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MANU/DE/6416/2023

IN THE HIGH COURT OF DELHI

FAO (OS) (COMM) 117/2020

Decided On: 21.09.2023

Appellants: **Jupiter Rubber Pvt. Ltd.**
Vs.
Respondent: **Union of India**

Hon'ble Judges/Coram:
Yashwant Varma and Dharmesh Sharma, JJ.

Counsels:
For Appellant/Petitioner/Plaintiff: Gautam Narayan, Adv.

For Respondents/Defendant: Aakanksha Kaul, Aman Sahani, Rhea, Advs., Dev P. Bhardwaj, CGSC and Chaahat Khanna, Adv.

JUDGMENT

Dharmesh Sharma, J.

1. This judgment shall decide the present appeal preferred by the appellant/claimant under Section 37 of the Arbitration and Conciliation Act, 1996[1] read with Section 13 of the Commercial Court Act, 2015[2] assailing the impugned judgment dated 27 May 2020 passed by the learned Single Judge of this Court in OMP (COMM) No. 365/2017, thereby partly allowing the petition/OMP filed by the appellant/claimant under Section 34 of the Act where the impugned Award dated 26 May 2017 was challenged.

FACTUAL BACKGROUND:

2. Succinctly stated, the respondent floated a tender on 25 October 2012 for supply of 1,41,309 Light Weight Ground Sheets[3] and pursuant thereto, an offer was made by the appellant/claimant on 26 November 2012 to supply the material @ Rs. 501/-per piece aggregating to Rs. 7,07,95,809/-. This offer was accepted on 13 December 2013 inter alia incorporating that the contract was to be governed by DGS&D-229[4] with upto date addendum and the conditions contained in form DGS&D-68 (Revised)[5]. The tender provided for approval of the goods through 16 numbers of advance samples representing the entire bulk supply, out of which, one number each had to be submitted to the Inspecting Officer, Indentor for each of the 14 consignees and 2 numbers for physical testing with the DIG (Prov.), Directorate General, CRPF, New Delhi and the supplies to be effected within 15 days of the receipt of the order for approval of the goods by the purchaser/respondent.

3. It is the admitted case that the advance samples of the goods were duly approved by the Competent Authority on 10 March 2014 and that information was received by the appellant/claimant on 17 March 2014. The delivery period[6] of the goods as per the tender condition was four months or earlier, from the date of approval of advance samples for the entire quantity and it is common case that in view of delay on the part of the respondent in processing the approval of the samples, the DP was re-fixed from

10 March 2014 to 09 July 2014 or earlier. However, the appellant/claimant offered first lot of goods of 20477 numbers for pre-dispatch inspection on 20 May 2014, after an expiry of more than two and a half month from the date of re-fixation of DP. To cut a long story short, the delivery of goods was not done in bulk but in five lots, details of which are tabulated as under:-

TABLE-A

Quantity of supply	Offer by Appellant of goods for inspection	Actual date of grant of permission/ clearance qua the offer	Time taken by respondent to grant clearance for supply (in days)
20,447	08.05.2014	30.5.2014	22
32,612	20.06.2014	15.09.2014	87
32,358	17.09.2014	17.11.2014	60
35,600	17.11.2014	27.01.2015	87
20,327	29.01.2015	31.03.2015	61

4. It is also an admitted fact that the DP was extended twice, first upto 02 December 2014 and later upto 11 March 2015, and consequent to last delivery made on 25 May 2015, the delay was regularized accordingly vide CRPF Directorate letter No. U-II-1059/2012-2013-Proc-II dated 03 August 2015. The appellant/claimant received 90% payment in respect of the goods supplied under each of the first four lots but while making 90% payment towards fifth lot, a sum of Rs. 70,79,581/-was deducted by the respondent towards Liquidated Damages[7]; and the appellant/claimant was also denied interest on delayed payments.

5. Aggrieved by the imposition of LD and denial of interest by the respondent on delayed payments, the latter being contrary to the provision of 'Interest on Delayed Payment to Small Scale and Ancillary Industrial Undertakings Act, 1993', which the appellant/claimant claimed it was entitled to due to being an SSI Unit, the appellant/claimant invoked the arbitration and made the following claims before the Arbitral Tribunal[8] appointed on 13 June 2016:

> "(a) An award for Rs. 86,14,596/-against Respondent and in favour of Claimant, as pleaded in paragraph 23 hereof;
>
> (b) A declaration that the Respondent is not entitled to impose Liquidated Damages of Rs. 70,79,581/-or any part thereof as against the Claimant;
>
> (c) Interest; interest pendente lite and interest upon award at the rate of 21.075% per annum."

