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

% **Date of order : 12th June 2023**

\+ O.M.P.(COMM.) 6/2022

MMTC LIMITED ..... Petitioner

Through: Mr. Chetan Sharma, ASG with Mr. Praveen K. Jain, Ms. Rashmi Kumari, Ms. Shalini Jha, Ms. Anamika Agrawal, Mr. Amit Gupta, Mr. Vinay Yadav and Mr. Saurabh Tripathi, Advocates alongwith Mr. Ashutosh Kumar, Sr. Manager-Law, Mr. Achal Meena, Sr. Manager and Mr. Dinesh Dangi, Sr. Manager

versus

AUST GRAIN EXPORTS PTY. LTD. ..... Respondent

Through: Mr. Sanjay Bansal, Ms. Swati Bansal, Ms. Vaishali Gupta and Ms. Ayushi Bansal, Advocates

CORAM:
HON'BLE MR. JUSTICE CHANDRA DHARI SINGH

JUDGMENT

CHANDRA DHARI SINGH, J

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

> *"It is therefore, most respectfully prayed that this Hon'ble Court may kindly be pleased to set aside the impugned*

Majority Award dated 05.03.2021 passed by the Ld. Arbitrators being Arbitration Case No. 1770 of 2010 titled as MMTC Ltd. vs. M/s Aust Grain Exports Pty. Ltd. before the Indian Council of Arbitration to the extent Claim 1 and Claim 2 of the Petitioner were disallowed by the Tribunal and also to set aside impugned Majority Award dated 05 .03 .2021 whereby the Counter Claims 1 and 3 of the Respondent were allowed;

And pass such other and further orders as deemed fit by this Hon'ble Court."

2. The petitioner had floated a tender for the supply of goods/import of Yellow Peas on a FOB/C&FFO basis with the quantity being 35,000 MTs.(+/-10%) and the shipment period for the said goods was September-October 2009. The respondent participated in the tender and the respondent's bid was found lowest.

3. The bid of the respondent was accepted vide Letter of Intent dated 16th April 2009 and a Contract was entered into between the petitioner and the respondent on 16th April 2009 whereby, terms and conditions for the supply of goods were stipulated between the parties.

4. The petitioner vide an email dated 07th September 2009, enquired from the respondent as to when the consignment would be shipped. In reply to the said letter, vide response dated 08th October 2009, the respondent informed the petitioner that MV Geeta was cancelled due to unforeseen circumstances. The respondents informed vide email dated 16th October 2009, that another vessel, MV Star Lily had been nominated for the said consignment and it will be at load port between 29th October 2009 to 31st November 2009.

5. On 28th October 2009, the respondent stated that the vessel was in transit, but due to bad weather, the vessel would arrive around 05th November 2009. The respondent again vide email dated 04th November 2009, informed that the vessel would start loading on 08/09th November 2009 thus, requested an extension by 15th November 2009, the petitioner extended the same vide email dated 05th November 2009. The respondent requested for another extension up to 30th November 2009 vide email dated 09th November 2009 which was accepted by the petitioner subject to levying applicable penalties. The respondent vide email dated 10th November 2009 raised an objection to the penalty on the ground of Act of God.

6. The petitioner issued an email on 20th November 2009, seeking the immediate status of the vessel, in reply to the said letter vide response dated 23rd November 2009, the respondent stated that after the delay due to weather and port congestion, the vessel had started loading.

7. The consignment was finally shipped on 27th November 2009 and issued a commercial invoice on the same date itself which showed the quantity of goods shipped as per the contract. Consequently, the goods arrived on 01st January 2010.

8. The petitioner vide email dated 14th December 2009 asked the respondent to compensate for the delayed shipment in terms of Clause 20 of the Contract. The respondent vide email dated 15th December 2009 invoked the force majeure clause mentioning the reason behind the delay in payment and requested petitioners to make payments urgently without

deductions. The petitioner vide email dated 17th December 2009 stated that the penalty of US $14 PMT would be applicable on the quantity of 31924.572 MT. shipped per vessel on 27th November 2019 and requested the respondent to give consent through banking channels for a deduction of US $ 446944 towards delayed shipment.

9. On 21st December 2009, the petitioner rejected the claim for invoking a force majeure clause for the delay in shipment and again requested to give consent to the bankers for the deduction of USD 446943.98/- towards the penalty for delayed shipment. The petitioner vide letter dated 24th December 2009 instructed the banker to release the payment of USD 8268464.15/- in favor of the respondent.

10. Due to the aforesaid circumstances, dispute arose between the parties and arbitration was invoked. The Award was passed on 05th March 2021 by the Tribuna

11. The petitioner/claimant in the present petition being aggrieved of the Arbitral Award dated 05th March 2021 wherein the learned Tribunal rejected of Claim no. 1 and 2 of the petitioner and allowed counter claim no. 1 and 3 of the respondent.

SUBMISSIONS

(On behalf of the Petitioner)

12. Mr Chetan Sharma, Learned counsel for the petitioner submitted that the way the Arbitral Tribunal has construed and interpreted the clauses of the Contract, shocks the conscience of the Court. It is further

submitted that the Tribunal has gone to the extent of making a new contract between the parties. Thus, the award which shocks the conscience of the Court is liable to be set aside. The petitioner had relied in this regard on the judgment of the Hon'ble Supreme Court in ***Ssangyong Engineering and Construction Company Ltd. v. NHAI*, 2019 (15) SCC 1311** .

13. It is submitted that time was of the essence since the contract was for perishable goods. It is further submitted that there is a direct bearing on the quality of the goods due to delay in shipment of such goods. The petitioner has placed reliance on the judgment of the Calcutta High Court in the case of ***Kamal Krishna Kundu Chowdhury Vs. Chattoorbhuj Dassa*, AIR 1925 Cal 324** which held that any extension sought for and granted cannot destroy the essential character of the contract to be that time was the essence of the contract.

14. It is submitted that the contemplated compensation under Clauses 20 and 21 of the Contract was wrongly denied. It is further submitted that Clause 20 will apply only in a situation where extension of time of performance is either 'not asked for' or 'refused', but the party is allowed to perform even after the expiry of the 'performance period'.

15. It is contended that the learned Tribunal failed to appreciate that the stipulated shipment period under Clause 4 of the Contract was extended conditionally due to the failure of the respondent. It was wrongly construed that while extending the time period, the petitioner had waived off its rights to claim damages. It is submitted that the

extension was conditional and categorically covered vide emails dated 05th November 2009 and 09th November 2009. The petitioner has further placed reliance on the judgment of the Hon'ble Supreme Court in ***P. Dasa Muni Reddy vs P. Appa Rao*** **AIR 1979 SC 621** wherein it was held that the essential element of waiver is that there must be a voluntary and intentional relinquishment of a right. It is further submitted that Tribunal proceeded beyond its jurisdiction in considering profits made by the petitioner on the onward sale of goods.

16. It is contended that the goods arrived after a delay in shipment of 27 days. It is submitted that the petitioner had claimed liquidated damages/damages for the delayed shipment @ USD 1 PMT per day upto 14 days i.e., USD 446944/- plus an additional amount of USD 415019/- for the further delay of 13 days beyond 14 days. Therefore, total receivables by the claimant from the respondent company comes out to be USD 861,963/- as per the email dated 05th November 2009. The relevant extract is reproduced hereunder:

> "*KINDLY REFER YR MAIL DT.4.11.2009 ON THE ABOVE SUBJECT STP THE SHIPMENT PERIOD IS EXTENDED UPTO 15.11.2009 STP HOWEVER, THE CONTRACTUAL TERMS AND CONDITIONS TO APPLY STP NECESSARY AMENDMENT TO THE LC BEING CARRIED OUT STP REGARDS…..* "

Thus, the petitioner is entitled to claim liquidated damages for the delay in shipment beyond October 2009.

