1996 Act would reveal that, no doubt, a discretion is vested in the Arbitral Tribunal to include in the sum for which the Award is made interest, on the whole or any part of the money, for the whole or any part of the period between the date on which the cause of action arose and the date on which the Award is made. However, it would reveal*

> *that the section itself requires interest to be at such rate as the Arbitral Tribunal deems reasonable. When a discretion is vested to an Arbitral Tribunal to Award interest at a rate which it deems reasonable, then a duty would be cast upon the Arbitral Tribunal to give reasons as to how it deems the rate of interest to be reasonable. It could further be seen that the Arbitral Tribunal has also a discretion to Award interest on the whole or any part of the money or for the whole or any part of the period between the date of cause of action and the date on which the Award is made. When the Arbitral Tribunal is empowered with such a discretion, the Arbitral Tribunal would be required to apply its mind to the facts of the case and decide as to whether the interest is payable on whole or any part of the money and also as to whether it is to be Awarded to the whole or any part of the period between the date on which the cause of action arose and the date on which the Award is made."*

85. In ***Vedanta Ltd. v. Shenzhen Shandong Nuclear Power Construction Co. Ltd.*, (2019) 11 SCC 465** the Hon'ble Supreme Court held as under:

> *"9. The discretion of the Arbitrator to Award interest must be exercised reasonably. An Arbitral Tribunal while making an Award for interest must take into consideration a host of factors, such as : (i) the "loss of use" of the principal sum; (ii) the types of sums to which the interest must apply; (iii) the time period over which interest should be Awarded; (iv) the internationally prevailing rates of interest; (v) whether simple or compound rate of interest is to be applied; (vi) whether the rate of interest Awarded is commercially prudent from an economic standpoint; (vii) the rates of inflation; (viii) proportionality of the count Awarded as interest to the principal sums Awarded."*

86. In ***MSK Projects Ltd v State of Rajasthan*** **(2011) 10 SCC 573**, a two-Judge bench of the Hon'ble Supreme Court held that:

> *"20. This Court, in ONGC Ltd. v. Saw Pipes Ltd. [(2003) 5 SCC 705 : AIR 2003 SC 2629] and Hindustan Zinc Ltd. v. Friends Coal Carbonisation [(2006) 4 SCC 445] , held that an Arbitration Award contrary to substantive provisions of law, or provisions of the 1996 Act or against the terms of the Contract, or public policy, would be patently illegal, and if it affects the rights of the parties, it would be open for the court to interfere under Section 34(2) of the 1996 Act.*
> *XXXXXX*
> *25. So far as the rate of interest is concerned, it may be necessary to refer to the provisions of* ***Section 3 of the Interest Act, 1978****, the relevant part of which reads as under:*
>
> > *"**3.Power of court to allow interest.—(**1) In any proceedings for the recovery of any debt or damages or in any proceedings in which a Claim for interest in respect of any debt or damages already paid is made, the court may, if it thinks fit, allow interest to the person entitled to the debt or damages or to the person making such Claim, as the case may be, at a rate not exceeding the current rate of interest…."*
> >
> > *Thus, it is evident that the aforesaid provisions empower the court to Award interest at the rate prevailing in the banking transactions. Thus, impliedly, the court has a power to vary the rate of interest agreed by the parties."*

87. In light of the aforementioned judicial decisions, it can be said that the learned Arbitral Tribunal may not resort to Section 31(7)(b) to award a rate of interest when express provisions regarding the same are present in the Concessionaire Agreement.

88. In the instant case, the Concessionaire Agreement expressly stipulated the rate of interest when there is a delayed payment.

> ***"Section 1.2 Interpretations***
> *(p) unless otherwise provided, any interest to be calculated and payable under this Agreement, shall accrue pro-rata on a monthly basis and from the respective due dates as provided for in this Agreement.*
> ***Section 20.21 Interest and Right of Set off and Lien***
> *Any sum which is due and payable under any of the provisions of this Agreement by one party to the other shall, if the same is not paid within the time allowed for payment thereof, be deemed to be a debt owed by the Party responsible for such payment to the Party entitled to receive the same. Such sum shall until payment thereof carry interest at the rate specified herein, and if not specified at the rate of SBI PLR plus 2% (two percent) per annum, from the due date and until the date of payment or otherwise realisation thereof by the Party entitled to receive the same. Without prejudice to any other right or remedy available under this Agreement or under law, the Party entitled to receive such amount shall also have the right of set off.*
>
> *Provided this provision for payment of interest for delayed payment shall not be deemed or construed to (i) authorise any delay in payment of any amount due by a party or (ii) be a waiver of the underlying breach of the payment obligations.*
> *Provided further, in the event any sums whatsoever are due and owing to DSIIDC shall recover the same by appropriating such dues from the Annuity, Performance Security and/or exercising lien over the revenue of the Concessionaire generated from the Project."*