6. The respondent not only contested the claim of the appellant but also raised a counter claim before the AT. Suffice it to state that pointing out that the DP was extended initially from 10 March 2014 to 09 July 2014 thus twice upto 01 December 2014 and 11 March 2015. The fact that delay in supply of goods was regularized without prejudice up to 25 May 2015, it was canvassed that as per Clause 33 of the Schedule to the contract and provisions contained in 14 (7) (i) of the DGS&D-68 (Revised), LD had been imposed to the tune of Rs. 70,79,581/-on account of unprecedented delays in the supply of the goods after taking approval from the Competent Authority. The other claims including for grant of interest raised by the appellant/claimant were vehemently opposed and on the contrary a counter-claim was raised to grant costs of arbitration to the tune of Rs. 2,00,000/-

AWARD PASSED BY THE ARBITRAL TRIBUNAL

7 . The AT vide the impugned award dated 26 May 2017 held that since the appellant/claimant had failed to make supply of the goods within time, it was not entitled to claim any interest; and that in any case there were no terms in the contract providing for levy of interest in case of delayed payments. As regards imposition of LD of Rs. 70,79,581/-, the AT referred to clause 9 of the Tender Condition No. U.II-1059.2012-2013-Proc-II dated 13 December 2013, which provided that the delivery was to be completed within four months or earlier from the date of approval of advance sample for the entire quantity. While holding that the appellant/claimant was bound to supply 1,41,309 numbers of goods @ Rs. 501/-to the respondent within the stipulated time fixed by the parties in the impugned contract, it observed that the appellant/claimant had offered first lot of goods of 20477 for pre-dispatch inspection on 20 May 2014 i.e. after expiry of more than two and a half months from the date of re-fixation of DP (10 March 2014 to 09 July 2014 or earlier) and it was found that the last consignment was received by the GC CRPF, Bilaspur, Chhattisgarh on 23 May 2015 i.e., after lapse of more than one year and five months from the date of placement of supply order against stipulated DP of four months. It was thus held that the goods were not supplied in bulk as per the conditions in the contract rather they were supplied in five lots for appellant/claimant convenience as a result of which pre-inspections by the respondent were delayed as also the payments. Relying on the decision in the case of Ministry of Defence, GOI v. CENREX, Sp. Z.O.O. & Ors.[9] it was held that act of the respondent in recovering LD from the appellant/claimant was legally sustainable, and therefore, further relying on decision by the Bombay High Court in Arbitration Petition No. 4 of 1986 in the case of Dilip Dharamsey Khatau MANU/MH/0325/2013 : (2013) 4 Bom CR 137, it was held that although the respondent was entitled to claim LD for delayed supply of goods in five lots, the deduction of 10% from the contract value of supplies was apparently harsh and in the nature of a 'penalty' thus, the imposition of LD was reduced to 3% from 10% to serve the ends of justice. Accordingly, the respondent was directed to return the balance amount of 7% that was withheld while assessing the payment towards the fifth delivery of the lot within three months from the date of the award failing which the appellant/claimant was made entitled to claim simple interest @ 6% per annum on the balance amount from the date of award till its realization while the other reliefs were declined.

IMPUGNED JUDGMENT

8. Both the parties assailed the impugned award dated 26 May 2017 passed by the AT by filing petitions under Section 34 of the Act. Needless to state that the appellant/claimant challenged the part of the award with regard to imposition of LD as also rejection of his claim on interest on delayed payment whereas the respondent/UOI assailed the award to the extent that LD was reduced from 10% to 3%, which were disposed off vide common impugned order dated 27 May 2020 by the learned Single Judge. Both the parties cited a plethora of case laws as reflected in the impugned judgment. Learned Single Judge after appreciating the record of the matter and considering the submissions made, arrived at the following conclusions:

> (i) that although actual loss was not proven by the respondent, there was no infirmity in the finding recorded by the AT thereby making the respondent entitled to LD since timely supply of the material was extremely crucial to the armed forces and delay in supplies tantamounted to inflicting 'legal injury' upon the respondent in terms of Section 74 of the Contract Act;

(ii) that the AT had assigned cogent reasons to justify the reduction of LD from 10% to 3% as the respondent was only entitled to reasonable compensation and not damages in the nature of 'penalty'; and the Court in exercise of powers under Section 34 of the Act could not substitute the wisdom or a plausible view of the arbitrator. Reliance was placed on the decisions in ONGC v. Saw Pipes MANU/SC/0314/2003 : 2003(5) SCC 705; Union of India v. Mecano Export Import S.A. MANU/DE/0113/2014 and Tower Vision India Pvt. Ltd. vs. Procall P. Ltd. MANU/DE/4958/2012 : 2014 (183) Comp Cas 364 (Delhi).

(iii) that the appellant/claimant was not entitled to any interest on delayed payments since the contract did not contemplate any bifurcation of the supplies and the appellant/claimant was responsible for delayed supplies in five lots as against bulk supply;

9. As regards claim for interest on delay payments by the respondent raised by the appellant/claimant, it would be expedient to reproduce the relevant observations of the learned Single Judge, which read as under:

"46. The next issue that arises is with respect to the claim of the Petitioner for interest on delayed payments. The Arbitrator has rejected the claim on two grounds, that there was no provision in the Contract for grant of interest on delayed payments and there was failure to deliver goods in time. **A perusal of the several documents filed by the Petitioner before the Arbitrator and the categorical stand taken in the Statement of Claim and the rejoinder indicates that the Petitioner had throughout claimed that the Bills were cleared belatedly. The Arbitrator has himself noticed in page 16 of the Award that the Petitioner had annexed documents to justify the claim, but does not even deal with them. In the later part of the Award, the Arbitrator contradicts himself by observing that the Petitioner failed to put on record any copy of the payment to show that the payment was delayed. Petitioner delivered Two lots out of five within the original delivery period and was entitled to payment as per the terms of AT. The Arbitrator has confused the Claim of Interest on delayed payments with the ultimate completion of supply of all the five lots.** No doubt the scope of interference under Section 34 of the Act is limited, but it is equally settled that if the Arbitrator ignores vital evidence, the Award can be interfered with. In **Sunil Kukreja v. North West Sales and Marketing Ltd.**[10], this Court has held as under:-

"12. A bare reading of the above finding of the Arbitrator would clearly show that there is no mention about the admission by the respondent recorded in the MOU regarding the receipt of Rs. 5 crores from the petitioner. Equally, there is no discussion on the oral testimony of the witness of the petitioner and the lack of cross-examination by the respondent and its effect. There is also no discussion on the effect of the answer to question no. 5 given by the witness produced by the respondent in support of its claim. In my view, this is a case of total absence of consideration of evidence led before the Arbitrator. It is not a case where an inference is to be drawn on the evidence led before the Arbitrator because in that case, the Court, in exercise of its powers under Section 34 of the Act, would not act as a Court of Appeal to re-appreciate such evidence. The present is the case of total lack of consideration of the evidence by the Arbitrator.

13. In Associate Builders vs. Delhi Development Authority [MANU/SC/1076/2014 : (2015) 3 SCC 49], Supreme Court has held that where the Arbitrator based his finding on no evidence or ignores vital evidence in arriving at his decision, the said decision would necessarily be perverse and is foul of the fundamental policy of Indian Law. Paragraph 31 of the judgment is instructive in this regard and is reproduced hereinbelow:-

"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. "

14. In **Hindustan Lever Ltd. v. Shiv Khullar**, MANU/DE/0590/2008, **this Court had underlined the difference between reappreciating the evidence and considering where material evidence has been ignored.** It was emphasized that whereas the former would be an activity prohibited while considering the objections under Section 34 of the Act, the latter would be an activity to find out whether the learned Arbitrator has acted within his mandate for the reason the mandate of the Arbitrator is to decide on facts after considering all the relevant facts and not ignoring the same. Paragraphs 17 and 20 of the judgment are important and are reproduced hereinbelow:-

"17. A commonly held belief that while considering objections under Section 34 of the Act the Court cannot look into the evidence before the arbitrator also needs to be clarified. **There is a difference in re-appreciating evidence and considering whether material evidence has been ignored.** Whereas the former would be an activity prohibited while considering objections under Section 34 of the Act for the reason an arbitrator is a chosen forum by the parties to conclude rival issues of fact between the parties, the latter would be an activity to find out whether learned arbitrator has acted within his mandate for the reason the mandate of the arbitrator is to decide on facts after considering all the relevant facts and not ignoring the same.

xxxx xxxx xxxx

20. Even in the realm of evidence, no doubt the provisions of the Evidence Act, 1872 are not strictly applicable before an arbitral forum, but underlying principles thereof would certainly apply. For example, Section 21 of the Evidence Act, 1872 mandates that an admission made by a party is a relevant fact. The said section underlines a fundamental policy of the law that the best evidence of a party is the admission of the opponent. Suppose an arbitrator ignores an admission made by a

party which has not been explained. Would not such an award be liable to be challenged on the plea that by ignoring a material evidence, a fundamental policy of law relating to evidence being violated by the arbitrator, the award is liable to be challenged? Surely, such an award would suffer from the mandate of the arbitrator being violated as also on the ground that the conclusions are perverse. "

47. The second reason for rejecting the claim in my view is against the well-settled law on the discretion of the Arbitrator to grant interest. In the perception of the Arbitrator, the law on interest is that the Arbitrator will have the power to Award interest only when the Contract between the parties so provides. This observation is in the teeth of Section 31 (7) (a) of the Act which clearly stipulates that the Arbitral Tribunal has the power to grant interest on a claim for payment of money, at such rate as it deems reasonable for the whole or any part of the period between the date on which cause of action arose and the date on which the Award is made, unless otherwise agreed by the parties. Thus, when the contract between the parties stipulates **a specific bar on the grant of interest**, the Arbitrator cannot grant interest. Supreme Court recently in case of Jaiprakash Associates Ltd. (Jal) v. Tehri Hydro Development Corporation India Ltd., MANU/SC/0157/2019 has held as under:-

"13. Insofar as power of the arbitral tribunal in granting preference and/or pendente lite interest is concerned, the principles which can be deduced from the various judgments are summed up below:

(a) A Constitution Bench judgment of this Court in the case of Secretary, Irrigation Department, Government of Orissa v. G. C. Roy exhaustively dealt with this very issue, namely, power of the arbitral tribunal to grant preference and pendente lite interest. The Constitution Bench, of course, construed the provisions of the 1940 Act which Act was in vogue at that time. At the same time, the Constitution Bench also considered the principle for grant of interest applying the common law principles. It held that under the general law, the arbitrator is empowered to award interest for the pre-reference, pendente lite or post award period. This proposition was culled out with the following reasoning:

"43. The question still remains whether arbitrator has the power to award interest pendente lite, and if so on what principle. We must reiterate that we are dealing with the situation where the agreement does not provide for grant of such interest nor does it prohibit such grant. In other words, we are dealing with a case where the agreement is silent as to award of interest. On a conspectus of aforementioned decisions, the following principles emerge:

(i) A person deprived of the use of money to which he is legitimately entitled has a right to be compensated for the deprivation, call it by any name. It may be called interest, compensation or damages. This basic consideration is as valid for the period the dispute is pending before the arbitrator as it is for the period prior to the arbitrator entering upon

the reference. This is the principle of Section 34, Civil Procedure Code and there is no reason or principle to hold otherwise in the case of arbitrator.

(ii) An arbitrator is an alternative form (sic forum) for resolution of disputes arising between the parties. If so, he must have the power to decide all the disputes or differences arising between the parties. If the arbitrator has no power to award interest pendente lite, the party claiming it would have to approach the court for that purpose, even though he may have obtained satisfaction in respect of other claims from the arbitrator. This would lead to multiplicity of proceedings.

(iii) An arbitrator is the creature of an agreement. It is open to the parties to confer upon him such powers and prescribe such procedure for him to follow, as they think fit, so long as they are not opposed to law. (The proviso to Section 41 and Section 3 of Arbitration Act illustrate this point). All the same, the agreement must be in conformity with law. The arbitrator must also act and make his award in accordance with the general law of the land and the agreement.

(iv) Over the years, the English and Indian courts have acted on the assumption that where the agreement does not prohibit and a party to the reference makes a claim for interest, the arbitrator must have the power to award interest pendent lite. Thawardas [Seth Thawardas Pherumal v. Union of India, MANU/SC/0070/1955 : (1955) 2 SCR 48: AIR I955 SC 468] has not been followed in the later decisions of this Court. It has been explained and distinguished on the basis that in that case there was no claim for interest but only a claim for unliquidated damages. It has been said repeatedly that observations in the said judgment were not intended to lay down any such absolute or universal rule as they appear to, on first impression. Until Jena case [MANU/SC/0004/1987 : (1988) 1 SCC 418: (1988) 1 SCR 253] almost all the courts in the country had upheld the power of the arbitrator to award interest pendente lite. Continuity and certainty is a highly desirable feature of law.

(v) Interest pendente lite is not a matter of substantive law, like interest for the period anterior to reference (pre-reference period). For doing complete justice between the parties, such power has always been inferred. "

It is clear from the above that the Court decided to fall back on general principle that a person who is deprived of the use of money to which he is legitimately entitled to, has a right to be compensated for the deprivation and, therefore, such compensation may be called interest compensation or damages.

(b) As a sequitur, the arbitrator would be within his jurisdiction to award pre-reference or pendent lite interest even if agreement between the parties was silent as to whether interest is to be awarded or not.

(c) Conversely, if the agreement between the parties specifically

prohibits grant of interest, the arbitrator cannot award pendente lite interest in such cases. This proposition is predicated on the principle that an arbitrator is the creature of an agreement and he is supposed to act and make his award in accordance with the general law of the land and the agreement. This position was made amply clear in G. C. Roy case in the discussion that ensued thereafter:

"44. Having regard to the above consideration, we think that the following is the correct principle which should be followed in this behalf:

Where the agreement between the parties does not prohibit grant of interest and where a party claims interest and that dispute (along with the claim for principal amount or independently) is referred to the arbitrator, he shall have the power to award interest pendente lite. This is for the reason that in such a case it must be presumed that interest was an implied term of the agreement between the parties and therefore when the parties refer all their disputes-or refer the dispute as to interest as such-to the arbitrator, he shall have the power to award interest. This does not mean that in every case the arbitrator should necessarily award interest pendente lite. It is a matter within his discretion to be exercised in the light of all the facts and circumstances of the case, keeping the ends of justice in view. "

(d) Insofar as 1940 Act is concerned, it was silent about the jurisdiction of the arbitrator in awarding pendent lite interest. However, there is a significant departure on this aspect insofar as 1996 Act is concerned. This distinction has been spelt out in Sayeed Ahmed case in the following manner:

"Re: Interest from the date of cause of action to date of award

7 . The issue regarding interest as noticed above revolves around Clause G1.09 of the Technical Provisions forming part of the contract extracted below:

> "G. 1.09. No claim for interest or damages will be entertained by the Government with respect to any money or balance which may be lying with the Government or any become due owing to any dispute, difference or misunderstanding between the Engineer-in Charge on the one hand and the contractor on the other hand or with respect to any delay on the part of the Engineer-in-Charge in making periodical or final payment or any other respect whatsoever. "
>
> xxx xxx xxx
>
> **14.** The decisions of this Court with reference to the awards under the old Arbitration Act making a distinction between the pre-reference period and pendente lite period and the observation therein that the arbitrator has the discretion to award interest during pendente lite period in spite of any bar against interest contained in the contract between the parties are not applicable to arbitrations governed by the Arbitration

and Conciliation Act, 1996. ""

48. Therefore, in my view, this part of the Award, declining the relief of interest suffers from patent illegality, and deserves to be set aside.