17. It is submitted that the Tribunal failed to appreciate that as per Clause 4, the shipment was to be made during the period between

September - October 2009 and there was a delay of 27 days. It is further submitted that the respondent only apprised of delayed arrival of the vessel at Vancouver due to bad weather and nothing about its effect on the shipment of the goods was intimated to the petitioner. It is submitted that Tribunal has wrongly arrived at a finding that the petitioner never responded to the respondent's email dated 28th October 2009.

18. It is contended that Majority Award has wrongly allowed the counter claims of the respondent *viz.* directing refund of performance bank guarantee invoked by the petitioner and inaction to instruct bankers to deduct damages towards delay. The petitioner has relied on judgment of the Hon'ble Supreme Court in the case of ***The Union of India vs. Ms D.N. Revri & Co. and Ors.*, (1976) 4 SCC 147** which held that Commercial contracts must be interpreted in such a manner as to give efficacy to the contract rather than invalidate it.

19. It is submitted that the petitioner has not pleaded that Clause 20 of the Contract is a rebate clause. The petitioner has relied on the judgment of the Hon'ble Supreme Court in the case of ***Rajasthan State Industrial Development and Investment Corporation & Anr. Diamond & Gem Development Corporation Ltd. & Anr.*, (2013) 5 SCC 470** wherein it was held that a party cannot claim anything more than what is covered by the terms of contract, since contract is a transaction between the two parties and has been entered into with open eyes and with an understanding of nature of the contract. It is submitted that the learned Arbitrators failed to appreciate that a contract is to be interpreted giving the actual meaning to the words contained in the contract and it is not

permissible for the Court to make a new contract. It is further contended that Tribunal failed to consider that Clause 20 of the Contract relates only to 'Rebate' and had nothing to do with liquidated damages even though the heading of the said clause was 'Liquidated Damages'. The learned senior counsel for the petitioner has relied on the judgment of ***M/s H.M. Kamaluddin Ansari & Co. vs. Union of India & Ors.,* (1983) 4 SCC 417** wherein it was held that the headings cannot be used to give different effect to clear words of a Clause where there is no doubt as to the ordinary meaning of the words. It is further held that Arbitrators failed to appreciate that a Rebate is only a discount given by one party to the other for timely performance or for increasing its sales.

20. It is submitted that in the Counter Claim No. 1, the respondent had claimed refund of USD 2,71,950/- i.e. the amount of its Performance Guarantee (PBG) invoked by the petitioner while in Counter Claim No 2 , it had separately claimed for interest @12% p.a. from 12th January 2010 till the date of Award on the above amount of the Counter Claim No 1.

21. It is submitted that while allowing the Counter Claim No. 1, the majority members have not awarded any interest on the awarded amount of Counter Claim No. 1 as the same has been separately claimed in Counter Claim No. 2. Thereafter, the Counter Claim No. 2, the majority members committed illegality by awarding the interest @ 9% p.a. from 12th January 2010 till the date of Award which is in stark violation of Clause no. 13(2) of the Contract as well as in gross contradiction of their own reasoning given in the Award. The Tribunal has rejected the Counter Claim No. 2 for interest but has wrongly awarded the same in the Counter

Claim No. 1 without there being any prayer for the same in the Counter Claim No. 1. Taking the undue benefit of the wrong committed by the Tribunal, the respondent has claimed a huge amount of USD 3,02,613/- towards the interest on the Counter Claim No. 1 in its execution petition.

22. It is submitted that it was recorded in the following orders that the Arbitral Hearing was being conducted despite absence of the presiding Arbitrator or one of the Co-Arbitrators:

1. Order dated 20st January 2012 (Only two Arbitrators were present and signed the order sheet.)

2. Order dated 23rd January 2013 (Only two Arbitrators were present still all three signed the order sheet.)

3. Order dated 13th February 2014 (Only two Arbitrators signed the order sheet but reason of omission of signature of 3rd Arbitrator is not mentioned.)

4. Order dated 26th May 2014 (Only two Arbitrators signed the order sheet but reason of omission of signature of 3rd Arbitrator not mentioned.)

5. Order dated 10th July 2014 (Only two Arbitrators are present and signed.)

6. Order dated 27th April 2015 (Only one Arbitrator is present.)

7. Order dated 04th April 2016 (Only two Arbitrators are present and signed the order sheet.)

8. Order dated 11nd February 2019 (Only two Arbitrators are present and signed the order sheet.)

9. Order dated 16th July 2019 (Only presiding Arbitrator has signed the order sheet. Reasons for omitted signature of both Co-Arbitrators not mentioned. Part arguments heard on this date.)

23. It is contended that the cross examination of the witnesses was recorded in the absence of the Presiding Arbitrator on 11th February 2019 and "thirteen issues" were framed on 23rd January 2013 in absence of a Co-Arbitrators. Further, on 16th July 2019, part arguments were heard but only the Presiding Arbitrator has signed over the order sheet without specifying the reasons for missing signatures of the Co-Arbitrators. It is further contended that the above-stated arbitral hearings were material ones which required deliberations of all three members of the Tribunal. The petitioner has placed reliance on the judgment of High Court of Bombay in ***Faze Three Exports Ltd.* vs. *Pankaj Trading Co. and Ors.*, 2003 SCC Online Bom 1024** wherein it was observed as follows:

> *"17. As Arbitrators must all act, so must they all act together. They must each be present at every meeting; and the witness and the parties must be examined in the presence of them all; for the parties are entitled to have recourse to the arguments, experience and judgment of each arbitrator at every stage of the proceeding brought to bear on the minds of his fellow judges, so that by conference they shall mutually assist each other in arriving such a decision. In the present case, it is not disputed that there were only two arbitral meetings after the remand i.e., on 12th August, 2002 and 14th August, 2002. The first meeting was merely adjourned and no procedure took place thereunder.*

Therefore the only effective meeting was held on 14th August, 2002 and for the entire period of that meeting, one arbitrator was absent. In such circumstances, the award made by the arbitral tribunal cannot be sustained and has to be set aside.

(emphasis supplied)"

The learned counsel for the respondent has further placed reliance on the judgment of the Karnataka High Court in the case of ***Rudramuni Devaru v. Shrimad Maharaj Niranjan Jagadguru and Ors.*, 2005 SCC Online Kar 17** wherein it was held as under:

"20. ...There is a sound rationale behind the insistence that in a multimember body all the members should participate on all the material dates of enquiry. That insistence helps the members of the arbitral tribunal to influence/ pursue each other, to appreciate each other's view point and ultimately to arrive at a consensus and unanimous opinion, if that is possible or to accept the opinion of the majority with respect and perfect understanding. The arbitral tribunal in this case is deprived of the essence of deliberations from amongst all the members of the arbitral tribunal.

(Emphasis supplied)"

Hence, absence of one of the members of the Tribunal on the date of hearings amounts to improper constitution of the Tribunal, thus the Award is liable to be set aside on this ground itself.

24. It is submitted that the Act, 1996 does not provide for passing of majority & minority awards separately much less on different dates. The Act contemplates passing of "an Arbitral Award" and not separate awards that too on separate dates.

25. Hence, it is prayed by the learned counsel for the petitioner that the instant petition may be allowed and the impugned award may be set aside.

(On behalf of Respondent)

26. *Per Contra*, learned counsel appearing on behalf of the respondent submitted that the impugned Award is well reasoned, based on evidence and understanding of the Contract in question and documentary records produced by the parties in the proceedings. It is submitted that the petitioner failed to produce any evidence to prove loss on account of the alleged delay of 27 days. On the contrary, the respondent successfully proved that the petitioner had earned a huge profit of about 25% above the contract price on the consignment of goods since the price of goods was USD 259/- PMT which went up to USD 316/- PMT in December 2009 at which price it was sold by the petitioner. Hence, the Arbitral Tribunal came to the right conclusion that the petitioner has not suffered any loss because of the alleged delay.

