

**HIGH COURT OF TRIPURA  
AGARTALA**

**ARB.A. NO.07 OF 2022**

**1.The State of Tripura,**

represented by the Secretary-cum-Commissioner,  
Public Works Department(R&B),  
New Secretariat Building,  
PO Kunjaban, Agartala, West Tripura.

**2. The State of Tripura,**

represented by the Executive Engineer,  
PWD (R&B), Kailashahar Division, Unakoti Tripura

.....Applicant-Appellant(s)

**Versus**

**Sri Debashish Das, Contractor.**

S/o Lt. Nirmal Bikash Das,  
Joynagar, Middle Road,  
Agartala-799002  
District:- West Tripura.

..... Respondent-contractor(s)

For the applicant-appellant(s)	:	Mr. K. De, Addl. GA
For the respondent-contractor(s)	:	Mr. Somik Deb, Sr. Advocate, Mr. P. Chakraborty, Advocate
Date of hearing and delivery of Judgment & Order	:	31-01-2024
Whether fit for reporting	:	No

**HON'BLE THE CHIEF JUSTICE MR. APARESH KUMAR SINGH  
HON'BLE MR. JUSTICE ARINDAM LODH**

**JUDGMENT & ORDER(ORAL)**

The issue falls under consideration in this appeal is in respect of the Agreement bearing No 01/SE(i)/EE/KLS/2014-2015(PBI) for construction work of Central Jail, Kailashahar, Unokoti Tripura for an estimated value of Rs.10,94,94,941/- to be completed within the stipulated period of two years, the dispute arose between the parties which led to appointment of an arbitrator.

**2.** Heard Mr. K. De, learned Addl. GA appearing for the applicant-appellants. Also heard Mr. Somik Deb, learned senior counsel assisted by Mr. P. Chakraborty, learned counsel for the respondent.

**3.** This appeal filed under Section 37(1)(c) of Arbitration and Conciliation Act, 1996 read with Section 13(1A) of the Commercial Courts Act, 2015 is directed against the impugned judgment and order dated 16/03/2022 in Title Suit 04 (Arbitration) of 2020 along with Arbitral award passed by the learned Arbitral Tribunal dated 17/06/2020, in Arbitration Case No.ARB/SRB/2019(2) whereby and whereunder the learned District Judge, Unokoti District, by an order dated 16/03/2022 upheld the arbitral award passed by the sole Arbitrator and dismissed the application filed under Section 34 of the Arbitration and Conciliation Act.

**4.** The relevant factual details of the case of the parties as culled out from the pleadings on record are narrated hereunder:

**4.1.** On 27/12/2013 the Executive Engineer, PWD(R&B), Kailashahar Division, Kailashahar, Unakoti Tripura published a Notice Inviting Tender(NIT) for execution of the instant work for an estimated amount of Rs.10,94,94,941 within a stipulated period of two years. The respondent-contractor dropped the tender for the said work and became the lowest tenderer at a tender value of Rs.11,71,04,839. Subsequently, the work was awarded to the respondent-contractor by issuing work order dated 06/06/2014, with a stipulated date of completion of two years. As per work order the stipulated date of commencement of the work was 20/06/2014 and the date of completion of the work was stipulated on 19/06/2016.

**4.2.** Thereafter, an undated agreement bearing No 01/SE/11/EE/KLSD/2014-2015 was entered between the contractor and the Executive Engineer, who represented the State of Tripura, detailing the terms and conditions and price schedules etc.