49. It is settled law that while setting aside whole or part of the Award under Section 34 of the Act, Court cannot modify the Award. In view of this, the Petitioner is at liberty to initiate appropriate legal proceedings for redressal of its claim for interest."

{bold portions emphasized}

GROUNDS OF APPEAL

10. The impugned judgment dated 27 May 2020 passed by the learned Single Judge is assailed in the present appeal inter alia on the grounds that it was within the jurisdiction of the learned Single Judge while exercising powers under Section 34 of the Act to deal with the claim for interest and grant the relief in the light of the fact that it had been deprived of a substantial amount lawfully due to it for five years; and that a very narrow and restricted interpretation was accorded to the scope and ambit of the power vested under Section 34 of the Act as larger public interest envisaged that instead of remanding back the matter to the arbitration, an end to the litigation should have been brought; and the delay in supplies had been occasioned or was attributable to the acts of omission and commission on the part of the respondent who delayed the process of inspection, testing and consequential grant of clearance for effecting the supply in as much as against a period of 100 days provided under the contract, the respondent consumed 320 days to grant clearance for supply of goods; and that the contract did not create any bar against making supplies in lots, and in any case the mode of supply was acceptable to the respondent ;and lastly that the LD has been imposed despite the fact that there was no agreement qua imposition of LD and no proof of actual damage was accounted for by the respondent. Thus, the appellant assails the impugned order passed by the learned Single Judge in so far as it has been denied the interest on delayed payments by the respondent as also imposition of penalty although reduced to the extent of 3% of the contract value.

11. Notice of the present appeal was issued to the respondent and the present appeal is opposed by filing a detailed written submissions.

ANALYSIS AND REASONS FOR DECISION

12. Having regard to the issues raised and canvassed by the learned counsels at the Bar, it would be apposite to take note of the principles enunciated by the Apex Court in some of the recent decisions on the scope of challenge and interference with an arbitral award under Section 34 as also the scope of appeal under Section 37 of the Act. Before we advert to some recent pronouncements in law, it would be expedient to re-produce the two provisions, which read as under:

"34. Application for setting aside arbitral award.-(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).

(2) An arbitral award may be set aside by the Court only if-(a) the party making

the application establishes on the basis of the record of the arbitral tribunal that-

(i) a party was under some incapacity; or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

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

(b) the Court finds that-

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

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

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

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

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

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

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

(2-A) An arbitral award arising out of arbitrations other than

international commercial arbitrations, may also be set aside by the court, if the court finds that the award is vitiated by patent illegality appearing on the face of the award:

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

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under Section 33, from the date on which that request had been disposed of by the arbitral tribunal:

> Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.

(4) On receipt of an application under sub-section (1), the Court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award.

13. We shall endeavour to explain the scope of the aforesaid provisions in the background of plethora of case law on the subject of arbitration in our country, some of which would be referred hereinafter. However, first things first, it is well ordained that section 34 is neither in the nature of an appellate nor it is in nature of a revisional remedy. It only provides for setting aside awards on very limited grounds, as spelled out vide sub-sections (2) and (3) of Section 34. Secondly, as the marginal note of Section 34 indicates, "recourse" to a court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-sections (2) and (3). In other words, there is a limited right to challenge an award. Thirdly, Section 34 proceedings do not entail a challenge on the merits of the award. Fourthly, it is evident from a reading of sub-section (4) that upon receipt of an application under Section 34(4), the court may adjourn the Section 34 proceedings and direct the Arbitral Tribunal to resume the arbitral proceedings or take such action as would eliminate the grounds for setting aside the arbitral award. Lastly, there is no gain saying that Section 34 is modelled on the UNCITRAL Model Law on International Commercial Arbitration, 1985, under which no power to modify an award is given to a court hearing a challenge to an award[11].

14. In order to further elucidate on the subject, while attempting not to burden this judgment with plethora of case law, we would refer to a few landmark decisions to understand the proposition of law and reach a decision in the instant appeal. In the case of MMTC Ltd. v. Vedanta Ltd. MANU/SC/0221/2019 : (2019) 4 SCC 163, the agreement between the parties envisaged that the goods manufactured by the respondent were to be stored and handled by the appellant as also to be marketed by it raising invoices in the name of the customers after taking 100% advance. It was further stipulated that the amount was then to be remitted to the respondent after deducting service

charges/commission at an agreed rate. It appears that there were certain communications between the parties enabling the appellant to have the liberty to supply the goods to the customers against letter of credit i.e. without advance payment while maintaining that it was the total responsibility of the appellant to ensure the bona fides of the letter of credit furnished as also to ensure that the principal amount besides the interest were paid on the due date against the letter of credit. A dispute arose with regard to supplies made by the appellant to Hindustan Transmission Products Limited ["HTPL"] since payment was not made and the respondent invoked the arbitration clause. The majority of the AT found in favour of the respondent and on the award being challenged, the Single Judge as well as the Division Bench of the High Court of Bombay found in favour of the respondent. On further challenge to the Supreme Court, a plea was advanced as to the arbitrability of the dispute as also the plea that the courts should have come to a different conclusion based on evaluation of evidence on the record as regards the alteration affected by the parties envisaging a distinct type of customers. Further, another plea was taken that the supplies had not been made to HTPL independent of the contract between the parties. Outrightly rejecting the aforesaid pleas, the Supreme Court elucidated the contours of the power under Section 34 and 37 of the Act as under:-

> "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."

