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

% **Reserved on : 1st May, 2023**
Pronounced on: 31st July, 2023

\+ O.M.P. (COMM) 467/2019 & I.A. 15464/2019 & I.A. 6524/2023

UNION OF INDIA ..... Petitioner

Through: Mr. Bhagwan Swarup Shukla, CGSC with Mr. Vinay Kumar Shukla, Mr. Sarvan Kumar, GP, Ms. Sunita Shukla and Mr. Daghmesh Tripathi, Advocates

versus

BESCO LIMITED (WAGON DIVISION) ..... Respondent

Through: Mr. Jayant Mehta, Sr. Advocate with Mr. Anirudh Bakhru, Mr. Suman Jyoti Khaitan, Mr. Vikas Kumar, Ms. Aarzu Khattar, Mr. Umang Tyagi and Mr. Aditya Sharma, Advocates

CORAM:
HON'BLE MR. JUSTICE CHANDRA DHARI SINGH

JUDGMENT

CHANDRA DHARI SINGH, J

1. The instant petition has been filed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "Act, 1996") to set aside the Arbitral Award dated 02nd May 2019 and the rectified Award dated 31st July 2019 seeking the following prayer:

"***INTERIM RELIEF***

That in view of the above-mentioned facts and circumstances, this Hon'ble Court may be pleased to pass the interim prayers as under:-

a) pass an order, granting a stay on the operation of the impugned order dated 02.05.2019 read with rectified award dated 31.07.2019 till the pendency of the proceedings before this Hon'ble Court;

b) pass an order, waiving the pre-deposit amount for challenging the said impugned award before this Hon'ble Court;

c) pass an order, reducing the pre-deposit amount if under any circumstances the prayer (b) is not allowed;

d) pass any other further order as this Hon'ble court may deem fit and proper in the facts and circumstances of the case.

PRAYER

In view of the aforesaid and in the interest of justice, it is humbly prayed that this Hon'ble Court may be pleased to:
(a)Set aside the Arbitral Award dated 02.05.2019 alongwith the rectified award dated 31.07.2019 passed by the Ld. Sole Arbitrator;
(b)Award the cost of the petition to the Petitioner; and
(c) Pass such other further orders as this Hon'ble Court may deem fit and proper in the circumstances of the case."

FACTUAL MATRIX

2. The petitioner is Indian Railways, one of the transport organization of the country and an autonomous body under Union of India.The respondent is Besco Limited (Wagon Division), a public limited company with headquarters in Kolkata and is engaged in the business of designing

and manufacturing various equipment including the rail wagons which are being supplied to the petitioner.

3. The petitioner floated the E-Tender No. 2011/RS(I)/954/l(TC) dated 23rd June 2011, *inter-alia* inviting tenders for manufacturing and supply of different types of wagons and on 28th June 2011 issued a corrigendum to the said E-Tender as per which a new kind of wagon i.e, BCNHL wagon, had to be manufactured and all the bidders were required to submit the prototype of the wagon and get the same approved by the petitioner and thereafter, start the production of the same. Therefore, now comprising five types of wagons; *viz.* BOXNHL, BOBYN, BTPN, BCNHL and BRN wagons were to be manufactured by the respondent.

4. The respondent submitted its offer to manufacture and supply different type of wagons pursuant to which a Counter Offer was made to the respondent by the petitioner. The respondent conveyed its unqualified acceptance to the said counter offer on 13th January 2012 pursuant to which the respondent was awarded a Contract dated 16th January 2012 by the petitioner.

5. As per the Contract, orders for 2937 wagons were to be released in two tranches by the petitioner in favor of the respondent with 1469 wagon in first tranche (I Tranche) and 1468 wagon in the second tranche(II Tranche).The respondent was placed with the Contract order of 1469 wagons (under I Tranche) and to be qualified for the release of 1468 (under II Tranche), the respondent was required to supply 1021 wagons in the duration of February 2012 to July 2012 i.e. a period of six months.

6. The disputes arose between the parties when the petitioner deducted and diverted 253 wagons from II tranche on the basis that the respondent had failed to supply 50% of the total orders outstanding in accordance with Clause 2.2 of the Contract, which were required before the release of the II tranche.

7. The respondent *vide* legal notice dated 05th April 2013, invoked the arbitration clause as per the terms of the said Contract after the dispute arose from the Contract between the petitioner and the respondent for the supply of wagons. The respondent invoked arbitration on the ground that the petitioner diverting wagons and delaying the release of quantities. The petitioner claims that it had the right to withhold and order wagons as per the Contract.

8. The Award was passed on 02nd May 2019 pursuant to which the respondent filed an application on 24th May 2019 under Section 33 of the Act, 1996 for the rectification, clarification and modification of the impugned Award. The Tribunal passed the rectified Award dated 31st July 2019 wherein the Tribunal partially allowed the rectification, clarification and modification. The petitioner has in the present petition challenged the said Award read with the rectified Award.

SUBMISSIONS

(On behalf of the petitioner)

9. Mr. Bhagawan Swarup Shukla, learned Senior Counsel for the petitioner submitted that the learned Arbitrator, without proper consideration, granted the respondent's claims without justification. It is submitted that the impugned Award dated 02nd May 2019 read along with

rectified Award dated 31st July 2019 is in conflict with the public policy of India and the most basic notions of morality or justice and are outside purview of the contract dated 16th January 2012 executed between the parties.

10. It is submitted that the learned Arbitrator misinterpreted the Contract Clauses and failed to consider the petitioner's submissions. The petitioner asserts that the respondent made false claims and attempted to avoid its obligations under the Contract. It is further submitted that the respondent alleged a breach of Contract and losses, but the petitioner argues that other bidders had more efficient supply rates.

11. The petitioner submitted that the Award favored the respondent without considering the facts of the case. The learned Arbitrator exceeded jurisdiction by awarding claims in favor of the respondent. The petitioner asserts that awarding claims for lawful actions under the Contract constitutes a breach of the public policy of India. The petitioner requests the Court to set aside the impugned Award. At the outset, it is submitted that similarly situated manufacturers were more than 100% compliant in the present tender and performed their respective contracts. However, it is only the respondent who could not perform the Contract due to its own volition and incompetency/fallacy and could only supply 669 wagons during the period of the Contract, for which petitioner could not be made liable.

12. It is submitted that the respondent tried to mislead the learned Arbitrator by including 775 wagons in their calculation wherein 106 wagons were supplied as per amendment no. VI of the Contract dated 08th

May 2012, which was for the supply of additional 243 BOXNHL wagons under 30% option clause. Therefore, the petitioner herein was justified in exercising their right as per the Contract dated 16th January 2012**.**

13. It is submitted that as per the terms and conditions of the Contract issued by the petitioner to the respondent, the liability to procure steel vests entirely on the respondent.

14. It is submitted that the learned Arbitrator has wrongly awarded the allocation of 253 wagons and the alleged losses incurred by the respondent under the Contract. Moreover, it is further submitted that the learned Arbitrator granted the respondent Rs. 40 lakhs as arbitration costs without any basis.

15. It is submitted that the respondent has failed to show any loss incurred due to delay in the release of the II Tranche order. The respondent did not suffer any loss and respondent had outstanding orders of 1009 wagons as on 01st August 2012. The respondent's production line did not remain idle, the same is evident from the amount of processing charges itself which are to the tune of Rs. 6 crores. Therefore, what the respondent is claiming as loss are the expenses incurred by it as can be seen in its 'Statement of Expenditure' certified by their Chartered Accountant.

16. It is further submitted that the release of the II Tranche order to some manufacturers, including the respondent, took time because of cases filed by M/s Cimmco Ltd before various fora, during the said period the petitioner had to hold the release of the quantities in question in these

matters has impacted the requirement of the petitioner and the respondent was aware of it as they participated in the proceedings. It is submitted that the series of these litigations culminated with the judgment dated 04th February 2013 of the Hon'ble Supreme Court pursuant to which tranche orders were released on all other manufacturers including the respondent.

17. It is submitted that the following sequence of events conclusively demonstrates how the impugned Award is perverse and how the respondent has committed serious fraud on the learned Arbitrator and this Court as well;

a. Firstly, Claimant Witness 03 (hereinafter referred to CW-3) submitted his evidence affidavit on 23rd October 2017 claiming Rs. 28,56,53,627.54/- as expenses incurred by the respondent. This amount aligned with the original claim filed by the respondent in its Statement of Claim.

b. Secondly, on 05th June 2018 CW-3 again filed an affidavit where he amended his previous affidavit and drastically reduced the expenses to Rs. 12,22,27,451.80/- by striking off more than 8 heads/entries/particulars from the list of expenses in the previous affidavit. Therefore, the struck-off entries and affidavit dated 23 October 2017 have no bearing on the present case.

c. Thirdly, on 02nd May 2019, the learned Arbitrator gave the Award in favor of the respondent and while doing so, the learned Arbitrator explicitly excluded around 28 or more heads on which the respondent was not entitled to claim any compensation.

d. Fourthly, the respondent was directed to file a "fresh statement of expenses" under various heads excluding the expenses which were held inadmissible by the learned Arbitrator. However, when the respondent noticed that the learned Arbitrator has committed a grave error by basing the Award on an affidavit dated 23rd October 2017, instead of an affidavit dated 05th June 2018, which cannot be relied on as they were expenses and no idling charge has ever been claimed, the respondent decided to exploit it for an unjust enrichment of Rs. 6,78,62,075.93/-.

e. Fifthly, defying all norms of law, justice and morality, the respondent herein reintroduced around 7 or more struck-off entries in its "fresh statement of expenses" dated 24th May 2019 claiming an amount of Rs. 14 crores. It is submitted that despite there being several deductions in the claims made by the learned arbitrator in the Award, it is surprising to note that the amount submitted as a fresh statement of expenses is higher than that of the claim voluntarily modified by the respondent in its affidavit dated 05th June 2018. Therefore, it is evident from above how the respondent/claimant had played fraud upon the learned Tribunal as well as with this Court.