89. The relevant portion of the impugned award that is being objected by the petitioner is reproduced herein:

> *"126. According to the Claimant as per Section 11.4(b) of the CA was to be made within 15 from the end of each month which has not been done and there was delay. So the Respondent must pay interest on the delayed amount, the Tribunal is not inclined to grant any interest to the Claimant under this Claim because there exists no provision under the C.A for payment of interest for delay in disbursement of monthly payment."*

90. The Claim no. 11 was interest due to delay in disbursement of monthly payment. The rate of interest granted is the rate provided under Section 31(7)(b) of the Act and is not in accordance with the provisions of the Concessionaire Agreement.

91. In ***Delhi Airport Metro Express (P) Ltd. (Supra),*** the Hon'ble Supreme Court conclusively decided on the question of the rate of interest when there exist an Agreement defining the lines of the same. The relevant paragraphs are reproduced below:

> *"28. It could thus clearly be seen that as per Article 29.8 of the concession Agreement, the termination payment would become due and payable to the Concessionaire by DMRC within thirty days of a demand being made by the Concessionaire. It further provides that if DMRC fails to disburse the full termination payment within 30 days, the amount remaining unpaid shall be disbursed along with interest at an annualised rate of SBI PLR plus two per cent for the period of delay on such amount. It can thus clearly be seen that Article 29.8 of the concession Agreement deals with payment of interest on termination payment amount.*
>
> *XXXXXX*
>
> *30. It is thus clear that the Arbitral Tribunal has directed that the termination payment would be as per the provisions of the concession Agreement and the interest on the termination payment would accrue from 7-8-2013*

> *(i.e. the date 30 days after the demand of termination payment by Damepl on 8-7-2013). It is pertinent to note that though the Arbitral Tribunal has found that the rates of interest on loans taken by the appellant Damepl are lower than SBI PLR + 2%, it has observed that it was beyond the competence of the Arbitral Tribunal to change or alter or modify the provisions of the concession Agreement. The Arbitral Tribunal, therefore, has granted interest at an annualised rate of SBI PLR + 2%, though it had found that the rate of interest on which the loan was taken by the appellant Damepl was on the lower side. The Arbitral Tribunal, therefore, has rightly given effect to the specific Agreement between the parties with regard to the rate of interest. We find that the arbitral Award has been passed in consonance with the provisions as contained in clause (a) of sub-section (7) of Section 31 of the 1996 Act and specifically, in consonance with the phrase "unless otherwise agreed by the parties".*

92. It was argued by the petitioner that the rate of interest may be modified by this Court. So, the issue that arises before this Court is whether the Arbitral Award can be modified by this Court within the ambit of the power enshrined under Section 34 of the Arbitration Act.

93. In ***NHAI v. M. Hakeem*, (2021) 9 SCC 1** the Hon'ble Supreme Court held that the power of the court under Section 34 to "set aside" the Arbitral Award does not include the power to modify such an award. There are limited grounds not dealing with the merits of an award, "limited remedy" under Section 34 is to either set aside an Award or remand a matter under circumstances mentioned under Section 34. Lastly held, Section 34 jurisdiction cannot be assimilated with revisional

jurisdiction under Section 115 CPC. The relevant paragraph is reproduced hereinunder:

> *"35. In Krishna Bhagya Jala Nigam Ltd. v. Harischandra Reddy [Krishna Bhagya Jala Nigam Ltd. v. Harischandra Reddy, (2007) 2 SCC 720] , a judgment of this Court referred to in para 36, this Court reduced the rate of interest for the pre-Arbitration period, pendente lite and future interest. It also referred to a suggestion that a certain amount be reduced from the Awarded amount from Rs 1.47 crores to Rs 1 crore, which the Learned counsel for the respondent therein fairly accepted. Obviously, these orders were also made under Article 142 of the Constitution of India and do not carry the matter very much further. From these judgments, to deduce, in para 39, that the judicial trend appears to favour an interpretation which would read into Section 34 a power to modify, revise or vary an Award is wholly incorrect. The observation found in* ***McDermott [McDermott International Inc. v. Burn Standard Co. Ltd., (2006) 11 SCC 181]*** *decision clearly bound the Learned Single Judge and any decision to the contrary would be incorrect."*

94. In view of the aforesaid pronouncements of the Hon'ble Supreme Court, this Court has no power to modify the rate of interest in the impugned award.

95. It is thus transparent from the aforementioned reasons that claim 11 is liable to be set aside with regards to the rate of interest awarded being contrary to the rate of interest agreed upon by the parties *vide* Concessionaire Agreement. Thus, the impugned arbitral award in terms of Claim no. 11 is not in consonance with Section 31(7)(a) of the Act.

96. The main ground taken by the learned senior counsel for the petitioner while assailing the impugned arbitral award is that the

impugned arbitral award is *ex-facie* erroneous and suffers from patent illegality, arbitrary, and contrary to the contract executed between the parties, and the provisions of law and public policy. The law regarding Patent Illegality and Public Policy of India is no longer *res integra* and has been authoritatively clarified by the Hon'ble Supreme Court in several judicial pronouncements.

97. Before delving into the judicial decisions, it is pertinent to reproduce the relevant portion of Section 34 of the Act, 1996:

> ***"34. Application for setting aside arbitral Award**.—(1) Recourse to a Court against an arbitral Award may be made only by an application for setting aside such Award in accordance with sub-section (2) and subsection (3).*
> *(2) An arbitral Award may be set aside by the Court only if—*
> *the party making the application [establishes on the basis of the record of the Arbitral Tribunal that]—*
> *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*
> *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*
> *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*

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

(a) the Court finds that—

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

the arbitral Award is in conflict with the public policy of India. *[Explanation 1.—For the avoidance of any doubt, it is clarified that an Award is in conflict with the public policy of India, only if,— (i) the making of the Award was induced or affected by fraud or corruption or was in violation of Section 75 or Section 81; or*

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

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

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

(2-A) An arbitral Award arising out of Arbitrations other than international commercial Arbitrations, may also be set aside by the court, if the court finds that the Award is vitiated by Patent Illegality appearing on the face of the Award: *Provided that an Award shall not be set aside merely on the ground of an erroneous application of the law or by reappreciation of evidence.]"*

98. In view of the law laid down by the Hon'ble Supreme Court in the case of ***NHAI (Supra),*** the arbitral award cannot be modified in the proceedings under Section 34 of the Arbitration Act. The impugned

award in Claim no. 11 clearly being irregular with respect to the Concessionaire Agreement, is liable to be set aside.

99. In ***Ssangyong Engineering & Construction Co. Ltd. (Supra)***, the Hon'ble Supreme Court while explaining the scope of the expression 'Public Policy of India' made the following pertinent observations:

> *"23. What is clear, therefore, is that the expression "public policy of India", whether contained in Section 34 or in Section 48, would now mean the "fundamental policy of Indian law" as explained in paragraphs 18 and 27 of Associate Builders (supra), i.e., the fundamental policy of Indian law would be relegated to the "Renusagar" understanding of this expression. This would necessarily mean that the Western Geco (supra) expansion has been done away with. In short, Western Geco (supra), as explained in paragraphs 28 and 29 of Associate Builders (supra), would no longer obtain, as under the guise of interfering with an Award on the ground that the Arbitrator has not adopted a judicial approach, the Court's intervention would be on the merits of the Award, which cannot be permitted post amendment. However, insofar as principles of natural justice are concerned, as contained in Sections 18 and 34(2)(a)(iii) of the 1996 Act, these continue to be grounds of challenge of an Award, as is contained in paragraph 30 of Associate Builders (supra).*
>
> *XXXXXX*
>
> *25. Thus, it is clear that public policy of India is now constricted to mean firstly, that a domestic Award is contrary to the fundamental policy of Indian law, as understood in paragraphs 18 and 27 of Associate Builders (supra), or secondly, that such Award is against basic notions of justice or morality as understood in paragraphs 36 to 39 of Associate Builders (supra). Explanation 2 to Section 34(2)(b)(ii) and Explanation 2 to Section 48(2)(b)(ii) was added by the Amendment Act only so that Western Geco (supra), as understood in*

Associate Builders (supra), and paragraphs 28 and 29 in particular, is now done away with. 26. Insofar as domestic Awards made in India are concerned, an additional ground is now available under sub-section (2A), 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.