15. Further, elaborating on the issue of the powers of the Court in dealing with a challenge to the legality of an award, we may refer to the case of NHAI v. M. Hakeem MANU/SC/0461/2021 : (2021) 9 SCC 1. Herein, the Supreme Court delved into the issue as to: whether power of the Court under Section 34 of the Act to set aside an award of an Arbitrator would include the power to modify such an award. It was a case where the Division Bench of the Madras High Court had disposed of large number of appeals under Section 37 of the Act laying down as matter of law that arbitral awards made under the National Highways Act, 1956 read with Section 34 of the Act should be so read as to permit modification of an arbitral award and thereby the Division Bench enhanced the amount of compensation awarded by the Arbitrator. Frowning upon such course of action, it was categorically held as under:-

> "It can therefore be said that this question has now been settled finally by at least 3 decisions [*McDermott International Inc.* v. *Burn Standard Co. Ltd.*, MANU/SC/8177/2006 : (2006) 11 SCC 181] , [*Kinnari Mullick* v. *Ghanshyam Das Damani*, MANU/SC/0514/2017 : (2018) 11 SCC 328 : (2018) 5 SCC (Civ) 106] , [*Dakshin Haryana Bijli Vitran Nigam Ltd.* v. *Navigant Technologies (P) Ltd.*, MANU/SC/0135/2021 : (2021) 7 SCC 657] of this Court. Even otherwise, to state that the judicial trend appears to favour an interpretation that would read into Section 34 a power to modify, **revise or vary the award would be to ignore the previous law contained in the 1940 Act; as also to ignore the fact that the 1996 Act was enacted based on the Uncitral Model Law** on International Commercial Arbitration, 1985 which, as has been pointed out in *Redfern and Hunter on International Arbitration*, makes it clear that,

given the limited judicial interference on extremely limited grounds not dealing with the merits of an award, the "limited remedy" under Section 34 is coterminous with the "limited right", namely, either to set aside an award or remand the matter under the circumstances mentioned in Section 34 of the Arbitration Act, 1996.

{paragraph 42}

Quite obviously if one were to include **the power to modify an award in Section 34, one would be crossing the Lakshman Rekha and doing what, according to the justice of a case, ought to be done.** In interpreting a statutory provision, a Judge must put himself in the shoes of Parliament and then ask whether Parliament intended this result. Parliament very clearly intended **that no power of modification of an award exists in Section 34 of the Arbitration Act, 1996.** It is only for Parliament to amend the aforesaid provision in the light of the experience of the courts in the working of the Arbitration Act, 1996, and bring it in line with other legislations the world over."

{paragraph 48}
{Bold Emphasized}

16. The dictum that there is no power vested in the Court to modify, revise or vary the terms of an award under section 34 was reiterated in a recent decision titled Hindustan Construction Company Limited v. National Highways Authority of India MANU/SC/0930/2023, that involved a dispute pertaining to interpretation of a condition in a contract. The Arbitral Tribunal consisting of three members passed an award with one member dissenting. Aggrieved by the majority view, the contractor filed application/objections under Section 34 of the Act. The said application was rejected by learned Single Judge on the ground that AT's opinion on the issue of measurement aspect reflected a 'plausible and reasonable view that did not call for interference'. On appeal by NHAI, the Division Bench set aside the order and observed that the award was based on an implausible interpretation of the contract. The Supreme Court held that Courts under Section 34 are not granted the corrective lens and cannot "through process.....forbidden under Section 34" and that the DB's view under Section 37 resulted in substitution of the AT's view and that such substitution was impermissible.. It was further observed:

"For a long time, it is the settled jurisprudence of the courts in the country that awards which contain reasons, especially when they interpret contractual terms, ought not to be interfered with, lightly. The proposition was placed in State of *UP* v. *Allied Constructions:*

> *"[..] It was within his jurisdiction to interpret Clause 47 of the Agreement having regard to the fact-situation obtaining therein. It is submitted that an award made by an arbitrator may be wrong either on law or on fact and error of law on the face of it could not nullify an award.* ***The award is a speaking one. The arbitrator has assigned sufficient and cogent reasons in support thereof. Interpretation of a contract, it is trite, is a matter for arbitrator to determine*** *(see Sudarsan Trading Co. v. The Government of Kerala,* MANU/SC/0361/1989 : (1989) 2 SCC 38 : AIR 1989 SC 890)*Section 30 of the Arbitration Act, 1940 providing for setting aside an award is restrictive in its operation. Unless one or the other condition contained*

in Section 30 is satisfied, an award cannot be set aside. The arbitrator is a Judge chosen by the parties and his decision is final. The Court is precluded from reappraising the evidence. Even in a case where the award contains reasons, ***the interference therewith would still be not available within the jurisdiction of the Court unless, of course, the reasons are totally perverse or the judgment is based on a wrong proposition of law".***