18. It is further submitted that the observation made by the learned Arbitrator, and heavily relied on by the respondent, that the petitioner has compared the performance of the respondent in the contract dated 16th January 2012 with the performance of other manufacturers in contracts awarded to them from 2014 onwards, is factually incorrect. The

comparison has been made with the similarly situated manufacturers who were awarded contracts arising out of the same tender in the same year.

19. It is thus, prayed to this Court that the impugned Award may be set aside as the same conflicts with the public policy of India and the most basic notions of morality or justice and is outside the contract executed between the parties for the reasons stated above.

(On behalf of the respondent)

20. Mr. Jayant Mehta, learned Senior Counsel appearing on behalf of the respondent submitted that it is a settled position of law, culled out from various pronouncements, that the learned Arbitrator is the master of facts and therefore, application of facts and evaluation of evidence is within the exclusive domain of the learned Arbitral Tribunal and interference under Section 34 of the Act, 1996 is not permissible. Moreover, the interference with the Award should be refused under Section 34 of the Act on the ground that the Court has a different view from the view taken by the learned Arbitrator.

21. It is submitted that the findings given in the Award are findings on facts, which are based on the evidence, led before the learned Arbitrator by the parties, and hence, cannot be interfered with before this Court under Section 34 of the Act.

22. It is further submitted that the mandate under Section 34 of the Act, 1996, with respect to the finality of the Award and the party autonomy, as held in the case of ***M/s Dyna Technologies vs. Crompton Greaves Ltd.,*** **(2019) 20 SCC 1**. The Hon'ble Supreme Court in ***Delhi Airport Metro Express Private Limited v. Delhi Metro Rail Corporation Limited,*** **2022**

1 SCC 131 and ***Connaught Plaza Restaurant Pvt. Ltd. vs. Niamat Kaur,* 2013(3) Arb. L.R. 19 (Delhi),** held that while exercising the jurisdiction under Section 34 of the Act, 1996, the Court does not sit as a Court of Appeal to re-assess the material, evidence and terms of the Contract assessed and interpreted by the learned Arbitrator. The principle of law was reaffirmed that the Courts while deciding the applications under Section 34 should mandatorily and strictly act as per Section 34 of the Act, 1996, refraining from appreciation or reappreciation of matters of fact as well as law.

23. It is contended that the aforesaid findings and Award given by the learned Arbitrator vis-a-vis both the two primary claims are pure findings of facts based on both documentary and oral evidence and therefore the said findings cannot be assailed particularly based on re-appreciation of evidence and reliance is placed on ***Associate Builders v. Delhi Development Authority*, (2015) 3 SCC 49**, wherein the Hon'ble Supreme Court opined that the learned Arbitral tribunal is the master of evidence. Therefore, the learned Arbitrator while deciding the said two primary claims has also interpreted the relevant clauses of the Contract.

24. It is further submitted that the interpretation of the Contract is within the jurisdiction of an Arbitrator and cannot be a subject matter of challenge under Section 34 of the Act, 1996 as laid down by this Court in a catena of judgments including in ***JSC Centrodostroy v National Highways Authority of India,* 2014 SCC OnLine Del 132,** wherein this Court opined that the view of the Arbitral Tribunal cannot be substituted because the Court prefers an alternative view on the facts of the case.

Similarly, the Hon'ble Supreme Court in ***Navodaya Mass Entertainment vs. J.M. Combines,*** **(2015) 5 SCC 698,** opined that the Court would not be justified in re-appraising the evidence and substituting its view in place of the Arbitrator.

25. It is further submitted that the learned Arbitral Tribunal held that the decision of the petitioner to deduct and divert 253 wagons from the II tranche allocable to the respondent was illegal and unjustified by observing that the petitioner had committed a breach of Contract. It is further submitted that the learned Arbitral Tribunal observed that the Bank Guarantee furnished by the respondent company aligned with the provisions of the tender notice and the Contract and objections raised by the petitioner that the petitioner is not entitled to free steel till 17th February 2012 was rejected as unsustainable and without any reason.

26. It is contended that the learned Arbitral Tribunal while passing the Award did not exceed the scope of jurisdiction to consider that the expenses (the alleged losses) filed by the respondent on 05th June 2018. It is submitted that the respondent witness was duly cross-examined before the learned Sole Arbitrator and the computation of the said amount is tenable and the same was given at the liberty of the Tribunal. The filing of the modified computation on behalf of the respondent is not a ground for setting aside the Arbitral Award. The computation of the amount is the issue that has to be mandatorily tried by the Court executing the Award and not in the petition under Section 34 of the Act, 1996. It is submitted that the entire process took almost six years that too only because of the dilatory tactics adopted by the petitioner and the petitioner

is still prolonging the legitimate claim of the respondents just to avoid payment of the substantial amount.

27. It has been alleged that the petitioner diverted 253 wagons out of the total quantity of 1468 wagons and awarded 1215 in the II tranche as per the contract dated 16th January 2012. The learned Arbitrator has found this diversion illegal and passed the necessary award for allocation of the said 253 wagons as mentioned in para 113 (i). It is apt to mention herein that the diversion of the quantities is a regular practice of the petitioner.

28. It is submitted that as per the respondent, as on 01st August 2012, i.e. on expiry of 6 months period, the respondent was able to supply 775 wagons in terms of Clause 2.2 of the Contract, which comprise almost the entire quantity to be supplied in the said period vis-a-vis BOQ\IHL wagons and BOBYN wagons, vis-a-vis two other wagons namely BCNHL and BRN 22.9, they were able to supply only one each (part of 775 wagons) the petitioner delayed in fulfilling two of their prior obligations, namely (i) failing to make a timely supply of free steel (ii) delay in freezing the design for the prototypes of the said wagons. Hence, as per the respondent, the entire quantity of the said two wagons which were to be supplied under the first tranche in the said given period of six months were required to be deducted while working out the respondent's obligations of supply to be made in terms of the Clause 2.2 of the Contract.

29. It has been further submitted that the supply of steel, which was the obligation of the petitioner, was delayed for many months and the said delay was contrary to the express written terms and conditions of the

contract duly executed between the petitioner and the respondent which naturally created a handicap for the respondent to manufacture the prototype and getting the same approval and thus prevented the respondent from undertaking the timely manufacture of wagons.

30. It is submitted that the learned Arbitral Tribunal has extensively examined and deliberated upon the evidence and documents on records, the pleadings made by the parties and thereafter arrived at a well-reasoned, logical and plausible interpretation of the Agreement along with the findings of fact and held that the contentions raised by the petitioner are not tenable. The petitioner has failed to make out any ground warranting interference with the well-reasoned and valid award.

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

ANALYSIS AND FINDINGS

32. I have heard the learned counsels for the parties at length, who have taken me through the Award passed by the learned Arbitral Tribunal, provisions of the Contract executed between the parties and the correspondences exchanged between them and all the relevant documents.

33. The petitioner made two broad sets of claims before the learned Arbitrator as follows:

(i) for allocation of the said 253 wagons (119 BOXNHL and 134 BCNHL wagons); in the alternate compensation for Rs. 16,46,00,407/- as loss of profit,

(ii) Claim for a sum of Rs.28,56,53,627.54/- (which was subsequently revised) for loss caused on account of the said delay in releasing the second tranche order by more than eight months.

34. 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 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 dealt with the scope of Section 34 of the Act, 1996 has held as under:

> *"47. Having regard to the contentions urged and the issues raised, it shall also be apposite to take note of the principles enunciated by*

this Court in some of the relevant decisions cited by the parties on the scope of challenge to an arbitral award under Section 34 and the scope of appeal under Section 37 of the Act of 1996.

48. In MMTC Limited (supra), this Court took note of various decisions including that in the case of Associate Builders (supra) and exposited on the limited scope of interference under Section 34 and further narrower scope of appeal under Section 37 of the Act of 1996, particularly when dealing with the concurrent findings (of the Arbitrator and then of the Court). This Court, inter alia, held as under:—

> *"11. As far as Section 34 is concerned, the position is well-settled by now that the Court does not sit in appeal over the arbitral award and may interfere on merits on the limited ground provided under Section 34(2)(b)(ii) i.e. if the award is against the public policy of India. As per the legal position clarified through decisions of this Court prior to the amendments to the 1996 Act in 2015, a violation of Indian public policy, in turn, includes a violation of the fundamental policy of Indian law, a violation of the interest of India, conflict with justice or morality, and the exIence 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.*
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> *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 dIurb 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.