27. Secondly, it is also made clear that re-appreciation 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.

28. To elucidate, paragraph 42.1 of Associate Builders (supra), namely, a mere contravention of the substantive law of India, by itself, is no longer a ground available to set aside an arbitral Award. Paragraph 42.2 of Associate Builders (supra), 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.

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30. What is important to note is that a decision which is perverse, as understood in paragraphs 31 and 32 of Associate Builders (supra), 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."*

100. It is pertinent to elaborate on the meaning of the 'Fundamental Policy of Indian Law', as the petitioner has taken a plea that the impugned arbitral award is contrary to the Fundamental Policy of Indian Law and hence, being opposed to the Public Policy of India.

101. In the case of ***Associate Builders vs. Delhi Development Authority*, (2015) 3 SCC 49,** where the Hon'ble Supreme Court clarified the meaning and scope of *"Fundamental Policy of Indian Law"* in the context of Section 34 of the Arbitration Act in the following manner:

> *"28. In a recent judgment,* ***ONGC Ltd. v. Western Geco International Ltd., 2014 (9) SCC 263,*** *this Court added three other distinct and fundamental juristic principles which must be understood as a part and parcel of the fundamental policy of Indian law. The Court held-*
>
> > *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:*
> > *a finding is based on no evidence, or*
> > *an Arbitral Tribunal takes into account something irrelevant to the decision which it arrives at; or*
> > *ignores vital evidence in arriving at its decision, such decision would necessarily be perverse.*
> > *XXXXXX*
> > *33. It must clearly be understood that when a court is applying the "public policy" test to an Arbitration Award, it does not act as a court of*

appeal and consequently errors of fact cannot be corrected. A possible view by the Arbitrator on facts has necessarily to pass muster as the Arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral Award. Thus an Award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score . Once it is found that the Arbitrators approach is not arbitrary or capricious, then he is the last word on facts....."

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35. What then would constitute the "fundamental policy of Indian law" is the question. The decision in ONGC [ONGC Ltd. v. Saw Pipes Ltd., (2003) 5 SCC 705] does not elaborate that aspect. Even so, the expression must, in our opinion, include all such fundamental principles as providing a basis for administration of justice and enforcement of law in this country. Without meaning to exhaustively enumerate the purport of the expression "fundamental policy of Indian law", we may refer to three distinct and fundamental juristic principles that must necessarily be understood as a part and parcel of the fundamental policy of Indian law. The first and foremost is the principle that in every determination whether by a court or other authority that affects the rights of a citizen or leads to any civil consequences, the court or authority concerned is bound to adopt what is in legal parlance called a "judicial approach" in the matter. The duty to adopt a judicial approach arises from the very nature of the power exercised by the court or the authority does not have to be separately or additionally enjoined upon the for a concerned. What must be

remembered is that the importance of a judicial approach in judicial and quasi-judicial determination lies in the fact that so long as the court, tribunal or the authority exercising powers that affect the rights or obligations of the parties before them shows fidelity to judicial approach, they cannot act in an arbitrary, capricious or whimsical manner. Judicial approach ensures that the authority acts bona fide and deals with the subject in a fair, reasonable and objective manner and that its decision is not actuated by any extraneous consideration. Judicial approach in that sense acts as a check against flaws and faults that can render the decision of a court, tribunal or authority vulnerable to challenge.