**4.3.** Accordingly, the respondent-contractor mobilized his working force and machinery but there was a delay in execution of the aforesaid agreement for 165 days i.e. from 02/12/2014 to 14/01/2016 at the instance of the appellants and as such the respondent-contractor had to remain idle for a considerable period of time as aforementioned. In addition, the work suffered further delay due to late supply/piece meal supply and changes in designs and drawings on several occasions and performing additional lead and lift in earth work due to geographical condition of site over which the respondent-contractor had no control, resulting in prolongation of the contract period and it became onerous for him to complete the work at the agreement rate due to abnormal rise in prices. The respondent-contractor proposed 30% enhancement over the agreement rate to compensate price escalation and if the proposal so made was not acceptable, the contract would be closed. But the appellants on 31/01/2019 rescinded the contract instead of closing it. Moreover, the respondent-contractor also alleged that payment against additional lift and lead in the earth work as executed by the contractor has not been made, which cropped up as major dispute in between the claimant-contractor and the respondent-appellants.

**4.4.** On the other hand, the appellants alleged that the respondent-contractor deliberately suppressed the material fact and field realities with the intention of causing fraud and abuse of the process of arbitration. Moreover, the appellants by denying the contentions of the respondent-contractor alleged that the department had handed over the clear and undisputed site to the respondent-contractor in time and performed reciprocal obligations as and when required. However, the department accepted the delay for 165 days as recorded in hindrance register and agreed on principle

to give extension for this delay without any levy of compensation as envisaged in the L.D. Clause. Further, the appellants denied the price escalation as demanded by the respondent-contractor as it was not as per provision of the agreement. The appellants also alleged that the contractor was provided enough opportunities to execute the work by extending time and carrying out reciprocal obligations, but the respondent-contractor suspended the work from time to time denying the instructions of the appellants and ultimately stopped the work in the month of March, 2017 and remained adamant to enhance the rate @30% over the agreement rate for executing further work. But when all efforts to re-start the work failed, the appellants rescinded the contract under the provisions of the agreement, after serving show cause notice to the respondent-contractor.

**4.5.** The respondent-contractor objected to the final action taken by the appellants depicting various grounds. As regards, payment against additional lead and lift in the execution of earth work as claimed by respondent-contractor, it is the stand of the appellants that the amount claimed by the respondent-contractor is not entertainable and whatever amount is payable on account of extra/additional lead and lift has been taken into consideration under extra item Nos.11 and 14(in total Rs.2,92,334/-), as shown in 7<sup>th</sup> RA and final bill, the balance outstanding payment of which is yet to be paid.

**4.6.** As a result, disputes arose between the parties, which resulted into appointment of a sole arbitrator on 28/5/2019 vide order no.7(17)/CE/PWD (Building).

**4.7.** Considering the controversies transpired from the respective statement of claims and defense and the documents filed by the parties, the learned Arbitrator framed the following issues:

- “1. Whether the arbitration case is maintainable in its present form.*
- 2. Whether the claimant is entitled to get the balance outstanding payment against the work executed upto 3-1-2017, but not measured? Rs 50,00,000/-*
- 3. Whether the claimant is entitled to get the balance outstanding payment against the extra/deviated item for additional lift, but not measured? Rs 1, 31.44,169/-*
- 4. Whether the claimant is entitled to get the balance outstanding payment against the work executed as extra item for additional lead, but not measured? -Rs 1,03,95,679/-*
- 5. Whether the claimant is entitled to get the balance outstanding payment against the work executed and measured, but not paid? Rs 28,01,334/-*
- 6. Whether the claimant is entitled to get refund of security deposit? Rs.14,05,000/*
- 6(a)- Whether the claimant is entitled to get refund of earnest money amounting to Rs.10,95,000 ?*
- 7. Whether the claimant is entitled to get outstanding payment against price escalation bill upto 6<sup>th</sup> R.A. BILL?-Rs 1,37,99,630/-*
- 7(a)-Whether the claimant is entitled to get loss incurred due to overhead expenses amounting to Rs12,45,000?*
- 7(b)-Whether the claimant is entitled to get loss on the cost of materials brought to site amounting to Rs20,00,000?*
- 8. Whether the rescission of contract by the respondent is lawful or not?*
- 9. Whether the claimant is entitled to get loss of expected profit @ 15% on the balance work remaining unexecuted?- Rs 34, 24,048/-*
- 10. Whether the respondent Is entitled to get the difference of cost amounting to Rs 1,10,50, 639/- for completing the unexecuted work left by the claimant?*
- 11. Whether the claimant and/or respondent is/are entitled to get interest on dues to be paid to the claimant or respondent as per provisions of the Arbitration and Conciliation Act, 1996 as amended? - As would be decided by Arbitrator*
- 12. Whether the claimant or respondent is entitled to any Cost? -As would be decided by Arbitrator.”*