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.*
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> *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 jurIic 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:*
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> *(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.*
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> *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 dIurbing 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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> *xxx*
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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 dIurbing tendency of Courts setting aside arbitral awards, after dissecting and reassessing factual aspects of the cases to come to a conclusion that the award needs intervention and thereafter, dubbing the award to be vitiated by either perversity or patent illegality, apart from the other grounds available for annulment of the award. This approach would lead to corrosion of the object of the 1996 Act and the endeavours made to preserve this object, which is minimal judicial interference with arbitral awards. That apart, several judicial pronouncements of this Court would become a dead letter if arbitral awards are set aside by categorising them as perverse or patently illegal without appreciating the contours of the said expressions.

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

evidence or have been arrived at by ignoring vital evidence are perverse and can be set aside on the ground of patent illegality. Also, consideration of documents which are not supplied to the other party is a facet of perversity falling within the expression "patent illegality".

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

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

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

(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 DIrict 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.""*

35. As per the aforementioned judgment, the Hon'ble Supreme Court has settled the law on the limited grounds of challenge of Section 34 of the Act, 1996. The Court cannot re-examine the evidence and reasonableness of the reasons given by the Arbitrator since, the parties have themselves selected the forum then such forum must be conceded with the power of appraisement of evidence. The Arbitrator is the master of facts and law and has the jurisdiction and authority to decide the issue at hand and if the Tribunal has reached a conclusion after considering all

the material on record. Considering these principles, I will now examine the present case.

36. While deciding upon the issue no. 1 i.e., issue of allocation of the said 253 wagons (119 BOXNHL and 134 BCNHL wagons), in the alternate compensation for Rs. 16,46,00,407/- as loss of profit, the learned Arbitrator has given the following observations and the relevant portion of the same are also reproduced herein below:

> "*97. I have carefully considered the plea of estoppel raised by the respondent. A reading of notice dated 08.03.2013 sent by M/s. Chakraborty and Associates, Advocates, who was engaged by the claimant shows that after setting out reasons for delay in the manufacture of Prototype of BRN 22.9 and BCNHL wagons, the advocate emphasised that there was no default on the part of its client and the reasons for its inability to adhere to delivery schedule were non-availability of free steel and frequent changes in the specifications, drawing and design of the two types of wagons by RDSO. It was also mentioned in the notice that the respondent had, by taking advantage of its own wrong, decided to divert some number of wagons to other firms. It was averred that even if conditions of Clause 2.2 were not fulfilled, the claimant was entitled to the release of second tranche as of right. In the notice, a reference was also made to the case of Cimmco Ltd. to whom the wagons were allotted after initiation of legal proceedings and claimed that there was no legal justification not to release the wagons in the second tranche merely because case was filed by Cimmco Ltd. In the end, it was prayed that the respondent should release the quantity of wagons against the second tranche and the wagons should not be diverted / redIributed to any other firm. In its letter dated 03.04.2013, the claimant acknowledge the receipt of Amendment No. IV and averred that in the*

face of order dated 03.04.2013 passed by the Delhi High Court in the case of M/s. Modern Industries, the deducted wagons should not be allocated to any other manufacturer.

98. A holIic reading of various documents shows that after having protested the threatened diversion of wagons and questioning the decision taken by the competent authority to deduct and divert 253 wagons, the claimant had conveyed unqualified acceptance. It can be reasonably presumed that the claimant had made huge investment for development of infrastructure etc. for manufacture of wagons on behalf of respondent and continuous delay in the supply of free steel had adverse impact not only on the manufacturing activity but also caused financial loss to the claimant. Therefore, the latter was left with no choice but to communicate unqualified acceptance of reduction in the quantity of wagons to be allotted in the second tranche by 253 wagons and diversion thereof to other manufacturers. If the claimant had denied to accept Amendment No. IV, the respondent may have diverted the total quantity of wagons from the second tranche of the claimant and that would have caused immense injury to the latter.

99. <u>AWARD IN THE MATTER OF ARBITRATION BETWEEN MODERN INDUSTRIES AND EXECUTIVE DIRECTOR, RAILWAY STORES</u> :

(i) The facts of that case show that the claimant in that case had submitted offer dated 30.01.2010 against the advertisement issued by respondent on 04.09.2009 for manufacture / fabrication and supply of 10789 wagons of 11 different types. After considering the offer, the respondent awarded contract to Modern Industries for manufacture of 2144 wagons. 899 wagons were withheld to be released in the second tranche. The delivery of wagons allotted in the first

tranche was to be completed by 31.10.2011. Modern Industries sent letter dated 13.09.2010 and conveyed its unconditional acceptance of the allotment made by the respondent. However, it could not adhere to the delivery schedule and sought extension for completing the delivery against the first tranche.

(ii) While granting extension, which was the last extension, vide letter dated 06.07.2012, Director, Railway Stores (W) imposed the following four conditions:

"(a) Please note that the purchaser reserve the right to recover an amount equal to the liquidated damages at the rate prescribed in clause 12 of Indian Railways General Conditions of the contract for delay in supplies after 31.10.2011 for the balance quantity of wagons. If so decided in terms of the contract, from any outstanding dues against this contract or any other contracts for which the President of India is the purchaser notwithstanding the grant of this extension, pending a final decision on this matter after completion of the order and amount of liquidated damages, in terms of clause 12 of Indian Railway General Conditions of contract will be withheld for supplies made in extended period;

(b) that no increase in price on account of any statutory increase in or fresh imposition of customs duty, excise duty, sales tax / VAT, freight or on account of any other tax or duty leviable which takes place after 31.10.2012 for balance quantity of wagons shall be admissible on such of the said stores as are delivered after the said date;

(c) that notwithstanding any stipulation in the contract for increase in price on any other ground, no such increase which takes place on or after 31.10.2012 for balance quantity of wagons shall be admissible on such of the said stores as are delivered after the said date;

(d) but, nevertheless, the purchaser shall be entitled to the benefit of any decrease in price on account of reduction in or remission of customs duty, excise duty, sales tax / VAT or on account of any other tax or duty or on any other ground as stipulated in the price variation clause which takes place after

the expiry of the above mentioned date namely 31.10.2012 for balance quantity of wagon."

(iii) In the meanwhile, Modern Industries approached the respondent and succeeded in persuading it to release a part of the balance quantity. By an order dated 10.03.2011, Director, Railway Stores (W) diverted 268 wagons from the withheld quantity of Modern Industries and allotted the same to other manufacturers.

(iv) After two years and about two months of the diversion of 268 wagons, the claimant sent notice dated 06.05.2013 to Member Mechanical, Railway Board with a copy to Executive Director, Railway Stores, Railway Board for invoking the arbitration clause embodied in the contract. This was followed by filing of a petition in the Delhi High Court under Section 11 of the Arbitration and Conciliation Act, 1996 (for short, the Act') for appointment of an arbitrator to adjudicate the disputes arising out of contract dated 20.09.2010. On being notice by the High Court, the respondent filed reply and raised an objection to the maintainability of the petition. The respondent pleaded that the appointment of an arbitrator was within the exclusive domain of the Railway Board and the High Court cannot usurp that power.

(v) The learned Single Judge of the Delhi High Court overruled objection raised by the respondent to the maintainability of the petition filed under Section 11 of the Act and appointed the undersigned as the Sole Arbitrator to adjudicate all the disputes, claims and the counter claims arising out of contract dated 20.09.2010. He also gave liberty to the respondent to raise all objections including the one that having unconditionally accepted Amendment No. 1 dated 10.03.2011, the claimant is estopped from raising an arbitral dispute.

(vi) The Arbitral Tribunal heard the arguments, scrutinized the record and rejected the objection raised by the respondent to the maintainability of the claim and its plea that the claimant was estopped from questioning the deduction and diversion of 268 wagons because it had given unqualified acceptance by relying upon the law laid down by the Supreme Court. This is

evidence from paragraph 22 to 25 of the Award, which read as under:

"22. However, an important facet of the question framed hereinabove, which remains to be decided is whether the claimant is precluded from questioning diversion of 268 wagons merely because it had conveyed acceptance of order dated 10.03.2011 passed by Director, Railway Stores (W), Railway Board. A careful reading of that order shows that in terms of para 7.0 thereof, the claimant was required to convey its unconditional acceptance. The claimant's response was articulated by use of the following words in letter dated 14.03.2011 "we hereby convey our unconditional acceptance for the released quantity of wagon orders under the above contract on the terms and conditions mentioned therein." This shows that what the claimant had conveyed was unconditional acceptance for the released quantity of wagons and not for diversion of 268 wagons to other manufacturers. On a reading of letter dated 14.03.2011, no person of ordinary prudence can possibly form an opinion that the claimant had unconditionally accepted the decision of the concerned authority to divert 268 wagons from the withheld quantity of the claimant. In my view, the claimant could have refused to communicate its acceptance of order dated 10.03.2011 only at the risk of diversion of entire quantity of withheld wagons and that it could ill afford. It also deserves to be mentioned that if the claimant had intended to unconditionally accept diversion of 268 wagons, then it would have done so without any protest. However, the fact of the matter is that on the same day i.e. 14.03.2011, the claimant made a representation to the MinIer of State for Railways to protest against diversion of 268 wagons and reiterated the same by sending representations dated 18.05.2011, 09.09.2011 and 21.12.2011 to Executive Director, Railway Stores (Steel). All this lends credibility to the claimant's plea that it had not conveyed unconditional acceptance to diversion of 268 wagons to other

manufacturers. As a corollary, I hold that the claimant is not estopped from questioning the legality of order dated 10.03.2011. 23. The question whether a party enjoying dominant position can stifle the rights of the weaker party was considered by the Supreme Court in West Bengal State Electricity Board Vs. Deshbandhu Ghosh (1985) 3 SCC 116 and again in Central Inland Water Transport Corporation Limited Vs. Brojo Nath Ganguly (Supra). In the second case the respondent had challenged Rule 9 (1) of the Service, Discipline and Appeal Rules 1979 framed by the appellant Central Inland Water Transport Corporation Limited and sought a declaration that the rule is ultra vires Article 14 of the Constitution because it gives absolute right to the Corporation to terminate the employment of a permanent employee simply by giving three months' notice. The two Judge Bench referred to a number of precedence, posed the question whether the Courts in this country should not advance with the time and should permit the strong to push the weak to the wall and proceeded to observe :