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38. Equally important and indeed fundamental to the policy of Indian law is the principle that a court and so also a quasi judicial authority must, while determining the rights and obligations of parties before it, do so in accordance with the principles of natural justice. Besides the celebrated audi alteram partem rule one of the facets of the principles of natural justice is that the court/authority deciding the matter must apply its mind to the attendant facts and circumstances while taking a view one way or the other. Non-application of mind is a defect that is fatal to any adjudication. Application of mind is best demonstrated by disclosure of the mind and disclosure of mind is best done by recording reasons in support of the decision which the court or authority is taking. The requirement that an adjudicatory authority must apply its mind is, in that view, so deeply embedded in our jurisprudence that it can be described as a fundamental policy of Indian law.

> *39. No less important is the principle now recognised as a salutary juristic fundamental in administrative law that a decision which is perverse or so irrational that no reasonable person would have arrived at the same will not be sustained in a court of law. Perversity or irrationality of decisions is tested on the touchstone of Wednesbury principle of reasonableness. Decisions that fall short of the standards of reasonableness are open to challenge in a court of law often in writ jurisdiction of the superior courts but no less in statutory processes wherever the same are available.*
> *40. It is neither necessary nor proper for us to attempt an exhaustive enumeration of what would constitute the fundamental policy of Indian law nor is it possible to place the expression in the straitjacket of a definition. What is important in the context of the case at hand is that if on facts proved before them the Arbitrators fail to draw an inference which ought to have been drawn or if they have drawn an inference which is on the face of it, untenable resulting in miscarriage of justice, the adjudication even when made by an Arbitral Tribunal that enjoys considerable latitude and play at the joints in making Awards will be open to challenge and may be cast away or modified depending upon whether the offending part is or is not severable from the rest."*

102. It is therefore clear that the decisive factor is that *first*, the learned Sole Arbitrator had to adopt a judicial approach; *second*, the principles of natural justice had to be upheld; *third*, the decision must not have been egregious, or rather, perverse.

103. In ***R vs. Northumberland Compensation Appeal Tribunal. Ex Parte Shaw,* 1952 1 All ER 122**, Lord Denning made the following pertinent observations:

> *"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 the statute 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, 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 C.B.N.S. 189, but is now well established."*

104. The Privy Council in ***Champsey Bhara Company vs. The Jivraj Balloo Spinning and Weaving Company Ltd.*, AIR 1923 PC 66**, held as follows:

> *"The law on the subject has never been more clearly stated than by Williams, J. in the case of Hodgkinson v. Fernie (1857) 3 C.B.N.S. 189.*
>
> > *"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 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.

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Now the regret expressed by Williams, J. in Hodgkinson v. Fernie 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 then buyer rejected the cotton, the Arbitrators can only have arrived at that result by totally misinterpreting Cl.52."

But they were entitled to give their own interpretation to Cl. 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 erroneous."

105. The Hon'ble Supreme Court in ***Associate Builders vs. Delhi Development Authority (supra)***, while explaining the meaning and scope of Patent Illegality held as follows:

"42. In the 1996 Act, this principle is substituted by the patent illegality' principle which, in turn, contains three sub heads –

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 a 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 sub-head 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.— (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."*

106. In order to decide on the perversity of the impugned award, it is integral to first apply the triple test with regard to the grounds raised by the petitioner in this instant petition.

107. On the basis of the abovementioned analysis, it is evident that the impugned award has failed at the triple test with regard to the award of Claims 7 and 11. The lack of adequate reasoning regarding the award in Claim 7 and the deviation from the Agreement in fixing the rate of interest in Claim 11 shows that there wasn't adequate reasoning and the decision was perverse, respectively. Thus, the award of these claims is found to be patently illegal and contrary to the fundamental policies of India.

108. In ***J.G. Engineers (P) Ltd. v. Union of India,*** **(2011) 5 SCC 758**, the Hon'ble Supreme court held as below:

> *"27. Interpreting the said provisions, this Court in ONGC Ltd. v. Saw Pipes Ltd. [(2003) 5 SCC 705] held that a court can set aside an Award under Section 34(2)(b)(ii) of the Act, as being in conflict with the public policy of India, if it is (a) contrary to the fundamental policy of Indian law; or (b) contrary to the interests of India; or (c) contrary to justice or morality; or (d) patently illegal. This Court explained that to hold an Award to be opposed to public policy, the Patent Illegality should go to the very root of the matter and not*

> *a trivial illegality. It is also observed that an Award could be set aside if it is so unfair and unreasonable that it shocks the conscience of the court, as then it would be opposed to public policy."*

109. Since the Patent Illegality has been observed in the impugned award with respect to certain claims only, the impugned award will not be set aside in its entirety. When the learned Sole Arbitrator has evidently decided on other claims with due regard to the Law and Contract, the Court finds no reason to set aside the entire impugned award and nullify the time and effort by the parties and the learned Arbitral Tribunal wholly.