**4.8.** On going through the documentary evidence furnished by both the parties with their respective statement of claims and defense and having heard the learned counsel of the parties, the learned Arbitrator by the impugned order dated 18.04.2017 declared the award in the following manner:

*“Summary of award*

*Issue No-1-Whether the claim petition of the claimant contractor is maintainable?*

*It is declared by the sole arbitrator that claim petition of the claimant contractor is maintainable for the reasons as discussed under issue No-1*

*Issue No-2- Whether the claimant is entitled to balance outstanding payment against work executed upto 3-1-2017, but not measured? - Rs.50,00,000/-*

*This claim under issue-2 has not been established and hence NIL Award.*

*Issue-3.Whether the claimant is entitled to get the balance outstanding payment against the extra/deviated item for additional lift, but not measured? Rs 1,31,44,169/-*

*AND*

*Issue-4.Whether the claimant is entitled to get the balance outstanding payment against the work executed as extra item for additional lead, but not measured? -Rs 1,03,95,679/-*

*Both the issues are discussed together. The claims under these issues are not established and hence NIL award.*

*Claim No-5.- Whether the claimant is entitled to get outstanding payment against executed work measured but not paid ?-28,01,334*

*The issue has been established. The tribunal awards a sum of Rs.39,66,805 against CLAIM No-5. The awarded amount is subjected to statutory deduction, if not already made. The amount after deduction, if any, shall carry simple interest @ 5% from the commencement of arbitration up to the date of making award and whereafter it shall carry interest @ 7% till realisation.*

*6. Whether the claimant is entitled to get refund of security deposit? Rs. 14,05,000/-*

*6(a)- Whether the claimant is entitled to get refund of earnest money amounting to 10,95,000?*

*The claims under these issues 6 and 6(a) are established. The security deposit and earnest money claimed are released. The released security*

*deposit and earnest money, will however carry no interest, if paid within forty days; otherwise it will carry simple interest @ 5% per annum after forty days from the date of publication of award up to the date of realisation.*

*7. Whether the claimant is entitled to get outstanding payment against price escalation bill upto 6 R.A. BILL? -Rs.1,37,99,630/- as revised to Rs.1,44,64,88 up to 7<sup>th</sup> R.A, BILL.*

*The claim under the issue is partially established, Awarded a sum of Rs.1,07,73,166 against claim under this issue, with interest @ 5% p.a. from the commencement of arbitration up to the date of making award and thereafter it shall carry interest @ 7% till realisation.*

*7(a)-Whether the claimant is entitled to get loss incurred due to overhead expenses amounting to Rs12,45,000?*

*The claim under this issue is partially established. The tribunal awards a sum of Rs. 3.32,000/--*

*The awarded sum shall carry interest @ 5% p.a. from the commencement of arbitration up to the date of making award and thereafter it shall carry interest @ 7% till realisation.*

*Issue-7(b)-Whether the claimant is entitled to get loss on the cost of materials brought to site amounting to Rs20,00,000?*

*The claims under the issue 7(b) not established. Nil award.*

*-Issue No-8"Whether the rescission of contract by the respondent is lawful or not.*

*The arbitral declares that the rescission of contract by the respondent is not legally valid. Reasons are stated while discussing the issue.*

*Issue No-9. Whether the claimant is entitled to get loss of expected profit @ 15% on the balance work remaining unexecuted? Rs 34, 24,048/- as revised to Rs55,25,319*

*The claim under this issue is partially established. A sum of Rs 22,98,587- is awarded under this issue. The awarded sum shall carry interest @ 5% p.a. from the commencement of arbitration up to the date of making award and thereafter it shall carry interest @ 7% till realisation.*