> *"We have a Constitution for our country. Our judges are bound by their oath to "uphold the Constitution and the laws". The Constitution was enacted to secure to all the citizens of this country social and economic justice. Article 14 of the Constitution guarantees to all persons equality before the law and the equal protection of the laws. The principle deducible from the above discussions on this part of I the case is in consonance with right and reason, intended to secure social and economic justice and conforms to the mandate of the great equality clause in Article 14. This principle is that the courts will not enforce and will, when called upon to do so, strike down an unfair and unreasonable contract, or an unfair and unreasonable clause in a contract, entered into between parties who are not equal in bargaining*

power. It is difficult to give an exhaustive lI of all bargains of this type. No court can visualize the different situations which can arise in the affairs of men.One can only attempt to give some Illustrations. For instance, the above principle will apply where the inequality of bargaining power is the result of the great disparity in the economic strength of the contracting parties. It will apply where the inequality is the result of circumstances, whether of the creation of the parties or not. It will apply to situations In which the weaker party Is In a position In which It can obtain goods or services or means of livelihood only upon the terms Imposed by the stronger party or go without them. It will also apply where a man has no choice, or rather no meaningful choice, but to give his assent to a contract or to sign on the dotted line In a prescribed or standard form or to accept a set of rules as part of the contract, however unfair, unreasonable and unconscionable a clause In that contract or form or rules may be. This principle, however, will not apply where the bargaining power of the contracting parties Is equal or almost equal. This principle may not apply where both parties are businessmen and the contract Is a commercial transaction. In today's complex world of giant corporations with their vast Infrastructural organizations and with the State through Its Instrumentalities and agencies entering Into almost every branch of Industry and commerce, there can be myriad situations which result In unfair and unreasonable bargains between parties possessing wholly disproportionate and unequal bargaining power. These cases can neither be enumerated nor fully illustrated. The court must judge each case on Its own facts and circumstances."

24. The above noted proposition was reiterated In Delhi Transport Corporation Vs. DTC Majdoor

Congress (1991) Supp. 1 see 600. K Ramaswamy, J. who was a member of the Constitution Bench referred to the statement of law In Chltty on contract, 25th edition; volume - I and In Anson's Law of Contract and held 223 "That the freedom of contract must be founded on equality of bargaining power between contracting parties. Though ad idem is assumed, the standard form contract is the rule. The consent or consensus ad idem of a weaker party be totally absent. He must assent to it in terms of the dotted line contract or to forgo the goods or services. The freedom of equal bargaining power is largely an illusion. It was also further held (in para 22 at p.308) that in today's complex world of giant corporations with their vast infrastructural organisations and with the State, through its instrumentalities and agencies has been entering into almost every branch of Industry and commerce and field of service. There can be myriad situations which result in unfair and unreasonable bargain between parties possess wholly disproportionate and unequal bargaining power."

25. In LIC of India Vs. Consumer Education and Research Centre (Supra), the two Judge Bench culled out the following proposition "It is, therefore, the settled law that if a contract or a clause in a contract is found unreasonable or unfair or irrational one must look to the relative bargaining power of the contracting parties. In dotted line contracts there would be no occasion for a weaker party to bargain or to assume to have equal bargaining power. He has either to accept or leave the services or goods in terms of the dotted line contract. His option would be either to accept the unreasonable or unfair terms or forego the service forever. With a view to have the services of the goods, the party enters into a contract with

unreasonable or unfair terms contained therein and he would be left with no option but to sign the contract." (vii) The other plea taken by the respondent was that the issue of "No Claim Certificate" (NCC) should operate as bar to the 224 3 raising of the arbitration dispute was also rejected. In such matters the public authorities always tend to abuse their dominating position and compel the supplier to give 'No Claim Certificate' as a condition for release of the payments. Therefore the issue of 'No Claim Certificate' cannot operate as a bar to maintainability of the claim. A somewhat similar issue was considered in Ambica Construction Vs. Union of India (Supra). In that case contract for additions, alterations, repair and maintenance works of Mancheswar Complex was awarded to the appellant. A formal contract was executed between the parties on 04.03.1993, which provided that the general conditions of contract and standard specifications of the South Eastern Railways shall be applicable to the contract. Since the appellant could not complete the work within the stipulated time, it applied for extension. The request of the appellant was turned down after long lapse of time and certain deductions were made from running bills. After some correspondence, the appellant filed an application under Section 11 of the Act, which was disposed of by the Chief Justice of the Calcutta High Court and one Subrata Bagchi was appointed as the sole arbitrator. The award of the arbitrator was challenged by both the parties. By an order dated 31.1.2000, the learned Single Judge of the Calcutta High Court set aside the award and appointed one Shri G.C. Law as sole arbitrator. The award passed by the second arbitrator was unsuccessfully challenged by the Union of India. However, the appeal filed by it was allowed by the Division Bench of the High Court. In the appeal

filed against the judgement of the Division Bench, the Supreme Court considered the question whether an arbitral dispute could be raised after the issue of No-Claim Certificate by the appellant. The two Judge Bench referred to Clause 43 (2) of the general conditions of the contract and made the following observations

"17. A glance at the said clause will immediately indicate that a no claim certificate is required to be submitted by a contractor once the works are finally measured up. In the instant case the work was yet to be 225 completed and there Is nothing to indicate that the works, as undertaken by the contractor, had been finally measured and on the basis of the same a no claim certificate had been issued by the appellant. On the other hand, even the first Arbitrator, who had been appointed, had come to a finding that no claim certificate had been given under coercion and duress. It is the Division Bench of the Calcutta High Court which, for the first time, came to a conclusion that such no claim certificate had not been submitted under coercion and duress.

18. From the submissions made on behalf of the respective parties and in particular from the submissions made on behalf of the appellant, it is apparent that unless a discharge certificate is given in advance, payment of bills are generally delayed. Although, Clause 43(2) has been included in the General Conditions of Contract, the same is meant to . be a safeguard as against frivolous claims after final measurement. Having regard to the decision Reshmi Constructions it can no longer be said that such a clause in the contract would be an absolute bar to a contractor raising claims which are genuine, even after the submission of such no-claim certificate."

29. In National Insurance Company Limited Vs. Boghara Polyfeb (P) Limited (Supra) another two Judge Bench considered the question relating to the validity of the no dues certificate obtained by the State from the private contractors. The Supreme Court relied upon the observations made in Central Inland Water Transport Corporation Vs. Brojo Nath Ganguly and held that such certificate is inconsequential. Paragraph 49 of that judgment, which is quite instructive is reproduced below:

"49. Obtaining of undated receipts-in-advance in regard to regular/routine payments by government departments and corporate sector is an accepted practice which has come to stay due to adminIrative 226 exigencies and accounting necessities. The reason for insIing upon undated voucher/receipt is that as on the date of execution of such voucher/receipt, payment is not made. The payment is made only on a future date long after obtaining the receipt. If the date of execution of the receipt is mentioned in the receipt and the payment is released long thereafter, the receipt acknowledging the amount as having been received on a much earlier date will be absurd and meaningless. Therefore, undated receipts are taken so that it can be used in respect of subsequent payments by incorporating the appropriate date. But many a time, matters are dealt with so casually, that the date is not filled even when payment is made. Be that as it may. But what is of some concern is the routine insIence by some government Departments, statutory Corporations and government Companies for issue of undated "no due certificates" or a "full and final settlements vouchers" acknowledging receipt of a sum which is smaller than the claim in full and final settlement of all claims, as a condition precedent for releasing even the admitted dues. Such a procedure requiring

the claimant to issue an undated receipt (acknowledging receipt of a sum smaller than his claim) in full and final settlement, as a condition for releasing an admitted lesser amount, is unfair, irregular and illegal and requires to be deprecated."
(viii) In Asian Techs Limited Vs. Union of India, the Supreme Court considered the question whether after issuance of full and final settlement of discharge / voucher / no-dues certificate, the contractor is entitled to claim further compensation. After relying upon the observations made in National Insurance Company Limited Vs. Boghara Polyfeb (P) Limited, it was observed :
"20. It has been held by this Court in National Insurance Company Ltd vs. Boghara Polyfab Pvt. Ltd. that even in the case of issuance of full and final discharge/settlement voucher/no-dues certificate the arbitrator or court can go Into tho question whether the liability has been satisfied or not. This decision has followed the view taken in NTPC Ltd. vs. Reshmi Constructions, Builders and Contractors (vide paras 27 and 28).