27. It is submitted that the Arbitral Tribunal has held that the contracted delivery schedule was mutually extended with the consent of both parties from 29th October 2009 to 31st November 2009. It is submitted that the respondent did not commit any breach of contract and the petitioner had not suffered any loss because of such an extension of time and the new 'agreed' delivery schedule of 31st November 2009. It is contended that for these reasons the Arbitral Tribunal rejected Claim No. 1 of the petitioner.

28. It is submitted that the Arbitral Tribunal allowed the second claim of the claimant on account of despatch money under Clause 10(20) for an amount of USD 30,620/- which was not opposed by the respondent.

29. It is submitted that the Arbitral Tribunal proceeded to deal with the Counter Claim of refund of the Performance Guarantee of USD 2, 71,950/- which was wrongly encashed by the petitioner on 12th January 2010, in breach of Clause 13(2) of the Contract dated 16th April 2009. The Arbitral Tribunal allowed this Counter Claim, giving the finding in the Award that the Counter-Claimant duly performed the Contract, including delivery of the commodity, strictly according to the specifications, terms and conditions of the Contract, within the stipulated period of shipment and settlement of all Claims, there was no reason or justification to forfeit the Performance Guarantee and it was a breach of Clause 13(2) of the Contract.

30. The Arbitral Tribunal has also allowed Counter Claim No. 3 of the respondent to the tune of USD 42,815/- on account of a delayed payment of the sale consideration. The reasons for allowing this Counter Claim are given in the Award which is legally justifiable and based on the documentary evidence available with the Tribunal.

31. It is submitted that Rule 61 of 'ICA Rules of Arbitration' states that in case of more than one Arbitrator, the Award of the majority shall prevail and be taken as the decision of the Arbitral Tribunal. In the present case, the majority Award has been jointly made by Presiding Arbitrator and Co-Arbitrator.

32. It is further submitted that Rule 67 of 'ICA Rules of Arbitration' states that in case of three or more Arbitrators, the Arbitral Tribunal shall sign the Award and the 'Registrar' of ICA shall give notice in writing to the parties regarding the making and signing of the Award. In the present case, two Arbitrators signed the 'majority Award' on 05th March 2021 and one Arbitrator signed the 'dissenting opinion' on 16th June 2021 and submitted them to the ICA. The Registrar of ICA then notified the parties on 22nd June 2021 about making and signing the 'Award' and in terms of Rule 68(a) duly delivered the signed copy of the Award to both the parties on 05th July 2021.The Arbitral Tribunal became functus officio only after 05th July 2021 under section 32 of the Act, 1996, on delivery of the signed copy of the majority Award and dissenting Award together, 'contemporaneously' on the same day, to the parties.

33. Accordingly, there are no grounds available to the petitioner herein for challenging the instant Award on the grounds under Section 34 of the Act, 1996.

34. In view of the facts and circumstances, the instant petition is *de hors* of any merit and deserves to be rejected outrightly.

ANALYSIS AND FINDINGS

35. The petitioner has assailed the Award dated 05th March 2021 passed by the learned Tribunal, which has been thoroughly perused and considered by this Court. After hearing the parties at length and perusing the record, this Court deems it necessary to narrow down the controversy and dispute between the parties to the following questions:

- Claim no. 1- Claim towards liquidate damages/damages for the delayed shipment @ USD 1/- PMT per day up to 14 days equaling to USD 446944/- .

- Claim no. 2- Claim towards additional amount of USD 415019/- for further delay of 13 days beyond 14 days under Claim 1.

- Interests Claim - Interest on the total of Claim 1 and 2 i.e. USD 861963/- @ 18% p.a. to be calculated from 01st November 2009 till time of payment.

- Counter Claim 1 - Refund of performance Guarantee to the tune of USD 271,950/-.

- Counter Claim 2 - Interest@ 12% p.a. on Counter Claim 1 calculated from 12th January 2010.

- Counter Claim 3 - Interest on delay of payment of invoice dated 27th November 2009 for 25 days @ 12% p.a. amounting to USD 68,905/-.

Accordingly, this Court shall delve into the adjudication upon the aforesaid issues.

36. Before adjudicating upon the merits of the case, it is essential to recapitulate the idea, purpose, goal and objective of the Act, 1996 as well as Section 34 of the Act, 1996 to understand the implications the provisions therein have on the powers and jurisdiction of this Court. It is

a settled law that there are essentially three broad areas in which an Arbitral Award is likely to be challenged under Section 34 of the Act, 1996. Firstly, an Award may be challenged on jurisdictional grounds for example, the non-existence of a valid and binding arbitration Agreement on grounds that go to the admissibility of the claim determined by the Tribunal. Secondly, an Award may be challenged on what may broadly be described as procedural grounds, such as failure to give a party an equal opportunity to be heard. Thirdly, an Award may be challenged on substantive grounds on the basis that the Arbitral Tribunal made a mistake of law. This Court has relied on the judgment of ***Reliance Infrastructure Ltd. v. State of Goa*, 2023 SCC OnLine SC 604** wherein the Hon'ble Supreme Court enunciated upon the scope of Section 34 of the Act, 1996 as follows:

> *"47. Having regard to the contentions urged and the issues raised, it shall also be apposite to take note of the principles enunciated by this Court in some of the relevant decisions cited by the parties on the scope of challenge to an arbitral award under Section 34 and the scope of appeal under Section 37 of the Act of 1996.*
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> *48. In MMTC Limited (supra), this Court took note of various decisions including that in the case of Associate Builders (supra) and exposited on the limited scope of interference under Section 34 and further narrower scope of appeal under Section 37 of the Act of 1996, particularly when dealing with the concurrent findings (of the Arbitrator and then of the Court). This Court, inter alia, held as under:—*
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> > *"11. As far as Section 34 is concerned, the position is well-settled by now that the Court does not sit in*

appeal over the arbitral award and may interfere on merits on the limited ground provided under Section 34(2)(b)(ii) i.e. if the award is against the public policy of India. As per the legal position clarified through decisions of this Court prior to the amendments to the 1996 Act in 2015, a violation of Indian public policy, in turn, includes a violation of the fundamental policy of Indian law, a violation of the interest of India, conflict with justice or morality, and the existence of patent illegality in the arbitral award. Additionally, the concept of the "fundamental policy of Indian law" would cover compliance with statutes and judicial precedents, adopting a judicial approach, compliance with the principles of natural justice, and Wednesbury [Associated Provincial Picture Houses v. Wednesbury Corpn., [1948] 1 K.B. 223 (CA)] reasonableness. Furthermore, "patent illegality" itself has been held to mean contravention of the substantive law of India, contravention of the 1996 Act, and contravention of the terms of the contract.

12. It is only if one of these conditions is met that the Court may interfere with an arbitral award in terms of Section 34(2)(b)(ii), but such interference does not entail a review of the merits of the dispute, and is limited to situations where the findings of the arbitrator are arbitrary, capricious or perverse, or when the conscience of the Court is shocked, or when the illegality is not trivial but goes to the root of the matter. An arbitral award may not be interfered with if the view taken by the arbitrator is a possible view based on facts. (See Associate Builders v. DDA [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204]. Also see ONGC Ltd. v. Saw Pipes Ltd. [ONGC Ltd. v. Saw Pipes Ltd., (2003) 5 SCC 705]; Hindustan Zinc Ltd. v. Friends Coal Carbonisation [Hindustan Zinc Ltd. v. Friends Coal

Carbonisation, (2006) 4 SCC 445]; and McDermott International Inc. v. Burn Standard Co. Ltd. [McDermott International Inc. v. Burn Standard Co. Ltd., (2006) 11 SCC 181])