{paragraph 27}

This enunciation has been endorsed in several cases (Ref. *McDermott International Inc.* v. *Burn Standard Co. Ltd.* MANU/SC/8177/2006 : (2006) 11 SCC 181). In *MSK Projects (I) (JV) Ltd* v. *State of Rajasthan* MANU/SC/0840/2011 : (2011) 10 SCC 573 it was held that an error in interpretation of a contract by an arbitrator is "an error within his jurisdiction". The position was spelt out even more clearly in *Associate Builders* MANU/SC/1076/2014 : (2015) 3 SCC 49, where the court said that:

"[..] 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."

{paragraph 42.3. Bold emphasized}

17. Reference can also be invited to a recent decision in the case of Reliance Infrastructure Ltd. v. State of Goa MANU/SC/0553/2023 wherein earlier decision in the case of Delhi Airport Metro Express Private Limited v. Delhi Metro Rail Corporation MANU/SC/0623/2021 : (2022) 1 SCC 131 was reiterated and it was observed as under:-

"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., MANU/SC/1634/2019 : (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., MANU/SC/0008/2021 : (2022) 1 SCC 75] and Rashtriya Ispat Nigam Ltd. v. Dewan Chand Ram Saran [Rashtriya Ispat Nigam Ltd. v. Dewan Chand Ram Saran, MANU/SC/0327/2012 : (2012) 5 SCC 306].)

***

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."

18. That being the legal position, avoiding long academic discussion, we have arrived at the juncture to discuss another dimension of the issue raised in the instant matter which is not awarding interest on delayed payments by the respondent. It would be relevant to refer to the decision in the case of Larsen Air Conditioning and Refrigeration Company v. Union of India[12], wherein the Supreme Court set aside decision by the High Court whereby while disposing an appeal under Section 37 of the Act, it had modified the arbitral award to the extent of reducing the interest from compound interest of 18% to 9% simple interest per annum. It was observed that:

> "The limited and extremely circumscribed jurisdiction of the court under Section 34 of the Act, permits the court to interfere with an award, sans the grounds of patent illegality, i.e., that "illegality must go to the root of the matter and cannot be of a trivial nature"; and that the 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" [ref : Associate Builders(supra)]. The other ground would be denial of natural justice. In appeal, Section 37 of the Act grants narrower scope to the appellate court to review the findings in an award, if it has been upheld, or substantially upheld under Section 34. It is important to notice that the old Act contained a provision which enabled the court to modify an award. However, that power has been consciously omitted by Parliament, while enacting the Act of 1996. This means that the Parliamentary intent was to exclude power to modify an award, in any manner, to the court."
>
> {paragraph 15}

19. In the light of the aforesaid proposition of law, reverting back to the instant matter, a careful perusal of the tabular details referred hereinabove in paragraph (3) of this judgment read vis-a-vis the evidence brought on the record would demonstrate that there is more to the story put forth by the appellant than what meets the eye. First things first, there is no denial to the fact that the contract between the parties envisaged the delivery of goods in bulk supply and not in five different lots. The appellant had been communicated about the approval of the sample admittedly on 17 March 2014 and yet the appellant was not able to effect the delivery as a result of which the parties mutually agreed to extend the date of supplies from 10 March 2014 to 09 July 2014 or earlier. The evidence on the record shows that the details mentioned in Column No. 3 of the 'Table-A' with regard to actual date of grant of permission/clearance qua the offer tell one side of the story inasmuch as the first lot of consignment was delivered on 19 July 2014 after receiving approval on 20 May 2014. It appears that the appellant communicated to the respondent its readiness to supply the second lot of 32612 numbers but with the request for extension of four months which was allowed subject to invocation of LD Clause, and yet the actual dispatch was made on 11 November 2011. Likewise, the third supply was affected on 17 November 2014, whereas the 4th

and 5th lots of consignment were affected on 30 January 2012 and 25 May 2012, as evident on further extension of DP on the request of the appellant.

20. It is but manifest that inordinate and repeated delays in making supplies caused grave legal injury to the respondent not quantifiable in terms of money but considering the paramount requirement of the supplies to the Para Military Forces i.e., CRPF at different locations to deal with various kinds of hardships. Thus, we have no hesitation in concluding that the we find no illegality or irrationality in the approach and reasoning adopted by the learned Single Judge in arriving at the conclusion that the appellant was itself to be blamed for effecting delayed supplies of goods and thus finding justification in the imposition of LD by the respondent in terms of Clause 14(7)(i) of the DGS&D-68 (Revised)[13]. Further, it goes without saying that the learned Single Judge very rightly found no flaw in the reasoning accorded by the AT in reducing the LD from 10% to 3% of the contract value.