21. Apart from the above, it has been held by this Court in Port of Calcutta vs. Engineers-De-Space-Age that a clause like clause 11 only prohibits the Department from entertaining the claim, but it did not prohibit the arbitrator from entertaining it. This view has been followed by another Bench of this Court in Bharat Drilling & Treatment Pvt. Ltd. vs. State of Jharkhand." (ix) In view of the above discussion, I hold that objections raised by the respondent to the maintainability of the claim are legally unsustainable and are liable to be rejected."
(x) However, on merits, the diversion of 268 wagons from withheld quantity of Modern Industries was upheld because it was found as a matter of fact that

the claimant had failed to manufacture and deliver the wagons.

100. The above extracted portions of the Award passed in the case of Modern Industries show that the tribunal had, in that case, unequivocally rejected the respondent's plea that by having given unqualified acceptance to the diversion of 268 wagons, the claimant will be deemed to have given up its right to raise objection against the deduction and diversion of the wagons. In other words, the award passed in the case of Modern Industries does not at all support the plea of estoppel and waiver put forward by the respondent. Rather, the portions of the Award which have been extracted in paragraph 99 unmIakably show that the tribunal did not agree with the respondent that by giving unqualified acceptance to the diversion of 268 wagon, the claimant i.e. Modern Industries will be deemed to have r" { 1 "^1 waived Its right to challenge the decision of the respondent to divert 268 wagons or that It Is estopped from questioning that decision. The ratio of that Award clearly supports the stand taken by the claimant that the unqualified acceptance conveyed vide letter dated 04.04.2013 cannot operate as stopple or waiver and It cannot be precluded from questioning the deduction and diversion of 253 wagons from the second tranche allocable to It.

101. Another Issue of some significance relates to the Interpretation of Clause 2.2 of the contract which, at the cost of repetition Is reproduced below : 2.2 The above allocation under para 2.1 shall be released to you at the end of six months from the date of receipt of the order (I.e. by 31.07.2012) provided you have supplied at least 50% of the total outstanding RSP orders as on 01.08.2011 and current orders placed against this tender (detailed at para 1.2 above) during February 2012 to Julv 2012."

102. The pleaded case of the claimant Is that as per Clause 2.2 of the contract It had to deliver at least 50% of the total

outstanding within six months from release of the first tranche. According to the claimant, It had manufactured 775 wagons against the target of 1021 wagons and the shortage of 246 wagons consIed of BCNHL and BRN 22.9 wagons, which were allocated to It for the first time on 16.01.2012 and further that for the purpose of BCNHL and BRN 22.9 wagons It had to manufacture prototype and get the same approved from the competent authority. The break-up of wagons manufactured by the claimant between 01.02.2012 and 31.07.2012 has been given In paragraph 2.104 of the statement of claim. In paragraph 2.105, the claimant has averred that from the first 229 tranche it had performed cent per cent as far as the wagon types matching steel was made available and It could have performed equally well for BCNHL and BRN 22.9 wagons If the matching steel had been made available on time. The claimant has also averred that out of 775 wagons supplied between 01.02.2012 and 31.07.2012, the respondent took Into account only 669 wagons for the purpose of calculation In terms of Clause 2.2 and 106 BOXNHL wagons, which were ordered against 30% option was not taken Into consideration. In paragraph 2.106 of the statement of claim, the claimant has averred that 106 wagons which were supplied In the month of July, 2012 were excluded without any rhyme or reason because against 30% option clause 243 BOXNHL wagons were order by Amendment dated 08.05.2012 and even though outstanding of claimant as on 01.08.2011 were Included, the delivery of wagons between August, 2011 and January, 2012 should have been taken Into account while computing the total number of wagons for the purpose of Clause 2.2. In paragraph 2.108, the claimant has given complete break-up of the total quantity of wagons and averred that 650 wagons supplied between August, 2011 and February, 2012 I.e. 146 BOBRNHSMl, 364 BOXNHL and 140 BTPN were not taken into consideration.

103. The claimant has also alleged discrimination In the release of second tranche of wagons by pointing out that M/s.

Jupiter Wagon Limited, Texmeco Limited and M/s. TItagarh Wagons Limited. The second tranche of orders were Issued on 27.07.2012 and 09.08.2012 but wagons In the second tranche were released In its favour only on 03.04.2013 I.e. after a gap of almost 9 months of the allocation of wagons to other manufacturers.

104. In paragraph 2.103 of the written statement, the respondent has averred that there was outstanding of 722 wagons on the claimant as on 01.08.2011 and In the first tranche of Contract dated 16.01.2012, the claimant released 1469 wagons but It did not abide by the requirement of Clause 2.2 of the contract. The respondent has also denied various averments contained In the statement of claim as Is evident from paragraphs 2.103 to 2.112 of the statement of defence, which are extracted below :

"2.103That In response to averments made In para 2.103, It Is , submitted that there was outstanding order of 722 wagons on the claimant as on 01.08.2011 and first tranche of 1469 wagons was released on them. There was a relaxation of 25% In case of BCNHL wagon being a new type of wagon. 2.104 That In response to averments made In para 2.104, It Is submitted that the same Is matter of record and need no specific reply from the answering respondent. 2.105 That In response to averments made In para 2.105, It Is submitted that whenever matching steel was not available. Market Purchase Authorization (MPA) and transfer orders from other wagon builders Issued to the firm expeditiously. Quantity of wagons produced by the firm to be considered for release of second tranche quantity Is to be decided as ^ per the contractual provisions.

2.106 That In response to averments made In para 2.106, It Is submitted that the calculation for releasing quantity In second tranche Is to be done as per the contractual conditions which were accepted unconditionally by the firm.

2.107 That In response to averments made In para 2.107, It Is submitted that Clause 2.2 of the Contract was based on the tender condition which was agreed and accepted by the firm

231 and the same principle was applied on all other wagon manufacturers.

2.108 That in response to averments made in para 2.108, it is submitted that the same is matter of record and need no specific reply from the answering respondent.

2.109 That in response to averments made in para 2.109, it is submitted that Clause 2.2 of the Contract was based on the tender condition which was agreed and accepted by the firm and the same principle was applied on all other wagon manufacturers.

2.110 That in response to averments made in para 2.110, it is submitted that the second tranche orders were released to M/s Texmaco, M/s Titagarh and M/s. Jupiter because they had fulfilled their contractual obligations for release of second tranche orders. Second tranche order to the Claimant was delayed as their representation against reduction in quantity from second tranche was under examination at RDSO and Railway Board. In the meantime a miscellaneous application was filed by M/s Cimmco Ltd. to BIFR challenging the decision of MinIry of Railway in the instant tender and the second tranche of the claimant could be released on 03.04.2013 (Annexure-V) after finalization of SLP filed by MinIry of Railway before the Hon'ble Supreme Court of India which was disposed off on 04.02.2013. Claimant vide their letter dated 04.04.2013 (Annexure-VI) conveyed unqualified acceptance as under: "We thankfully acknowledge receipt of your letter No. 2012/RS(I)/954/2/1726 dated 03.04.2013 — Amendment No. IV — releasing the withheld quantity with delivery period till 31.10.2013 against the above contract. We(Ciaimant) hereby covey our unqualified acceptance of the same." 232 1 As the claimant Thad accepted the Amendment No. IV dated 03.04.2013 unconditionally, there was no dispute.

2.111 That in response to averments made in para 2.111, It is submitted that the calculation for releasing quantity in second tranche is to be done as per the contractual conditions which were accepted unconditionally by the firm.

2.112 That in response to averments made in para 2.112, it is

submitted that the second tranche orders were released to M/s Texmaco, M/s Titagarh and M/s. Jupiter because they had fulfilled their contractual obligations for release of second tranche orders. Second tranche order to the Claimant was delayed as their representation against reduction in quantity from second tranche was under ^ examination at RDSO and Railway Board. In the meantime a miscellaneous application was filed by M/s Cimmco Ltd. to BIFR challenging the decision of Ministry of Railways in the instant tender and the second tranche of the claimant could be released on 03.04.2013 (Annexure-V) after finalization of SLP filed by Ministry of Railways before the Hon'ble Supreme Court of India which was disposed off on 04.02.2013."

105. An almost identical issue had arisen in the case of M/s. Modern Industries, which filed OMR No. 789 of 2013 before the Delhi High Court in the context of Award dated 16.01.2012 whereby the petitioner was required to manufacture and supply 1771 wagons of four types i.e. BOXNHL, BCNHL, BTPGLN and BTPN. Clause 2.2 of the contract was identical to the contract awarded to the claimant on 16.01.2012. Prior to the filing of OMP No. 789 of 2013, M/s Modern Industries had filed writ petition No. 7695 of 2012 for directing the respondent to release the wagons in second tranche. During the pendency of that petition, the respondent released the order for 703 wagons against the withheld quantity of 885 233 and the dispute relating to remaining 182 wagons was referred to the Sole Arbitrator Shri Madhu Ranjan Kumar, EDRS (G). The Sole Arbitrator referred to various clauses of Contract dated 16.01.2012 and recorded his conclusion that the decision of the respondent to deduct 427 wagons was fair. The reasons recorded by the Sole Arbitrator are extracted below :