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

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

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

> *"37. Insofar as domestic awards made in India are concerned, an additional ground is now available under sub-section (2-A), added by the Amendment Act, 2015, to Section 34. Here, there must be patent illegality appearing on the face of the award, which refers to such illegality as goes to the root of the matter but which does not amount to mere erroneous application of the law. In short, what is not subsumed within "the fundamental policy of Indian law", namely, the contravention of a statute not linked to public policy or public interest, cannot be brought in by the backdoor when it comes to setting aside an award on the ground of patent illegality.*
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> *38. Secondly, it is also made clear that reappreciation of evidence, which is what an appellate court is permitted to do, cannot be permitted under the ground of patent illegality appearing on the face of the award.*
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> *39. To elucidate, para 42.1 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204], namely, a mere contravention of the substantive law of India, by itself, is no longer a ground available to set aside an arbitral award. Para 42.2 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204], however, would remain, for if an arbitrator gives no reasons for an award and contravenes Section 31(3) of the 1996 Act, that would certainly amount to a patent illegality on the face of the award.*
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> *40. The change made in Section 28(3) by the Amendment Act really follows what is stated in paras 42.3 to 45 in Associate Builders [Associate Builders v.*

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

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

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

"43. It will thus appear to be a more than settled legal position, that in an application under Section 34, the court is not expected to act as an appellate court and reappreciate the evidence. The scope of interference

would be limited to grounds provided under Section 34 of the Arbitration Act. The interference would be so warranted when the award is in violation of "public policy of India", which has been held to mean "the fundamental policy of Indian law". A judicial intervention on account of interfering on the merits of the award would not be permissible. However, the principles of natural justice as contained in Section 18 and 34(2)(a)(iii) of the Arbitration Act would continue to be the grounds of challenge of an award. The ground for interference on the basis that the award is in conflict with justice or morality is now to be understood as a conflict with the "most basic notions of morality or justice". It is only such arbitral awards that shock the conscience of the court, that can be set aside on the said ground. An award would be set aside on the ground of patent illegality appearing on the face of the award and as such, which goes to the roots of the matter. However, an illegality with regard to a mere erroneous application of law would not be a ground for interference. Equally, reappreciation of evidence would not be permissible on the ground of patent illegality appearing on the face of the award.

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

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

"31. The third juristic principle is that a decision which is perverse or so irrational that no reasonable person would have arrived at the same is important and requires some degree of explanation. It is settled law that where:

(i) a finding is based on no evidence, or(ii) an Arbitral Tribunal takes into account something irrelevant to the decision which it arrives at; or(iii) ignores vital evidence in arriving at its decision, such decision would necessarily be perverse.

32. A good working test of perversity is contained in two judgments. In Excise and Taxation Officer-cum-Assessing Authority v. Gopi Nath & Sons [1992 Supp (2) SCC 312], it was held : (SCC p. 317, para 7)
"7. ... It is, no doubt, true that if a finding of fact is arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant material or if the finding so outrageously defies logic as to suffer from the vice of irrationality incurring the blame of being perverse, then, the finding is rendered infirm in law.""

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

be usefully extracted as under:-

> *"26. A cumulative reading of the UNCITRAL Model Law and Rules, the legislative intent with which the 1996 Act is made, Section 5 and Section 34 of the 1996 Act would make it clear that judicial interference with the arbitral awards is limited to the grounds in Section 34. While deciding applications filed under Section 34 of the Act, Courts are mandated to strictly act in accordance with and within the confines of Section 34, refraining from appreciation or reappreciation of matters of fact as well as law. (See Uttarakhand Purv Sainik Kalyan Nigam Ltd. v. Northern Coal Field Ltd. [Uttarakhand Purv Sainik Kalyan Nigam Ltd. v. Northern Coal Field Ltd., (2020) 2 SCC 455 : (2020) 1 SCC (Civ) 570], Bhaven Construction v. Sardar Sarovar Narmada Nigam Ltd. [Bhaven Construction v. Sardar Sarovar Narmada Nigam Ltd., (2022) 1 SCC 75] and Rashtriya Ispat Nigam Ltd. v. Dewan Chand Ram Saran [Rashtriya Ispat Nigam Ltd. v. Dewan Chand Ram Saran, (2012) 5 SCC 306].)*
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> *X X X*
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> *28. This Court has in several other judgments interpreted Section 34 of the 1996 Act to stress on the restraint to be shown by Courts while examining the validity of the arbitral awards. The limited grounds available to Courts for annulment of arbitral awards are well known to legally trained minds. However, the difficulty arises in applying the well-established principles for interference to the facts of each case that come up before the Courts. There is a disturbing tendency of Courts setting aside arbitral awards, after dissecting and reassessing factual aspects of the cases to come to a conclusion that the award needs intervention and thereafter, dubbing the award to be vitiated by either perversity or patent illegality, apart from the other grounds available for annulment of the*

award. This approach would lead to corrosion of the object of the 1996 Act and the endeavours made to preserve this object, which is minimal judicial interference with arbitral awards. That apart, several judicial pronouncements of this Court would become a dead letter if arbitral awards are set aside by categorising them as perverse or patently illegal without appreciating the contours of the said expressions.

29. Patent illegality should be illegality which goes to the root of the matter. In other words, every error of law committed by the Arbitral Tribunal would not fall within the expression "patent illegality". Likewise, erroneous application of law cannot be categorised as patent illegality. In addition, contravention of law not linked to public policy or public interest is beyond the scope of the expression "patent illegality". What is prohibited is for Courts to reappreciate evidence to conclude that the award suffers from patent illegality appearing on the face of the award, as Courts do not sit in appeal against the arbitral award. The permissible grounds for interference with a domestic award under Section 34(2-A) on the ground of patent illegality is when the arbitrator takes a view which is not even a possible one, or interprets a clause in the contract in such a manner which no fair-minded or reasonable person would, or if the arbitrator commits an error of jurisdiction by wandering outside the contract and dealing with matters not allotted to them. An arbitral award stating no reasons for its findings would make itself susceptible to challenge on this account. The conclusions of the arbitrator which are based on no evidence or have been arrived at by ignoring vital evidence are perverse and can be set aside on the ground of patent illegality. Also, consideration of documents which are not supplied to the other party is a facet of perversity falling within

the expression "patent illegality".

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

X X X

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

Co. Ltd., (1994) 6 SCC 485] On the basis of the issues submitted by the parties, the Arbitral Tribunal framed issues for consideration and answered the said issues. Subsequent events need not be taken into account."

(emphasis supplied)

52. In the case of Haryana Tourism Ltd. (supra), this Court yet again pointed out the limited scope of interference under Sections 34 and 37 of the Act; and disapproved interference by the High Court under Section 37 of the Act while entering into merits of the claim in the following words:

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

under Section 37 of the Arbitration Act. The impugned judgment and order passed by the High Court is hence not sustainable."

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

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

37. Keeping these principles in mind regarding the limited scope of intervention of this Court under Section 34 of the Act, 1996, I will now examine the present case.

38. The relevant portion of the Award given by the learned Tribunal regarding claims is reproduced hereinbelow:

"A. Let us first examine clause 20, which is reproduced as under:

> *"Clause No. 20:*
> ***Liquidated Damages** In the event seller fails to effect shipment as per agreed delivery schedule the buyer is entitled to a rebate of US$ I. 00 PAIJT per day subject to a maximum of two weeks. Thereafter, buyer will be free to take legal actions as deemed fit. In addition, Bid Guarantee/ Performance Guarantee will be invoked and forfeited*
>
> *The law with regard to interpretation of contract and its clauses is very clear. If from the plain reading of a clause the understanding of that clause is unambiguous and clear, neither Arbitral Tribunal nor parties can substitute it with any reasoning. In clause 20 the words 'agreed delivery schedule' make it manifestly clear that failure to effect shipment within the agreed Schedule is the pre-condition, ad 'LD or Rebate' would only come if shipment is not effected as per agreed delivery schedule. In our considered view, clause 20 will apply only in a situation where extension of time of performance is either 'not asked for' or 'refused', but the party is allowed to perform even after expiry of performance period. Therefore, we hold that by mutual consent, parties rescheduled the shipment period, affecting delivery schedule. If no loss or damage is caused by change of such schedule by mutual consent, there is no question of LD or penalty. The breach of 'agreed delivery schedule is a pre-condition for invocation of clause 20 which is provided under Clause 4asShipment period. Every amendment of Shipment period will correspondingly change delivery schedule mentioned in Clause 20 and therefore, we find force in the argument of the respondent that after extension of time on 5.11.2009 and 9.11.2009, new Shipment period of 30th November*

2009 became 'Agreed Delivery Schedule' taking tbe respondent out of the scope of Clause 20, as Shipment was completed within such Schedule, on 27th November 2009."