*Issue No-10. Whether the respondent is entitled to get the difference of cost amounting to Rs 1,10,50, 639/- for completing the unexecuted work left by the claimant ?*

*This is a counter-claim from respondent. The claim is not established. Nil award.*

*Claim No.11. Whether the claimant and/or respondent is/are entitled to get interest on dues to be paid to the claimant or respondent as per provisions*

*of the Arbitration and Conciliation. Act, 1996 as amended? - As would be decided by Arbitrator*

*The tribunal has awarded interest separately, where applicable, while discussing the issues. There is no need to discuss the issues under this issue.*

*12. Whether the claimant or respondent is entitled to any Cost? -As would be decided by the Arbitrator*

*Awarded a sum of Rs.5,74,230 to the claimant with direction that 35% of the cost so awarded shall have to be paid to the respondent with interest where applicable.”*

**4.9.** Being aggrieved by the award dated 17/06/2020, the appellants filed a petition before the Court of learned District Judge, Unokoti District, Kailashahar under Section 34 of the Arbitration and Conciliation Act, 1996 for setting aside the arbitral award passed by the learned Arbitrator in Arbitration Proceeding No.02 ARB/SRB of 2019 which was registered as Title Suit 04 (ARBITRATION) of 2020. The learned District Judge by an order dated 16.03.2022 upheld the arbitral award passed by the learned Arbitrator and rejected the petition filed by the appellants. Hence, the instant Appeal.

**5.** Mr. K De, learned Addl. G.A. appearing for the appellants submitted that learned District Judge, Unokoti Judicial District failed to appreciate the arbitral award arrived at by the learned Sole Arbitrator. Moreover, the learned Court below as well as the learned Sole Arbitrator have failed to consider that none of the 13 claims as submitted by the Contractor-Respondent is covered by the terms and conditions of the contract. Further, the learned District Judge as well as the learned Sole Arbitrator have failed to consider that the claimant-respondent is not at all entitled to get payment as per issue No. 2 as the payment relating to issue No. 2 has already been paid to the Contractor-Respondent. Also, they failed to



consider Issue No. 3 that the Contractor-Respondent is not entitled to get any amount as the said claim for lift had already been measured and Rs.1,71,906/- upto 7<sup>th</sup> RA bill and final bill had already been paid to the Contractor Respondent. The learned District Judge, Unakoti Judicial District as well as the Sole Arbitrator have failed to consider that the interest of 7% so preferred for any delay beyond the time frame is not entertainable as there is no provision of contract exists in the agreement in this regard.

**5.1.** Mr. De, learned Addl. GA further submitted that according to clause 44 of the agreement price escalation clause as inserted in the agreement will not be applicable in this case and as such the contractor respondent is not entitled to any amount as escalation of price. As a result, state had suffered irreparable loss due to suspension of work by the respondent contractor. Moreover, the Respondent Contractor was never forced to dump the materials at the work site rather, it was the duty of the contractor concerned to procure materials according to requirement of the work.

**6.** In the instant appeal, the appellants have *inter alia* made the following prayers:

“(i) Admit this application;

(ii) Issue notice upon the respondent;

(iii) Call for the LC records;

(iv) After hearing the parties, set aside the judgment and order dated 16/03/2022 passed in Title Suit 04 (Arbitration) of 2020 by the Ld District Judge, Unakoti District, Kailashahar along with arbitral Award passed by the Ld. Arbitral Tribunal on 17/06/2020 in Arbitration Case No. ARB/SRB/2019(2);

(v) Any other order/order(s) may pass as Your Lordship may deem fit and proper.

AND

For this act of kindness the Appellant as in duty bound shall ever pray.”