> *"E. Observation of the arbitrator: Arbitrator notes that the respondent failed to provide steel / MPA in time and claimant failed to get steel from market in*

time. It is to be noted that prototype wagon qty was only one wagon. Thus, having failed to perform its contractual obligation of providing steel in time and also having provided MPA (which is just a management decision) with a delay 2 months and that too not for all sections, respondent cannot use its own failure to the detriment of the claimant." Decision of the arbitrator: E.l Hence, arbitrator is of the opinion that out of the 1309 wagons that was available to claimant to supply all 427 wagons (for BCNHL) should be deducted for a fair assessment of compliance. So the base quantity which should be used to calculate compliance = 1309 - 427 = 882. Therefore compliance percentage = 603/882 = 683 i.e. 68.3% Therefore 2nd tranche order will be for 885/2 + 683 x 885 /2 = 745 Quantity already ordered 703. Quantity to be ordered extra = 745 - 703 = 42 wagon. 234 '>63 Therefore additional wagon order to be placed by respondent on the claimant = 42 wagons It has been agreed by both the parties that 50 BOXNHL and 132 BCNHL wagon have been withheld from ordering 50/182 = 27.4% (ratio for BOXNHL) 132/182 = 72.5% (ratio for BCNHL) E.2 Therefore 42 x 72.5% = 30 wagon of BCNHL AND 42 X 27.4% = 12 wagon of BOXNHL Are the type of wagons to be ordered on the claimant by the respondent. E.3 The learned counsel for the respondent brought out that subsequent to the award of contract there Is a change In specification which have also resulted In a decrease In price. The arbitrator, however, notes that the Hon'ble High Court has brought out In Its oder dt.21.4.14 para 2 that the dispute Is with respect to the order of balance 182 railway wagon. Hence, the arbitrator has limited his decision only within the scope ordered by Hon'ble High Court of Delhi. Arbitrator is not a surrogate purchase officer who can take a call on aspects not directed by the Hon'ble High Court."

106. M/s. Modern Industries challenged the aforesaid Award of the Sole Arbitrator in OMP No. 1314 of 2014. The learned Single Judge of the Delhi High Court adverted to the factual background of the case, referred to Clause 2.2 of the contract and set aside the award by recording a finding that the Sole Arbitrator's Interpretation of Clause 2.2 was erroneous. The 235 I reasons recorded by the learned Single Judge for overturning the award of the Sole Arbitrator are extracted below :

> *"11. The only dispute between the parties concerns the interpretation of Clause 2.2. That clause states that for release of the 2nd tranche of 885 wagons, the Petitioner should have supplied: at least 50% of (a) the total outstanding RSP orders as on 01.08.2011 and (b)the current orders placed against the tender during February to July 2012. 12. In other words, 50% qualifies both quantities i.e. (a) the total outstanding RSP as on 1st August 2011 (which was 423) and current orders placed between February to July 2012 (886) minus the entire lot of 427 BCNHL for which steel was not supplied. This meant 50% of 1309-427 = 882. If 50% of 882 wagons were supplied then in terms of Clause 2.2 the Respondent was required to release in favour of the Petitioner, the order for the entire balance 886 wagons under Tranche 2. The Petitioner having admittedly supplied 603 wagons i.e. 68.3% of 882, was entitled to the release of the order of the entire balance Tranche 2 quantity of 885. 13. The interpretation by the learned Arbitrator of Clause 2.2 was plainly erroneous and impermissible in law. His interpretation would require re-writing Clause 2.2 to read: "50% of total outstanding RSP orders as on 01.08.2011 and the entire current orders placed against this tender (detailed at para 1.2 above) during February, 2012 to July 2012." In other words the learned Arbitrator could not have inserted the words*

"the entire" prior to the words "current orders" in Clause 2.2 of the Contract. Significantly, in arriving at the figure of 1309, the learned Arbitrator rightly took into account the total outstanding RSP orders as on 1st February 2012 i.e. 423 -i- 886 = 1309 and subtracted 427 BCNHL 236 A wagons since the steel for the manufacture of those wagons was not supplied within time. However, the error crept in on account of the failure of the learned Arbitrator to thereafter correctly apply Clause 2.2. The learned Arbitrator had to ask if 50% of 882 wagons had already been supplied. If the answer was in the affirmative then the logical corollary was to conclude that the order for the entire balance 885 wagons of the 2nd Tranche minus orders that had already been placed (703) had to be released in favour of the Petitioner. Instead, without explaining the reasons for doing so, the learned Arbitrator applied the pro rata percentage of 68.3% to the balance quantity of 885 to arrive at the figure of 745 wagons for which orders were required to be released. This was not warranted by Clause 2.2. 14. The learned Arbitrator's basic approach in denying relief in respect of the balance 140 wagons was flawed. His interpretation of Clause 2.2 was not one which could be said to be plausible. The impugned Award to the above extent is unsustainable in law. 15. For the above mentioned reasons, while the Court upholds the impugned Award to the extent it directs the Respondent to release in favour of the Petitioner the order for 42 wagons, it sets aside the impugned Award to the extent it denies the Petitioner the relief of a direction to the Respondent to release in favour of the Petitioner the order for the balance 140 wagons in the 2nd Tranche. Resultantly, the Petitioner would be entitled to a release in its favour of the order for the balance 140 wagons in the 2nd Tranche."

> *107. The respondent has neither pleaded nor any document has been placed on record to show that order dated 26.05.2015 passed by the learned Single Judge of the Delhi High Court in OMP No.1314 of 2014 has been set aside by any higher judicial forum. In my view, the ratio of order of the learned Single Judge represents correct interpretation of Clause 2.2 of Contract and I respectfully agree with him and hold that the 237 respondent committed error by reducing the quantity of total number of wagons manufactured by the claimant between 01.02.2012 and 31.07.2013.*"

37. The Tribunal has taken into consideration the decision of this Coordinate Bench of this Court in ***M/s. Modern Industries v. Executive Director Railway Stores,*** **O.M.P No. 1314 of 2014** dated 26th May 2015, whereby the petitioner therein was required to manufacture and supply 1771 wagons different types of wagons as per the Clause 2.2 of the Contract which was identical to the Contract awarded to the respondent on 16th January 2012. The Coordinate Bench of this Court has set aside the Award by recording a finding that the learned Sole Arbitrator's interpretation of Clause 2.2 was erroneous and held that the respondent has committed an error by reducing the quantity of total number of wagons manufactured by the respondent between 01st February 2012 to 31st July 2013. This Court upheld the impugned Award to the extent it directed the respondent therein to release in favor of the petitioner therein the order for 42 wagons and it has set aside the impugned Award to the extent it denies the petitioner the relief of a direction to the respondent to release in favour of the petitioner the order for the balance 140 wagons in the II Tranche. The same position has been adopted by the Learned Arbitrator in the present case. The Learned Arbitrator has further held

that the decision of the Coordinate Bench of this Court has not been challenged or set aside by any of the higher forums.

38. A review of the Award reveals that the learned Arbitrator has carefully examined the evidence presented by both parties and has provided a reasoned analysis of the facts and law. Disagreements with the arbitrator's evaluation of the evidence do not amount to a valid ground for setting aside the Award. The learned Arbitrator has considered these submissions and has provided a rational basis for the Award.

39. This Court is of the view that the reasoning of learned Sole Arbitrator is logical and all the material and evidence were taken note of by Learned Sole Arbitrator and this Court cannot substitute its own evaluation of conclusion of law or fact to conclude other than that of learned Sole Arbitrator. Cogent grounds, sufficient reasons have been assigned by learned Sole Arbitrator in reaching the just conclusion and no error of law or misconduct is apparent on the face of the record. This Court cannot re-apprise the evidence and it is not open to this Court to sit in the appeal over the conclusion/findings of facts arrived at by learned Sole Arbitrator. After taking into consideration the aforesaid reasons, given by the learned Arbitrator, I do not find any reason to interfere with the Award passed by the learned Arbitrator *qua* issue no. 1 regarding for allocation of the said 253 wagons (119 BOXNHL and 134 BCNHL wagons); in the alternate compensation for Rs. 16,46,00,407/- as loss of profit.

40. While deciding the issue no.2 -issue of claim for a sum of Rs.28,56,53,627.54 for loss caused on account of the said delay in releasing the II tranche order by more than eight months., the learned

Arbitrator has following observation and the relevant portion of the same given by the learned Arbitrator is also reproduced herein below:

> *"108. The Issue which remains to be considered is whether the claimant had suffered pecuniary loss on account of delay In the supply of free steel by the suppliers upon whom supply orders were placed by the respondent. Reverting to Notice Inviting Tender Issued on 23.06.2011, I find that as per Clause 15.0 Steel, CTRB and Wheel-Sets were free supply Items and all tenderers were mandated to give offer considering these Items as free supply Items. In terms of Clause 15.1, the steel was to be procured and supplied by Director, Railway Stores (I&S), Kolkata within (as per schedule prescribed by RDSO) and the tenderer was required to render the account regularly as per the Performa In use and advised by Director, Railway Stores (I&S), Railway Board. In the end. It was mentioned that the purchaser reserves right to alter this sealing (as per schedule prescribed by RDSO) In case steel Is supplied In sizes different and those on which present annexure V Is based. In terms of Clause 15.2, allocation for Wheel Sets and CTRBs was to be done CMM (BL), Eastern Railway, Kolkata subject to furnishing of Indemnity bond by the contractor. In terms of Clause 15.3, the contractor was required to furnish bank guarantee and planning for steel was to start only after getting the requisite bank guarantee to the satisfaction of the concerned authority. Clause 1(b) of Special Conditions of Contract also contains similar provision so far as supply of steel Is concerned. As per that Clause, the steel was to be procured on behalf of the President of India directly from the steel plants and supply to the contractor at their works siding. Contract 16.01.2012 awarded to the claimant also contained Clause 5.0 for supply of free steel items.*
>
> *109. Notwithstanding the mandate of various clauses contained in Notice Inviting Tender and contract dated 16.01.2012, the respondent failed to ensure that the required quantity and type of steel is made available to the claimant so*