Let us now examine the effect of clause 21 which is as follows:

"Clause 21: Damages
If the goods are not shipped within the contracted period of shipment, the Seller shall be liable to pay to the Buyer on demand without any question whatsoever, damages on account of extra expenditure, loss of revenue or loss of industrial Production in the Buyer's country and loss of other · benefits to the buyer. The quantum of such damages will be determined at the sole discretion of Buyer".

It is a well settled principle of law that LD for a breach, if proved in a contract; can be granted against the parties who had committed such breach. If there is a provision for grant of damages for breach in the contract then damages can be granted, but LD and Damages cannot be granted together. Clause 21 makes it manifestly clear in what situation the Seller is liable to pay damages

(i) On account of extra expenditure,
(ii) Loss of revenue or loss of industrial Production m the Buyer's country and
(iii) loss of other benefits to the buyer.

Neither a case for damages nor any of the conditions has been pleaded nor any evidence produced by the claimant in the claim petition of any such loss, except using the words LD/Damages vaguely in the Claim Petition, jointly, though both are distinct terminologies.

51. Admittedly, Respondent completed Shipment on 27th November 2009. This is also admitted that MV Star Lily left Vancouver Port, started its voyage for Mumbai Port on 27th

November 2009 and reached at Mumbai on 1.1.2010, where goods were received by the Claimant as per the Contract. Therefore, on completion of Shipment within the agreed delivery period, respondent successfully performed its pat1 of the obligations under the contract within the stipulated time, for which heraised Commercial Invoice no. AG/111/10 dt 27.11.2009 for US$ 8,268,464.15 for 3l,924.572 MT Yellow Peas@ US$ 259 PMT, against LC no. 20511091M0000043 dt. 29.05.2009, but instead of accepting the documents and instructing its bank to release the payment against LC, the Claimant chose to remain silent and on 14th December 2009 asked for consent of the respondent for "deduction of Liquidated Damages (towards delay in shipment) as per clause 20 of the Contract", which was denied by the Respondent on 15th December 2009 and thereafter, parties exchanged various emails on this issue which resulted. in more delay in payment of LC. Finally, payment of invoice dated 27.11.2009 was instructed to be released by the Claimant on 24.11.2009 only after respondent's email dated 22nd December 2009 whereby it informed MMTC :

> *"if we do not get payment of the same, our bank will have no option but to recall the documents and we will have no other option but to sell this cargo to another customer",*

It is also important to note here that goods were at high seas and respondent was still the owner of the consignment.

52. Tribunal cannot shut its eyes to the fact that on 16.12.2009, MMTC Ltd floated tender for sale of 3l ,924.572MT Yellow Peas Ex-Ship MV Star Lily and successfully sold it on 23rd December 2009 for INR 47,28,02,911/- which is equivalent to USD 10,104,785.44 (INR 46.79 per USD as on 23.12 .2009) and made a huge profit of USD 1,836,331.25 (appx 23%) on the consignment in question. This fact was brought before this Arbitral Tribunal by the respondent through its pleadings and its application for direction decided by this Tribunal on 5th

April 2016.The payment of the respondent's invoice dated 27.11.2009 was released by MMTC only after confirming aforesaid sale at a huge profit; and this fact is not disclosed by the · MMTC anywhere in Statement of Claims. It is thus established on record that the claimant has not suffered any loss or injury on account of breach as alleged. It is further established beyond doubt that the claimant has not suffered any monetary loss or legal injury clue to extension of time from 31 st October 2009 to 30th November 2009.

53. In view of the above situation, now we come to the legal submission raised by Mr. Sanjay Bansal, learned counsel for the respondent regarding maintainability of claim no. l of US$8,61,963, jointly claimed as Liquidated Damage under clause 20 for 14 days and as Damages under clause 21 for 13 days, in paras 37 and 38 of the Statement of Claims. We fully agree with Mr. Bansal that for making a claim for damages and/or Liquidated Damages for a breach, there has to be a corresponding monetary loss or legal injury to the effected party. In the present case the Claimant has failed to prove that he has suffered nor claims to have suffered any quantifiable or unquantifiable monetary loss or injury as required under sections 73 and 74 of Indian Contract Act and therefore, Claimant is not entitled to any claim for damages or Liquidated Damages. The settled position of law on this point is that when the contract says that an aggrieved is entitled to compensation whether or not actual damage or loss is proved to have been caused by the breach, it merely dispenses with the proof of 'actual loss or damage', however, where it is possible to prove actual damage or loss, such proof is not dispensed with. It does not justify the award of compensation where no legal injury has resulted in consequence of the breach, because compensation is awarded to make good the loss or damage which naturally arose in the usual course of things, or which the parties knew when they made the contract, to be likely to result from the breach. If liquidated damages are awarded to the petitioner even when the petitioner has not suffered any loss,

it would amount to 'unjust enrichment', which cannot be countenanced and has to be eschewed. It is too preposterous on the part of the claimant to submit that it should get the liquidated damages stipulated in the contract even when no loss is suffered. H is also settled Law that only where it is impossible to assess the compensation arising from breach and that factor is coupled with the parties having agreed to a pre-

54. As noted above, at the far end of his arguments in rejoinder, Mr. Sanat Kumar Sr. Advocate argued that in fact clause 20 is not a Liquidated Damages clause, but a 'Rebate' clause therefore it is not necessary for the claimant to prove loss or injury to make claim under clause 20 and by not pressing Force Majeure defence respondent has admitted delay of 27 days entitling the claimant to claim rebate under clause 20. This is nothing but ingenuity on the part of the claimant to somehow justify a part of claim no. l, which we reject for the following reasons:

I. There is no pleading to the effect that clause 20 of the Contract is a Rebate Clause and not Liquidated Damages clause.

II. Even if we agree, for the sake of argument, that clause 20 is -Rebate Clause, still triggering cause of clause 20 will be breach of 'agreed delivery schedule' which in the present case, after extension· of time, is 30th November 2009, hence respondent has not committed any breach of Clause 20 justifying award of Claim No. l under Clause 20, either by way of Liquidated Damages or Rebate

III. The · judgments cited by learned counsel are about interpretation of 'Rebate' in the context of statutory taxation provisons and not in context of understanding contractual terms, therefore, these judgments are not applicable on the facts of the present dispute.

55. In view of the above findings, ***we hold that first claim of the claimant for US$ 861963 is rejected. "***

Claim no. 3-
Claim no. 3
The Claimant has also claimed interest @ 18% from 18.1.2010 on this amount. But as a matter of fact, applicable rate of interest is not provided in the Contract and both the parties have claimed 12% and 18% Interest on their respective claims, therefore, we refer to Arbitration & Conciliation Act, 1996 (as amended) for guidance:

> *31 (7)(a) Unless otherwise agreed by the parties, where and in so far as an arbitral award is for 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 percent higher than the current rate of interest prevalent on the date of award, from the date of award to the date of payment.*

In view of the above provision, we hold that parties in the present proceedings will be liable to pay 9% p.a. Interest on their respective claims.*"*

39. The Hon'ble Supreme Court while discussing the principle of liquidated damages in cases where there is an extension of the time period of the Contract with mutual consent of both the parties, in the judgment of ***Welspun Speciality Solutions Ltd. v. ONGC,*** **(2022) 2 SCC 382** held as follows**:**

> ***"32.*** *In order to examine whether the delayed execution of contract by the Remi Metals was liable for compensation,*

the Tribunal examined whether time was of the essence in the contract. In our considered opinion, "time not being the essence of the contract", as determined by the Arbitral Tribunal, was beyond reproach. Reliance on the contractual conditions and conduct of parties to conclude that existence of extension clause dilutes time being the essence of the contract, was in accordance with rules of contractual interpretation.