110. In ***N.H.A.I. vs. The Additional Commissioner*, (2022) 5 AIR Bom R 562** it was held as below:

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

111. In ***J.G. Constructions Pvt. Limited vs. Union of India & Another* (2011) 5 SCC 758**, the Hon'ble Supreme Court held as below:

> *"78. In this case also, the loss to be suffered in case of breach, was a genuine pre-estimated loss, which the Contractor is to pay as compensation for such breach. The Contractor at the time of executing the Contract knew about the said liability. The Arbitrator, by ignoring the agreed terms of Contract and also the legal provision has passed the Award rejecting the counter-Claim of the appellants thereby committing legal misconduct. The entire Award passed by Arbitrator is, therefore, required to be interfered with and liable to be set aside since the appellants would have entitled to adjust the amount payable to the respondent against Claim Nos. 2, 4, 6, 7, 8, 9 and 13, had the Arbitrator not rejected the counter-Claims by committing Patent Illegality and legal misconduct. Therefore, the Learned Arbitrator is required to reconsider the counter-Claims of the respondents and to pass an Award by making necessary adjustment of the amount payable to the Claimant/Contractor against Claim Nos. 2, 4, 6, 7, 8, 9 and 13 in terms of the finding recorded by this Court.*
>
> *79. In view of the above, the appeal filed by the appellants is allowed. The Award passed by the Arbitrator on 05.09.2001 and corrected on 22.09.2001 as well as the order dated 12.12.2003 passed by the Learned Ad hoc Additional District Judge No. 2, Kamrup, Guwahati in Misc. (Arbitration) Case No. 590/2001, are set aside. The Arbitration proceeding is remitted back to the Learned Arbitrator for reconsideration of the counter-Claims of the respondents and for passing an Award by making necessary adjustment of the amount payable to the Contractor/Claimant against his Claim Nos. 2, 4, 6, 7, 8, 9 and 13 in terms of the finding recorded by this Court. Considering the facts and circumstances of the case, we leave the parties to bear their own cost."*

112. It is evident from the aforementioned precedents that there is no Patent Illegality with regards to clauses 2,3,5,6,9, and 10. But, the

arbitral award with regards to Claims 7 and 11 are patently illegal and liable to be set aside. Therefore, as discussed in the foregoing paragraphs, in the present petition, the learned Sole Arbitrator has erred in decreeing the award with respect to Claims 7 and 11. The entire impugned award need not be set aside due to the perversity in one specific claim or counter-Claim.

CONCLUSION

113. In light of the facts, submissions and contentions in the pleadings, and arguments advanced by the parties, and the applicable laws and judgments, this Court is inclined to hold forth that there appears a Patent Illegality in the impugned award passed by the learned Sole Arbitrator on the ground that the impugned award with respect to Claim 7 was not well-reasoned as required by the Act under Section 31(3), and the impugned award with respect to the award in Claim 11 is contrary to the provisions of the Agreement between the parties.

114. Further, the learned Arbitrator has passed the impugned award without considering the afore-mentioned clauses of the Agreement while adjudicating on the rate of interest to be granted. Therefore, the impugned award, being contrary to provisions of the Agreement, suffers from infirmity and patent illegality.

115. In view of the above discussion of facts and law, this Court finds no reason to completely set aside the impugned arbitral award. Therefore, the impugned award is set aside only with regard to Claims 7 and 11 where perversity, and thus Patent Illegality has been observed.

116. Hence, the instant petition is partly allowed with respect to the arbitral award in Claim no. 7 and 11. The Award *qua* these claims is set aside.

117. The petitioner is at liberty to take appropriate steps to initiate the arbitral proceedings *qua* Claim Nos. 7 and 11 in accordance with law.

118. Pending applications, if any, also stand dismissed.

119. The judgment be uploaded on the website forthwith.

(CHANDRA DHARI SINGH)
JUDGE

MARCH 16, 2023/SV/AS