as to enable it to manufacture prototype of BCNHL and BRN 22.9 wagon and also manufacture other types of wagons. Detailed discussion on this aspect has already been made in the earlier part of the award. In the statement of claim, detailed averments have been made disclosing the cause for loss suffered by the claimant. In paragraph 2.111, the claimant has averred that it had five production lines located at two plants at Ballygunge and Baruipur and each production line has to be set up for one particular type of wagon in each production cycle along with jigs and fixtures and dedicated equipments for a specific operation for each particular type of wagon. It has also been averred that once entire order for BOXNHL wagon was exhausted, the production line dedicated to that wagon remained idle for want of orders since 2012 and the claimant had to bear overhead costs which contributed to the total loss. In paragraph 2.120, the claimant has alleged that the respondent delayed the release of second tranche by 8 months and as a result of that it suffered irreparable loss in terms of fixed cost incurred during the phase of lull. Another cause for loss depicted by the claimant is the release of wagon to the competitors in business after July, 2012 and delayed release prayed that either the respondent be directed to allocate 253 wagons at the prices mentioned in the contract or in the alternative award Rs. 16,46,00,407/- as loss caused on account of deduction of 253 wagons. Rs. 17,68,030/- have also been claimed as bank guarantee charges and expenses. A further sum of Rs.28,56,53,627.54 has been claimed as loss caused due to release of second tranche with delay of 8 months. In addition, the claimant has prayed for award of pendent lite interest of Rs.45,20,22,064.54 and another 18% on the amount of award till the date of payment. Prayer has also been made for award of costs.

110. The reply of the respondent to various claims set up by the claimant is that quantity of wagons in the second tranche was released as per the conditions of contract and the same

unconditionally accepted by the claimant; that whenever free supply items were not available, Market Purchase Authorisations and transfer orders were issued expeditiously and that the claimant is not entitled to any amount for deduction of 253 wagons from the second tranche. It has also been mentioned that out of 253 wagons, 134 were BCNHL wagon and Indian Railways discontinued procurement of this type of wagon since 2015-16. 208 wagons from the second tranche of the claimant were diverted to other manufacturers and when the claimant challenged the diversion, the case was finalized by Delhi High Court directing the claimant {sic 'respondent') to supply 208 wagons and out of that 76 were BCNHL wagons but the Railways do not need BCNHL wagon and the claimant has been asked to take up production of only 132 BOXNHL wagons. As regards other monetary claims, the respondent has not filed any response.

111. In paragraphs 43 and 44 of his affidavit dated 21.10.2017, CW-1 has given details of 775 wagons manufactured against the first tranche 30% option. In paragraph 45, CW-1 stated that the respondent took into account only 669 wagons and remaining 106 BOXNHL wagons which were ordered against 30% option clause and supplied in July, 2012 were not taken into consideration. He has also referred to 30% option clause contained in Contract No. 2010/RS (I)/954/27/1711 dated 20.09.2010 and Amendment No.VI dated 08.05.2012 and averred that 243 BOXNHL wagons were ordered by the amendment but the same were not included in the outstanding quantity and the supply of 106 BOXNHL wagons were excluded from the performance index. CW-1 has claimed that if the outstanding quantity as on 01.08.2011 had been included, the total delivery of wagons between August, 2011 and January, 2012 should have been taken into account for computing the compliance on the part of the claimant for release of the second tranche of wagons as per Clause 2.2. In paragraph 48 of his affidavit, CW-1 has given breakup of total outstanding wagon as on 01.08.2011 for 722 wagons and alleged that complete break-up of 650 wagons supplied from 01.08.2011

to 31.01.2012 was not taken into consideration despite letters dated 21.08.2012 and 25.10.2012 to various officers of the respondent. In support of this, CW-1 has referred to Exhibit CW-1/33 (Annexure C-88) and Exhibit CW-1/34 (Annexure C-87). In paragraph 50, CW-1 has given how the loss was suffered on account of idling of production line. CW3 - Prem Chander Gupta, who was then working as Director with BDO India LLP, Business Restructuring Advisory, Gurgaon and was employed by the claimant from 01.01.91 to 31.07.2015 has, in paragraphs 4, 5 and 6 of affidavit dated 23.10.2017 given complete detail of expenses incurred by the claimant for 9 months due to idling of the production line. According to him, delay of 8 months In the release of second tranche of wagons has resulted in total loss of 28,56,53,627.54 (including payment of statutory liabilities, overhead costs, employer's liability, workers remuneration and depreciation on fixed assets). He has also given a chart showing details of expenses incurred during 9 months between August, 2012 and April, 2013 totaling Rs.24,42,89,717.61. In para 6 of his affidavit, CW-3 has stated that as a result of reduction of 253 wagons from the second tranche, the claimant's performance index went down by 27% in the next tender which was opened on 25.11.2013 and pursuant to which Contract dated 29.04.2014. According to CW-3, the negative report of lower performance would continue for five years and for that it is entitled to compensation of Rs.5,72,70,760/-. Learned counsel for the respondent could not shake the statements made by CW-3 In Examination-In-Chief. He stated that the details given in his affidavit are based on the record maintained by the claimant. He has also supported his statement by stating that he was working as Financial Advisor to the claimant. In his second evidence affidavit dated 02.05.2018, CW3 reiterated that he was in the claimant's employment from 01.01.1991 to 31.07.2015; that the balance sheet, profit and loss statement and cash flow statement of the claimant for the financial years ending on 31.03.2012, 31.03.2013 and 31.03.2014 were prepared by Shri R.M. Poddar, DGM (Finance) of the

claimant and he (CW-3) used to advise Shri Poddar in preparation of these documents. According to CW-3, the balance sheet, profit and loss statement and cash flow statement of the claimant were subsequently audited by independent auditor viz. R. Das Associates, Chartered Accounts and auditing was done on the basis of the books of accounts, records and other documents maintained by the claimant in the usual course of business. CW-3 added that before filing affidavit dated 23.10.2017, he had cross-checked various financial figures and statements given in the balance sheets, profit and loss statement and cash flow statement and satisfied himself with the correctness of the figures. According to CW-3 (Paragraph 5 of second affidavit), the balance sheet, profit and loss statement and cash flow statement, duly audited by the Chartered Accountant were filed with the Income Tax Department. When asked in cross-examination whether profit and loss account is maintained for each wagon, CW-3 stated that these documents are required to be maintained as per the Companies Act and there is no provision for maintenance of account for each wagon and profit from each wagon is to be derived by financial analysis. In reply to question No. 6, CW-3 stated that the claimant has been maintaining the books of accounts.

112. As against the losses suffered by it, the respondent neither produced any evidence by way of affidavit of Shri Ashok Kumar Verma nor any other material was placed on record to show that the claimant did not suffer any loss either on account of the alleged erroneous calculation of manufactured wagons as required by Clause 2.2 or on account of idling of production line or expenses incurred towards the bank guarantees, payment of salary to the workers etc.

113. In the result it is held that:

i) the decision of the respondent to deduct and divert 253 wagons from the second tranche allocable to the claimant was illegal and unjustified;

ii) the bank guarantee furnished by the claimant was in consonance with the provisions of the tender notice and the contract and the objection raised by the respondent that the claimant was not entitled to free steel etc. till 17.02.2012 i.e. the date on which the last instalment of bank guarantee was furnished is legally unsustainable and is rejected;

iii) the plea of estoppel and waiver raised by the learned counsel for the respondent by relying upon the unqualified acceptance given by the claimant vide letter dated 04.04.2013 for allotment of wagons in the second tranche is untenable and is rejected;

iv) the claimant is entitled to allotment of 243 wagons deducted and diverted from the second tranche of wagons. However, as the respondent has stopped manufacturing of BCNHL wagons, it will be opened' to the respondent to allocate other type of wagon of the same price to the extent of BCNHL wagons, which were deducted in 2003 and diverted to other manufacturers;

v) the claimant is entitled to be compensated for the loss suffered by it on account of delay of about 8 months in the release of second tranche because its production line was remained idle and it had incurred expenses for payment of statutory liability, overhead costs, employer's liabilities, workers' remuneration. However, the claimant shall not be entitled to anything towards store and consumables, electricity charges, conveyance charges, consultancy charges, transportation charges, equipment hiring charges, testing and inspection charges, loading and unloading charges, miscellaneous transportation expenses, expenses incurred by the claimant towards advertisement and publicity, books and periodicals, business promotion expenses, cost of tender, guest house maintenance, internal audit fees, recruitment charges, foreign travel expenses, donation and contribution. The claimant shall also not be entitled to directors' remuneration, leave travel assIance,

gratuity, encashment of leave, miscellaneous expenses / taxi hire charges, motor car expenses, vehicle expenses, car hiring charges, computer maintenance and drawing and design expenses; vi) the claimant is entitled to interest @ 8% on the quantum of loss incurred due to delay in the allotment of wagons in the second tranche and costs of this arbitral proceedings.