7. On the other hand, Mr. Somik Deb, learned senior counsel appearing for the respondent-contractor submitted that the claimant respondent ('claimant' for short) had raised his claims under various Heads, and the learned Arbitrator, by the impugned Award dated 17.06.2020 had partly allowed the claims of the claimant. According to learned senior counsel, ground Nos. I to IV are too vague, to inspire any confidence, and therefore, do not merit any consideration. According to learned senior counsel, ground No.V cannot be sustained inasmuch as the same relates to the findings, recorded by the learned Sole Arbitrator with reference to issue No.2 of the Claims, raised by the Claimant. The said Issue has been decided against the Claimant, and therefore, the appellants cannot have any justifiable reason to feel aggrieved. Moreover, Ground No.VI cannot be sustained inasmuch as the same relates to the findings, returned by the learned Sole Arbitrator with reference to Issue No.II raised by the Claimant as the said Issue has also been decided, against the claimant, and hence, the appellants cannot be treated to be as aggrieved parties against the said finding. The next Ground namely, Ground No. VII appertains to grant of Interest, awarded by the Learned Sole Arbitrator, in favour of the claimant. In this context, it is submitted that the mandate, contained in the two Clauses (a & b) of Section 31(7) of the Act assumes paramount significance.

7.1. Moreover, Mr. S. Deb, learned senior counsel appearing for the respondent-contractor submitted that Section 31(7)(a) of the Act relates to the award of Interest by the Arbitrator from the date of accrual of the cause of action to the date of Award. Accordingly, Section 31(7)(a) relates to Interest *pendente lite*. The expression "*unless otherwise aggrieved by the parties*", '*sum*' & '*award is made Interest*', assumes paramount significance.

**7.2.** Learned senior counsel has placed reliance upon the following judgments of the Apex Court:

- i) Hyder Consulting (UK) Ltd. v. State of Orissa, (2015) 2 SCC 189, Paragraph nos. 2, 7, 13, 26, 28 & 29**
- ii) Morgan Securities & Credits (P) Ltd. v. Videocon Industries Ltd., (2023) 1 SCC 602, paragraphs 1, 4 to 6, 13, 14, 16, 17, 20 to 25, 27 & 28,**

**7.3.** Mr. Deb, learned senior counsel for the respondent-contractor submitted that Arbitrator would be well within his limits & jurisdiction to award Interest, at such rate, as he may deem reasonable, on the whole/part of the money, payable for the whole/part of the period, between the date of accrual of cause of action to the date of making/passing of the Award. Thus, the Arbitrator would be well within his limits & jurisdiction to award Interest, at such rate, as he may deem reasonable.

**7.4.** Furthermore, Mr. Deb, learned senior counsel for the respondent-contractor submitted that, from a conspectus of the above two judicial pronouncements, it remains beyond the cavil of any dispute that the Arbitrator was well within his jurisdiction, in awarding Interest, in favour of the Claimant, and therefore, the judicial intervention, as sought for, by the appellants, vide Ground No. VII & XI of the Memorandum of Appeal, does not merit any consideration.

**7.5.** While discussing Ground No.VIII, Mr. Deb, learned senior counsel for the respondent-contractor submitted that the Award of the Arbitrator under Clause 44 of the agreement is sustainable.

**7.6.** Moreover, learned senior counsel vehemently argued that the Work Order was issued, in favour of the Claimant on 06.06.2014, with a stipulation that the parties to the contract should execute the Agreement

within 15 days, from the date of issuance of the Work Order, i.e., on or within 21.06.2014. Accordingly, the agreement was executed between the Claimant & the employer and the scheduled date of commencement of the work stipulated thereunder was 20.06.2014, with a stipulation that the work had to be concluded within two years therefrom. It is also an admitted fact that the execution of the work was hindered, on account of delay of 165 days, solely attributable to the employer. The said act had also been noted in the Hindrance Register, which has been adverted to by the learned Sole Arbitrator in his Award.

**7.7.** Learned senior counsel has referred Clause 44 of the Agreement which provides for Price Adjustment. Under Clause 44 of the Agreement, the Claimant was/is entitled to price escalation inasmuch as the said Clause is couched in a negative language, thereby embracing twin conditions, namely:-

- i) value of the work to be Rs.1.00 crore and above, and
- ii) the period for completion of the work is 24 months or less thereto.