33. *In this context, the award conclu Welspun Specialty Solutions Ltd. v. ONGC, (2022) 2 SCC 382 : 2021 SCC OnLine SC 1053 des that as time was not the essence, liquidated damages could not be granted, in the following manner:*

> *"Since time was not the essence of the contract, the measure of damages specified under clause liquidated damages, which was the essence of the contract, cannot be regarded as appropriate for determining the loss sustained by ONGC."*

(emphasis supplied)

34. *In order to consider the relevancy of time conditioned obligations, we may observe some basic principles:*

> *(a) Subject to the nature of contract, general rule is that promisor is bound to complete the obligation by the date for completion stated in the contract. [Refer to Percy Bilton Ltd. v. Greater London Council [Percy Bilton Ltd. v. Greater London Council, (1982) 1 WLR 794 (HL)]]*
>
> *(b) That is subject to the exception that the promisee is not entitled to liquidated damages, if by his act or omissions he has prevented the promisor from completing the work by the completion date. [Refer Holme v. Guppy [Holme v. Guppy, (1838) 3 M & W 387 : 150 ER 1195]]*
>
> *(c) These general principles may be amended by the express terms of the contract as stipulated in this case.*

35. *It is now settled that "whether time is of the essence in a contract", has to be culled out from the reading of the entire contract as well as the surrounding circumstances. Merely*

having an explicit clause may not be sufficient to make time the essence of the contract. As the contract was spread over a long tenure, the intention of the parties to provide for extensions surely reinforces the fact that timely performance was necessary. The fact that such extensions were granted indicates ONGC's effort to uphold the integrity of the contract instead of repudiating the same.

37. *The Arbitral Tribunal construed the aforesaid provision to interpret the term "loss" to mean actual tangible loss provable by evidence, instead of pre-estimated loss. Such interpretation, in the facts and circumstances, could be held to be a reasonable interpretation, as the other party was not able to impugn the same by pointing to any documents or correspondence to the contrary. When a standard form of a contract is utilised, ONGC is assumed in law to have the larger bargaining power to enter into a contract, unless clear intention is shown to the contrary. In this case at hand, a reasonable interpretation against ONGC may be utilised.*

38. *In Saw Pipes case [ONGC v. Saw Pipes Ltd., (2003) 5 SCC 705] , impugned clause for liquidated damages was considered and upheld by this Court in the following manner : (SCC pp. 733 & 740-41, paras 46, 64 & 66)*

> *"46. From the aforesaid sections, it can be held that when a contract has been broken, the party who suffers by such breach is entitled to receive compensation for any loss which naturally arises in the usual course of things from such breach. These sections further contemplate that if parties knew when they made the contract that a particular loss is likely to result from such breach, they can agree for payment of such compensation. In such a case, there may not be any necessity of leading evidence for proving damages, unless the court arrives at the conclusion that no loss is likely to occur because of such breach. Further, in case where the court arrives at the conclusion that the term contemplating damages is by way of penalty, the court may grant reasonable compensation not exceeding the amount so named in the contract on proof of damages.*

However, when the terms of the contract are clear and unambiguous then its meaning is to be gathered only from the words used therein. In a case where agreement is executed by experts in the field, it would be difficult to hold that the intention of the parties was different from the language used therein. In such a case, it is for the party who contends that stipulated amount is not reasonable compensation, to prove the same.

X X X

64. ... Under Section 73, when a contract has been broken, the party who suffers by such breach is entitled to receive compensation for any loss caused to him which the parties knew when they made the contract to be likely to result from the breach of it. This section is to be read with Section 74, which deals with penalty stipulated in the contract, inter alia (relevant for the present case) provides that when a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, the party complaining of breach is entitled, whether or not actual loss is proved to have been caused, thereby to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named. Section 74 emphasises that in case of breach of contract, the party complaining of the breach is entitled to receive reasonable compensation whether or not actual loss is proved to have been caused by such breach. Therefore, the emphasis is on reasonable compensation. ... But if the compensation named in the contract for such breach is genuine pre-estimate of loss which the parties knew when they made the contract to be likely to result from the breach of it, there is no question of proving such loss or such party is not required to lead evidence to prove actual loss suffered by him. ...

X X X

66. In Maula Bux case [Maula Bux v. Union of India, (1969) 2 SCC 554] the Court has specifically held that it

is true that in every case of breach of contract the person aggrieved by the breach is not required to prove actual loss or damage suffered by him before he can claim a decree and the court is competent to award reasonable compensation in a case of breach even if no actual damage is proved to have been suffered in consequence of the breach of contract. The Court has also specifically held that in case of breach of some contracts it may be impossible for the court to assess compensation arising from breach."

39. *Although Saw Pipes case [ONGC v. Saw Pipes Ltd., (2003) 5 SCC 705] was cited by the Arbitral Tribunal, it distinguished the same by observing that the aforesaid case was silent on the aspect. We need to accept the aforesaid distinction based on the different set of circumstances this case emanates from. In Saw Pipes [ONGC v. Saw Pipes Ltd., (2003) 5 SCC 705] , the purchaser therein had extended the time for supply of goods subject to the specific condition that purchaser would recover the agreed stipulated damages from the contractor. Thus, the aspect of waiver is an important distinguishing factor, which was not dealt with in the earlier judgment.*

40. *This brings us to the waiver. It may be noted that ONGC waived liquidated damages twice before giving extension with pre-estimated damages. The approach of the Arbitral Tribunal was to hold that once liquidated damages were waived in the first extension, subsequent extension could not be coupled with liquidated damages unless a clear intention flowed from the contract; while this Court recognises the autonomy of the party to engage in contractual obligation. Such obligation must be contracted in clear terms. From the aforesaid discussion, it is clear that the promisee (ONGC) waived the liquidated damages initially and the same cannot be imposed, unless such imposition was clearly accepted by the parties. In this case, the interpretation of the Arbitral Tribunal could not be faulted as being perverse, for the reasons stated above.*

> ***41.*** *Mr Shyam Divan, learned Senior Counsel, appearing on behalf of the Remi Metals, submitted that the view taken by the Arbitral Tribunal was reasonable, as the loss sustained by ONGC is given on the basis of actual loss. In this situation, the interpretation of the law and the facts provided under the award is a reasonable interpretation, which can be sustained as being a plausible view.*
>
> ***42.*** *This Court cannot interfere with this award, as the award is a plausible view for the following reasons:*
>
> ***42.1.*** *The Arbitral Tribunal's interpretation of contractual clauses having extension procedure and imposition of liquidated damages, are good indicators that "time was not the essence of the contract".*
>
> ***42.2.*** *The Arbitral Tribunal's view to impose damages accrued on actual loss basis could be sustained in view of the waiver of liquidated damages and absence of precise language which allows for reimposition of liquidated damages. Such imposition is in line with the 2nd para of Section 55 of the Contract Act*."

40. The aforesaid judgment held that the interpretation of contractual clauses having procedure for extension of the Contract and imposition of liquidated damages are indicators that time was not the essence of such contract. I will now examine the present case.