114. Accordingly, the following award is passed:

A. Within three months of this award, the respondent shall allocate 253 wagons dehors any other contract which the parties may have entered after 16.01.2012. Since the respondent has stopped manufacturing BCNHL wagon, in lieu thereof the respondent shall allocate any other type of wagon, which is being manufactured by the claimant. The cost of the wagons to be allocated to the claimant pursuant to this award shall be at the rate at which deducted wagons were diverted to other manufacturers;

B. Within one month's the claimant shall submit fresh statement of the expenses incurred by it under various heads excluding the expenses which have been held by this tribunai to be inadmissible The respondent shall pay the expenses to the claimant, as per the revised statement, within three months of the receipt of revised statement; The respondent Is liable to pay cost of this arbitration to the claimant. The record shows that in all 23 hearings were held. That apar^ the case was adjourned several times on account of pendency of the Special Leave Petition filed by the respondent against the order of the High Court. Even after dismissal of appeal by Hon'ble Supreme Court, many adjournments were granted at the Instance of both the parties due to non-availability of their advocate and/or witness. In 23 effective hearings, the claimant was represented by two advocates, namely, Shri Ramesh Singh and Ms. Ann Mathew. It can reasonably be presumed that the claimant must have paid fees to two advocates @ Rs.l lakh per hearing. The claimant had paid Rs. 15,75,000/- to the Sole Arbitrator after deducting TDS of Rs. 1,57,500/-. The claimant also paid Rs. 1,72,500 as

secretarial expenses. It will, therefore, be just and proper to award cost of Rs.40 lakhs to the claimant, which the respondent shall pay within a period of three months from the date of award. If the respondent fails to pay the amount of cost within the period specified in this clause of the operative portion then it shall have to pay Interest @ 8% from the date of award. "

41. The learned Tribunal has held that there is no substantiated evidence to support these allegations of loss suffered by the petitioner's account of the alleged erroneous calculation of manufactured wagons as required by Clause 2.2 or on account of idling of production line or expenses incurred towards the Bank Guarantees, payment of salary to the workers etc. The petitioner's assertions in this regard are speculative and do not justify setting aside the Award.

42. This Court has placed reliance on the judgment of the Division Bench of Bombay High Court in the case of ***Raheja Universal Pvt. Ltd. v. B.E. Billimoria and Co. Ltd.*, 2016 SCC OnLine Bom 1399** regarding the aspect that the damages suffered by a party needs to be proved by the party claiming such damage which held as follows:

"8. The Apex Court in Kailash Nath Associates v. Delhi Development Authority, (2015) 4 SCC 136 after dealing with similar contentions as those raised by the learned counsel appearing for the Appellant based upon the various judgments, including ONGC v. Saw Pipes Ltd., (2003) 5 SCC 705, and sections 47, 63, 73 and 74 of the Contract Act held as under:—

"43 On a conspectus of the above authorities, the law on compensation for breach of contract under section 74 can be stated to be as follows:

43.1 Where a sum is named in a contract as a liquidated amount payable by way of damages, the party complaining of a breach can receive as reasonable compensation such liquidated amount only if it is a genuine pre-estimate of damages fixed by both parties and found to be such by the Court. In other cases, where a sum is named in a contract as a liquidated amount payable by way of damages, only reasonable compensation can be awarded not exceeding the amount so stated. Similarly, in cases where the amount fixed is in the nature of penalty, only reasonable compensation can be awarded not exceeding the penalty so stated. In both cases, the liquidated amount or penalty is the upper limit beyond which the Court cannot grant reasonable compensation.

43.2 Reasonable compensation will be fixed on well-known principles that are applicable to the law of contract, which are to be found inter alia in section 73 of the Contract Act.

43.3 Since section 74 awards reasonable compensation for damage or loss caused by a breach of contract, damage or loss caused is a sine qua non for the applicability of the section.

43.4 The section applies whether a person is a plaintiff or a defendant in a suit.

43.5 The sum spoken of may already be paid or be payable in future.

43.6 The expression "whether or not actual damage or loss is proved to have been caused thereby" means that where it is possible to prove actual damage or loss, such proof is not dispensed with. It is only in cases where damage or loss is difficult or impossible to prove that the liquidated amount named in the contract, if a genuine pre-estimate of damage or loss, can be awarded.

> *43.7 Section 74 will apply to cases of forfeiture of earnest money under a contract. Where, however, forfeiture takes place under the terms and conditions of a public auction before agreement is reached, section 74 would have no application."*

9. This Court in Hindustan Petroleum Corporation Limited v. Offshore Infrastructure Limited, 2015 (6) Mh.L.J. 287 held as under:—

> *"28 This Court in case of Continental Transport Organisation Pvt. Ltd. v. Oil and Natural Gas Corporation Ltd., decided on 21st April, 2015 in Arbitration Petition No. 372 of 2013 has after adverting to the judgment of the Supreme Court in case of Kailash Nath Associates v. Delhi Development Authority, decided on 9th January, 2015 in Civil Appeal No. 193 of 2015 has held that unless loss is pleaded and proved, it cannot be recovered. There cannot be any windfall in favour of the respondent to recover liquidated damages even if no loss is suffered or proved."*

10. Additional factors are also noted by this Court (Coram:— Anoop V. Mohta, J.) in Oil and Natural Gas Corporation Limited, New Delhi v. Oil Country Tubular Limited, Hyderabad, 2011 Vol. 113 (3) L.R. 141 while dealing with the similar circumstances has observed as under:—

> *"(g) In Saw Pipes (supra), the Apex Court has observed that the party who relied upon such clause, may lead evidence to claim more, if the damage/compensation amount is not reasonable. The Court may also direct the parties to lead evidence to confirm that the action of delay amounts to breach of contract and which has caused the damages and therefore, entitled for a reasonable compensation/amount. The reasonable amount/compensation cannot be equated with the fixed amount and/or maximum amount as per the*

> *liquidated damages clause in question. The observations that other side to prove that the claimant has not suffer any loss or damage itself contemplates necessity of leading evidence by both the parties. The burden is always on the parties who claimed compensation to prove actual loss, even for the reasonable compensation. The other doctrines; "Mitigation of loss", "Burden of Proof", "Onus of proof" and "Shift of burden" just cannot be overlooked by the Court or the Arbitrator, while determining the reasonable compensation."*
>
> *11. We are inclined to observe that the conclusions of the Hon'ble Supreme Court indicated above in Kailash Nath Associates (supra), concludes the issue in support of the Judgment passed by the learned Judge. We are, therefore, not dealing with the other cases cited by the Appellant, even on other issues.*
>
> *12. Considering the totality of the matter, including the material placed on record and the interpretation given by the learned Judge after considering the Judgments of the Apex Court and the High Court, we are in agreement with the view expressed by the learned Judge. The impugned order/Judgment of the learned Judge of setting aside the claim of liquidated damages, in the facts and circumstances, and in view of the settled position of law recorded above, and as the same is within the framework of law and the record, is maintained."*

In the aforementioned judgment the Bombay High Court affirmed the judgment of a Single Judge who had set aside the arbitral award on the grounds that the award for awarding of liquidated damages were issued despite no proof of loss or damages being produced.

43. The learned Tribunal has held that there is no substantial evidence to support these allegations of loss suffered by the petitioner on account of the alleged erroneous calculation of manufactured wagons, as required

by Clause 2.2 or on account of idling of production line, or expenses incurred towards Bank Guarantees, payment of salary to the workers, etc. The petitioner's assertion in this regard is speculative and does not justify the damages to be awarded to the petitioner.

44. This Court is of the view, placing reliance on the judgment of ***Raheja Universal Pvt. Ltd.*** **(Supra)** that the learned Arbitrator has rightly held that without substantiating the loss accrued, such loss cannot be awarded to the petitioner. The loss can be awarded only if there is a proof that such loss has been suffered by the party claiming such damage. After taking into consideration the aforesaid reasons, given by the learned Arbitrator, I do not find any reason to interfere in the award passed by the learned Arbitrator *qua* issue no. 2 regarding the loss suffered by the respondent.

CONCLUSION

45. In the light of facts, submissions and contentions in the pleadings, this Court finds that the petitioner has failed to substantiate its grounds for setting aside the impugned Arbitral Award that the impugned award suffers from patent illegality and the findings therein are perverse and would shock the conscience of this Court, or the Arbitrator has not considered the pleadings and evidence placed before him and has arrived at a conclusion that is implausible, or the said Award has been passed by adopting an incorrect interpretation of the Contract as well as the law. In what I have already discussed above, the view of the learned Arbitrator while awarding the impugned Award is a plausible view.

46. It is settled law that the ground of Patent illegality gives way to setting aside an Arbitral Award with a very minimal scope of

intervention. A party cannot simply raise an objection on the ground of patent illegality if the Award is against them. Patent illegality requires a dIinct transgression of law, the clear lack of which thereof makes the petition simply a pointless effort of objection towards an Award made by a competent Arbitral Tribunal. In the instant case, the petitioner has not been able to prove that the impugned Arbitral Award is patently illegal, and thus failed to make out a case for the award to be set aside.

47. Therefore, after consideration of the material on record, including the impugned Arbitral Award, submissions on behalf of the parties, this Court is of the view that there is no finding or conclusion reached by the learned Arbitrator which warrants interference of this Court. The petitioner has not been able to substantiate the case for setting aside of the impugned Award.

48. Accordingly, the instant petition is dismissed as being devoid of merits since there are no cogent reasons to set aside the impugned Award.

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

50. The judgment be uploaded on the website forthwith.

(CHANDRA DHARI SINGH)
JUDGE

JULY 31, 2023
gs/db