**7.8.** For invocation of the negative stipulation, contained in Clause 44 of the Agreement, both the conditions mentioned therein, are mutually inclusive Clauses, and hence, are not applicable in the instant case as submitted by learned senior counsel, Mr. Deb for the respondent-contractor. Moreover under Clause 44.1 of the Agreement, which is couched in a positive language mandates that Price Adjustment would be admissible to a contractor, where the estimated price of the work is more than Rs.1.00 crore, and having a completion period of more than 24 months.

**7.9.** Moreover learned senior counsel appearing on behalf of the respondent-contractor submitted that it is an admitted position that the value of the contract in question is more than Rs.2.00 crores, and it was completed

within a period of more than 24 months. The second sentence of Clause 44.1 of the Agreement amplifies the above position, by mandating that Price Adjustment would be applicable, within the original contract period, as also in the extended time for completion, due to the fault of the respondent/employer.

**7.10.** Clause 44 of the Agreement employs the expression 'stipulated time for completion', but Clause 44.1 of the Agreement employs the expression 'having completion period of more than 24 months'. The second sentence of Clause 44.1 of the Agreement i.e. *“This should be applicable within the original contract period extended period owing to departmental delay”* leads to a conclusion that Clauses 44 & 44.1 of the Agreement operates in two different fields, and one is no substitute for the other, and hence, the said claim of the claimant under Issue No. ii is sustainable, under Clause 44.1 of the Agreement.

**7.11.** Further, learned senior counsel appearing on behalf of the respondent-contractor submitted that both under Clause 44 & Clause 44.1 of the Agreement, the Claimant was/is entitled to Price Escalation/enhanced rate for execution of the work, which had been asserted by him.

**7.12.** Moreover, it is contended by the learned senior counsel appearing on behalf of the respondent-contractor that a recital contained in the Agreement to the effect that time is the essence of the contract, is by itself, not conclusive of the fact that the time is the essence thereof, and whether time is the essence of the contract is a question of intention of the parties to the contract, to be gathered from the Terms of the contract. Further, it is submitted that when a contract provided for imposition of penalty and grant of extension of time, and the contractee grants extension of time,

without imposing any penalty therefore, then in such circumstances, it cannot be inferred that the time was the essence of such a contract.

**7.13.** In support of his submission, learned Counsel for the respondent-contractor has placed reliance upon the following judgments of the Apex Court (i) **Hyderabad Municipal Corpn. v. M. Krishnaswami Mudaliar, (1985) 2 SCC 9**, (ii) **Asian Techs Ltd. v. Union of India, (2009) 10 SCC 354** (iii) **Asian Techs Ltd. v. Union of India, (2009) 10 SCC 354**, and argued that since, the execution of the work was hindered for 165 days, for reasons attributable to the employer, applying the mandate, contained in Clause 44.1 of the Agreement, it may be concluded that the said period of the execution of the work was two years + 165 days. Since, the period of execution of the work actually got extended beyond two years, the negative stipulation, contained in clause 44 of the Agreement would not come into play.

**7.14.** Moreover, learned senior counsel appearing on behalf of the respondent-contractor submitted that an arbitrator is the best interpreter of the Clauses of the Agreement, and any erroneous interpretation of a Clause of an Agreement cannot constitute a valid basis for challenge, either under Section 34(ii) read with the Explanation appended thereto, or Section 34(2A) of the Act. It is submitted that the Proviso, appended to the substantive part of Section 34(ii) of the Act amplifies the above two contention. In view of the same, since, a challenge on the aforesaid premise is not maintainable, under Section 34 of the Act, as a corollary thereof, it logically follows therefrom that a challenge under the said premise, is equally not maintainable, under Section 37(1)(c) of the Act.