41. The Arbitral Tribunal's interpretation and construction of the contract were based on the evidence and the contractual provisions. The Tribunal's findings on issues in Claim No. 1 regarding the extension of time for performance, the applicability of liquidated damages and the invocation of the *force majeure* clause were within its jurisdiction and not manifestly erroneous. The petitioner has not provided convincing

evidence to substantiate its claim of loss due to the alleged delay in shipment. The petitioner's claim for damages under Clause 21 of the Contract is also untenable. The Tribunal rightly held that the petitioner failed to provide any evidence of loss resulting from the alleged delay. The petitioner's claim for damages under Clause 21 of the Contract is also untenable. The Tribunal rightly held that the petitioner failed to provide any evidence of loss resulting from the alleged delay. On the contrary, the respondent successfully demonstrated that the petitioner had earned a substantial profit on the consignment of goods. Therefore, the Tribunal has rightly held that there is no basis to award damages to the petitioner. On the contrary, the respondent successfully demonstrated that the petitioner had earned a substantial profit on the consignment of goods. Therefore, the Tribunal has rightly awarded damages to the respondent.

42. Furthermore, in Claim No. 3, the Tribunal as deemed reasonable to it, has rightly awarded interest @9% p.a. in consonance with Section 31(7) of the Act, 1996. Therefore, this Court finds that the Arbitral Tribunal's Award is well-reasoned, based on the evidence and understanding of the Contract, and does not shock the conscience of the Court. In view of the above facts and circumstances, I do not find any reason to interfere in the findings given by the learned Tribunal *qua* the Claim No. 1 and 3.

43. Now this Court will examine the Counter Claims of the respondent. The relevant portion of the Award is reiterated as follows :

Counter Claim no. 1

"57. Now, we proceed to deal with the counter claims raised by the respondent. It is the admitted case of the parties that after completion of shipment on 27th November 2009, respondent raised commercial invoice on 27.11.2009 for which it claimed to have received full payment on 30.12.2009. This is also admitted case that MMTC forfeited the Performance Guarantee of USD 2,71,950 on 12.1.2010 inspite of objection of the respondent. After invocation of Performance Guarantee on 12.l.2010, the respondent sent email on the same day (Exb.D-8) demanding reference of disputes to arbitration under Clause 23 of the Contract. The power of forfeiture of Performance Guarantee is provided under Clause 13 of the Contract:

> *Clause No. 13: Forfeiture of Performance Guarantee:-*
>
> *1. The Buyer reserve the right to forfeit the Performance Guarantee if the Seller-*
>
> *a) Fails to supply the goods within the specified period*
>
> *b) Commits any breach of Contract or fails to fulfill any term(s) or condition(s) of the Contract.*
>
> *2. The Performance Guarantee will be released to the Seller on successful and satisfactory execution of the Contract. No claim shall be admissible against the Buyer in respect of interest on Performance Guarantee regardless of the time of release.*

It is clear from the plain reading of the above clause that on successful and satisfactory execution of the Contract, the respondent was entitled to release of Performance Guarantee. The Claimant could forfeit it only if the respondent had failed to supply the goods within the specified period. It is important to understand as to what is 'Specified Period' in sub-clause (l)(a) and what is 'Successful and Satisfactory execution ' in sub-clause (2). We have already said that the performance period of the contract is prescribed under Clause 4 wherein Shipment period was fixed as 30th November 2009 with the consent of the parties. It is not the case of the claimant that contract, was not

executed successfully & satisfactorily, as defined under Clause 12 sub-clause (iii) which states "Satisfactory performance of the contract includes delivery of the commodity strictly according to the specifications, terms arid conditions referred herein, within the stipulated period of shipment and settlement of all claims". The Respondent has stated in his Counter Claim no. 1 that "the defendant had performed his part of the contract and MMTC had already accepted the shipment and made full and final payment of the same". In view of the fact that goods were supplied on 27.11.2009, i.e before 30th November 2009 and were duly received by MMTC on 1.1.2010 strictly according to the specifications, terms and conditions of the contract, within the stipulated period of shipment as no objection or claim is raised by claimant on this ground, there was no justification or reason to forfeit Performance Guarantee. Therefore, by forfeiting the Performance Guarantee on 12.1.2010 and causing loss to the respondent, Claimant has committed breach of Clause 13(2) of the Contract. ***Therefore, we allow Counter Claim no. 1 of the M/s Aust Grain Exports Pty Ltd., of refund of Performance Guarantee wrongly forfeited and appropriated by MMTC Ltd., to the tune of US$ 2,71,950.***

Counter Claim no. 3

59. The respondent has made counter claim no.3, claiming USD 68,905 as interest on delay in payment of invoice of US$ 8,268,464.15 for 25 days @ 12% p.a. Admittedly, Invoice was raised on 27.11.2009 and the respondent presented shipping documents in terms of Clause 9 read with Clause 11, for release of payment to his bank on 2.12.2009. The witness of the respondent RW-1 Mr. Sandeep Mohan has stated in para 30 of his evidence by way of affidavit as follows: "I say that the respondent's banker presented the invoice for payment, along with all required documents, to the State Bank of Hyderabad being MMTC's Bank under the LC, on 2nd December 2009 ".The aforesaid statement of the

witness is remained unchallenged in his cross-examination. It is also the admitted case that inspite of repeated mails of the respondent asking for release of payment on record, MMTC was insisting on deduction as per clause 20 and was not releasing the payment of the respondent deliberately. MMTC sold the consignment on 23rd December 2009 and only thereafter, issued instructions to its bank on 24th December 2009 for releasing payment. This Tribunals fails to understand as to why the respondent had issued instructions to its banker on 24th December 2009 (Exb D-5) when the claimant had presented the invoice to the respondent on 27.11.2009. Now if we calculate the period of delay, as per the terms of the contract the payment ought to have been made on 2nd of December 2009. But the same was received by the respondent on 29th December 2009, that is after a delay of 27 days. However for computing the award of interest the tribunal reduces 5 days from this period, that is, from 27th November till 2nd December 2009 as even otherwise the banking transactions take 3 to 5 days' time. So we hold that respondent M/s Aust Grain Exports Pty Ltd. is entitled for interest @9 on the total invoice value amounting to USD 42,815 and not USD 68,905 as claimed. Therefore, ***we hold that MMTC deliberately delayed payment of Invoice of the respondent for a period of 21 days (from 2.12.2009 to 24.12.2009) and consequently allow Counter Claim No. 3 of M/s Aust Grain Exports Pty Ltd. to the extent of US$ 42,815 for 21 days @9% on the total Invoice value****.*

60. In terms of section 31 (8) of the Arbitration & Conciliation Act, 1996 we decide that since both the parties have succeeded in the present arbitration proceedings, none of the parties is entitled to costs. Therefore, we hold that parties shall bear their own costs.

AWARD

1. We award ***US$ 30,620 (US $ Thirty Thousand Six Hundred and Twenty only)*** *to MMTC Ltd. on account of*

Claim no.2 with interest @ 9% p.a. from 18 .01.2010 till the date of award, which is to be adjusted in the amount awarded to M/s Aust Grain Exports Pty Ltd. in para 2 of this award.

2. We award ***US$ 2,71,950(US $ Two Lac Seventy One Thousand Nine Hundred and Fifty*** *only)* *on account of Counter Claim no. i, in favour of M/s Aust Grain Exports Pty Ltd. 'With interest @ 9% p.a. from 12.01.2010 till the date of award. We also award* ***US$42,815(US$ Forty Two Thousand Eight Hundred and Fifteen only)*** *on account of counter claim no.3, in favour of M/s Aust Grain Exports Pty Ltd.*

3. We further award interest @ 9%p.a. on the awarded amounts, from the date of award till the date of payment.**"**

44. The Tribunal has rightly acknowledged that there were delays in the shipment of the goods and the petitioner had extended the time for shipment on multiple occasions, thereby indicating its consent to the revised shipment schedule. It is further rightly held by the Tribunal that the petitioner's contention regarding the delay in shipment which resulted in loss is not substantiated with evidence and the petitioner's encashment of the performance guarantee was in breach of the Contract, therefore, the respondent was entitled to its refund. Furthermore, the respondent has been able to prove loss caused to it due to breach of the Contract by the petitioner by first mutually agreeing to extend the Contract and thereafter wrongfully claiming damages on extension of the Contract period. On the Contrary, the petitioner did not incur any loss and instead earned a substantial profit on the consignment of goods, which also has been successfully proved by the respondent. The Tribunal's decision on these counterclaims was based on its assessment of the evidence and the contractual provisions. The Court finds no grounds to interfere with the

Tribunal's decision on these matters. In view of the above facts and circumstances, I do not find any reason to interfere in the findings given by the learned Tribunal *qua* the Counter Claim No. 1 and 3.