21. In so far as the claim of the appellant with regard to denial of interest on delayed payments made by the respondent, it would be pertinent to refer to the details in the tabular forms submitted by the appellant before the AT depicting in different columns the dates of submission of bills towards the 90% of the consignment amount received as also the received date, and the last Column showing the delays.

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TABLE -B
Jupiter Rubber Private Limited

Bill No. (90%)	Submission Dates	Bill Amount (90%)	Amount Received	Received Date	Delay (days)
JR/2014-15/001	19/06/2014	5218266.00	5218266.00	09/07/2014	20
JR/2014-15/002	16/07/2014	2809558.00	2809558.00	01/08/2014	16
JR/2014-15/004	03/09/2014	1191729.00	1191729.00	01/10/2014	28
JR/2014-15/005	28/09/2014	5667362.00	5667362.00	31/12/2014	94
JR/2014-15/006	07/10/2014	3907048.00	3907048.00	11/12/2014	65
JR/2014-15/007	22/10/2014	590228.00	590228.00	13/02/2015	114
JR/2014-15/010	28/10/2014	4540112.00	4540112.00	11/02/2015	75
JR/2014-15/012	30/12/2014	8108535.00	8108535.00	19/02/2015	51
JR/2014-15/014	12/03/2015	1474893.00	1474893.00	25/03/2015	13
JR/2014-15/016	25/03/2015	6481688.00	6481688.00	17/04/2015	23
JR/2014-15/017	25/03/2015	6173272.00	6173272.00	01/04/2015	7
JR/2014-15/018	25/03/2015	3607200.00	3607200.00	12/05/2015	48
JR/2014-15/019	21/05/2015	4206446.00	4206446.00	14/08/2015	85
JR/2015-16/14	27/08/2015	590228.00	590228.00	30/09/2015	34
JR/2014-15/020	30/06/2015	4943216.00	2070081.00	14/08/2015	51
JR/2014-15/021	24/06/2015	4206446.00			
Total		**63716227.00**	**56636646.00**		
Amount Not Received [Principal Amount]			**7079581.00**		

22. A careful perusal of the aforesaid Table-B would show that out of fourteen bills, evidently in respect of two bills, there were inordinate delays of about three months, whereas in case of three bills there were unfathomable delays of about 60 days and the rest of them were processed in about a month or so. Avoiding unnecessary long discussion, the decision by the AT refusing to grant interest for non-existence of an agreement between the parties to that effect, was however flawed since nothing precluded the AT to award interest in view of its suo moto power under Section 31 of the Act[14]. Thus, the impugned order passed by the learned Single Judge declining to interfere or to modify the impugned award in so far as relief of interest on delayed payments by the respondent and instead giving liberty to the appellant to approach the AT for substantiating its claim for interest cannot be said to be illegal, perverse or adopting incorrect approach in law.

RELIEF:

23. In view of the foregoing discussion, the instant appeal is dismissed, thereby

holding that there is no illegality, infirmity or incorrect approach adopted by the learned Single Judge in passing the impugned order dated 27 May 2020 upholding the imposition of penalty for delayed supplies to the extent of 3% of the contract value as also declining the relief of interest on untimely payments by the AT and instead giving liberty to the appellant to initiate appropriate legal proceedings for redressal of its claim for interest afresh before the AT.

The present appeal is disposed of accordingly. No order as to costs.

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[1]The Act

[2]CC Act

[3]Goods

[4]Directorate General of Supplies and Disposals

[5]DGS&D-68 (Revised)
14. Delivery
(1) Time for and date of delivery; the essence of the contract:-The time for and the date of delivery of the stores stipulated in the schedule shall be deemed to be the essence of the contract and delivery must be completed not later than the date(s) as specified in the contract.
(2) Passing of property:-Property in the stores shall not pass to the purchaser unless and until the stores have been delivered to the consignee or interim consignee, as the case may be in accordance with the conditions of the contract.
(7) Failure and termination:-If the contractor fails to deliver the stores or any instalment thereof within the period fixed for such delivery or at any time repudiates the contract before the expiry of such period, the Secretary may without prejudice to the right of the Purchaser to recover damages for breach of the contract:-
(i) recover from the contractor as agreed liquidated damages, including administrative expenses and not by way of penalty a sum equivalent to 2% of the price of any stores which the contractor has failed to deliver within the period fixed for delivery in the schedule for each month or part of a month during which the delivery of such stores may be in arrears where delivery thereof is accepted after expiry of the aforesaid period, provided that the total damages so claimed shall not exceed 10% of the total contract price.

[6]DP

[7]LD

[8]AT

[9]OMP No. 408/2007

[10]208/DHC/2701

[11]Article 34. Application for setting aside as exclusive recourse against arbitral award.-
(1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article.
****
4) The court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the Arbitral Tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the Arbitral Tribunal's opinion will eliminate the grounds for setting aside."

[12]MANU/SC/0876/2023 decided on August 11, 2023

[13]Clause 14. Delivery

[14]31(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 date 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)

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