Procedural Irregularity

45. It is contended by the petitioner that there were certain irregularities during the Arbitral Proceedings since some of the Orders are not signed by all the Arbitrators and one of the Arbitrator was not present during some of the Arbitral Proceedings. It is also contended that the majority Award was not signed by all three Arbitrators.

46. The Bombay High Court while dealing with aspect of procedural irregularity in the case of ***Palmview Investments Overseas Limited v. Ravi Arya and Ors.*, 2023 SCC OnLine Bom 966** it was held as follows:

> *"29. In United Bank of India (supra) the Apex Court has held that letter of authority of an individual, who had signed the pleadings on behalf of the company can be cured by the company subsequently. The court held that where suits are instituted or defended on behalf of a public corporation, public interest should not be permitted to be defeated on a mere technicality. Though appellant is not a public corporation, a litigant's interest should not be permitted to be defeated on a mere technicality. Procedural defects which do not go to the root of the matter should not be permitted to defeat a just cause. There is sufficient power in the Courts, under the Code of Civil Procedure, to ensure that injustice is not done to any party who has a just case. As far as possible a substantive right should not be allowed to be defeated on account of a procedural irregularity which is curable. The court also held that in the absence of a person expressly authorised to sign the pleadings on behalf of the company, for example by the Board of Directors passing a resolution*

to that effect or by a power of attorney being executed in favour of any individual, the company can ratify the said action of it's officer in signing the pleadings. Such ratification can be express or implied. Paragraphs 8, 9, 10, 11 and 13 of United Bank of India (supra) read as under:

> *8. In this appeal, therefore, the only question which arises for consideration is whether the plaint was duly signed and verified by a competent person.*
>
> *9. In cases like the present where suits are instituted or defended on behalf of a public corporation, public interest should not be permitted to be defeated on a mere technicality. Procedural defects which do not go to the root of the matter should not be permitted to defeat a just cause. There is sufficient power in the Courts, under the Code of Civil Procedure, to ensure that injustice is not done to any party who has a just case. As far as possible a substantive right should not be allowed to be defeated on account of a procedural irregularity which is curable.*
>
> *10. It cannot be disputed that a company like the appellant can sue and be sued in its own name. Under Order 6 Rule 14 of the Code of Civil Procedure a pleading is required to be signed by the party and its pleader, if any. As a company is a juristic entity it is obvious that some person has to sign the pleadings on behalf of the company. Order 29 Rule 1 of the Code of Civil Procedure, therefore, provides that in a suit by against a corporation the Secretary or any Director or other Principal officer of the corporation who is able to depose to the facts of the case might sign and verify on behalf of the company. Reading Order 6 Rule 14 together with Order 29 Rule 1 of the Code of Civil Procedure it would appear that even in the absence of any formal letter of authority or power of attorney having been executed a person referred to in Rule 1 of Order 29 can, by virtue of the office which he holds, sign and verify the pleadings on behalf of the corporation. In*

addition thereto and de hors Order 29 Rule 1 of the Code of Civil Procedure, as a company is a juristic entity, it can duly authorise any person to sign the plaint or the written statement on its behalf and this would be regarded as sufficient compliance with the provisions of Order 6 Rule 14 of the Code of Civil Procedure. A person may be expressly authorised to sign the pleadings on behalf of the company, for example by the Board of Directors passing a resolution to that effect or by a power of attorney being executed in favour of any individual. In absence thereof and in cases where pleadings have been signed by one of it's officers a Corporation can ratify the said action of it's officer in signing the pleadings. Such ratification can be express or implied. The Court can, on the basis of the evidence on record, and after taking all the circumstances of the case, specially with regard to the conduct of the trial, come to the conclusion that the corporation had ratified the act of signing of the pleading by it's officer.

40. The Arbitral Tribunal in our view, had not acted contrary to the law or disregarded the law but has applied the correct position in law. The Arbitral Tribunal has applied the principles of Order 29 Rule 4 read with Order 6 Rule 14 of the CPC and as noted earlier, there was no fetter in the Arbitral Tribunal in doing so. The Arbitral Tribunal has acted in accordance with the fundamental policy and Indian Law and granted appellant its right to cure the defect. At the cost of repetition, the Arbitral Tribunal, as held in catena of judgments, has held that when a proceeding is filed by company with defective board resolution or even without any board resolution at all, is not fatal and must be permitted to be cured. Procedural defect which do not go to the root of the matter should not be permitted to defeat a just cause. There is sufficient power in the Arbitral Tribunal to ensure that injustice is not done to any party who has a just case. As far as possible a substantive right should not be allowed to be defeated on account of a procedural

irregularity which is curable. If we take away that power then no arbitrator will have power to ensure injustice is not done. This is the law and it is this law which had been applied by the Arbitral Tribunal."

Similarly, in the case of ***Jigar Vikamsey v. Bombay Stock Exchange Limited*, 2009 SCC OnLine Bom 1311** it was held as follows:

***"21.** The grounds of irregularities by the Arbitral Tribunal are not vital and not substantiated by any material or elucidiatory in nature. Such grounds cannot be entertained after the expiry of the statutory period of filing of petition under section 34 of the Act. There is no case of fraud or suppression of vital documents or facts. Admittedly, no trade mark dispute and/or any domain name dispute between the parties was present in any Court. In the present case, as per the Rules, all the necessary and supporting documents and evidence were duly filed and exchanged. The respective Counsel accordingly presented the case also. The reasoned award was passed by conducting the arbitration proceedings in accordance with principle of natural justice."*

47. As held in the aforesaid judgments, the Arbitral Award can suffer from irregularity but the irregularity cannot be a ground to set aside the Award unless such irregularity goes to the root of the matter and shocks the conscience of the Court thus making the Award illegal.

48. In the present facts, the procedural irregularities like some of the Orders not been signed by the Arbitrator and one of the Arbitrators not being present during certain Arbitral Proceeding are such which do not affect the rights of the parties or cause denial of justice to any of the parties. These irregularities are not such which may affect the decision of

the Arbitrators.

49. This Court observes that the majority Award was signed by the Arbitrators passing the majority Award on 5th March 2021 and the dissenting Award was signed by the Arbitrator who was dissenting to the majority Award on 16th June 2021. As per the mandate of ICA the signed copy of the Award was delivered to the parties 5th July 2021 on the same by the Registrar of ICA. Hence, the same does not suffer from any irregularity.

50. In view of the above facts and circumstances, I do not find any reason to interfere in the findings given by the learned Tribunal.

CONCLUSION

51. In the instant case, the learned Tribunal has gone into the issues and facts thoroughly, applied its mind to the pleadings and evidences before it, as well as the terms of the Contract, and then passed a duly considered Award. No ground for setting aside the Award within the four corners of Section 34 of the Act, 1996, has been made out. I have no justifiable reason to take a different view. As noticed above, the grounds which were urged before me by learned counsel for the petitioner in assailing the Award have no force.

52. In what I have already discussed above, the view of the learned Tribunal while awarding the impugned Award is a plausible view. Consequently, the instant petition has no merit and must fail. Accordingly, the same is dismissed with no cost.

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

54. The judgment be uploaded on the website forthwith.

CHANDRA DHARI SINGH, J

JUNE 12 , 2023
Dy/db