**7.15.** In this context, learned senior counsel appearing on behalf of the respondent-contractor referred following judicial pronouncements:-

- i) **Associate Builders v. DDA, (2015) 3 SCC 49, paragraph nos.15 to 19, 27 to 30, 35, 36, 40, 42.1 & 42.2;**
- ii) **Ssangyong Engg. & Construction Co. Ltd. v. NHAI, (2019) 15 SCC 131, paragraph nos. 20, 26, 34 to 44, 67 & 68; and**
- iii) **Delhi Airport Metro Express (P) Ltd. v. DMRC, (2022) 1 SCC 131 Paragraph nos. 22, 24, 26, 28, 29 to 31, 37 to 43, 48 to 52.**

**8.** We have considered the rival submissions of learned counsel appearing for the parties and gone through the relevant materials placed on record. We have also gone through the award returned by the learned Arbitrator as well as the judgment and order passed by learned District Commercial Court by which the arbitral award passed by the learned Arbitrator has been upheld.

**8.1.** The scope of interference in an appeal under Section 37 of the Act of 1996 has been delineated in the decisions rendered by the Apex Court. We are inclined to refer to the latest decision of the Apex Court in this regard rendered in case of *S.V. Samudram v. State of Karnataka and Anr.2024 SCC Online SC 19*. Paragraphs 62 to 73 are extracted here-under:

*“62. Moving further, we now consider the judgment impugned before us, i.e., the order of the High Court upholding such modification, under the jurisdiction of Section 37 of the A&C Act.*

*63. It has been observed by this Court in MMTC Ltd. v. Vedanta Ltd.*

*“14. As far as interference with an order made under Section 34, as per Section 37, is concerned, it cannot be disputed that such interference under Section 37 cannot travel beyond the restrictions laid down under Section 34. In other words, the court cannot undertake an independent assessment of the merits of the award, and must only ascertain that the exercise of power by the*

*court under Section 34 has not exceeded the scope of the provision. Thus, it is evident that in case an arbitral award has been confirmed by the court under Section 34 and by the court in an appeal under Section 37, this Court must be extremely cautious and slow to disturb such concurrent findings.”*

*(Emphasis Supplied)*

**64.** *This view has been referred to with approval by a bench of three learned Judges in UHL Power Company Ltd v. State of Himachal Pradesh. In respect of Section 37, this court observed:—*

*“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.”*

**65.** *This Court has not lost sight of the fact that, as a consequence to our discussion as aforesaid, holding that the judgment and order under Section 34 of the A&C Act does not stand judicial scrutiny, an independent evaluation of the impugned judgment may not be required in view of the holding referred to supra in MMTC Ltd. However, we proceed to examine the same.*

**66.** *We may also notice that the circumscribed nature of the exercise of power under Sections 34 and 37 i.e., interference with an arbitral award, is clearly demonstrated by legislative intent. The Arbitration Act of 1940 had a provision (Section 15) which allowed for a court to interfere in awards, however, under the current legislation, that provision has been omitted.*

**67.** *The learned Single Judge, similar to the learned Civil Judge under Section 34, appears to have not concerned themselves with the contours of Section 37 of the A&C Act. The impugned judgment reads like a judgment rendered by an appellate court, for whom re-examination of merits is open to be taken as the course of action.*

**68.** *We find the Court to have held the award to be perverse and contrary to public policy. The basis for such a finding being the delay on the part of the contractor in completion of the work which “could have been avoided”. Significantly, as we have observed earlier such a finding is not backed by any material on record.*

**69.** *What appears to have weighed with the court is that the factoring of the cost escalation between the years 1989-1990 and 1992 by 100% was exaggerated. But then equally, there is no justification in granting lump sum escalation by 25% of the contract value. Well, this cannot be a reason to modify the award for the parties are governed by the terms and conditions and the price escalation stood justified by the petitioner based on cogent and*



*reliable material as was so counted by the Arbitrator in partly accepting and/or rejecting the claims.*

*70. In our considered opinion, the court while confirming the modification of the award committed the very same mistake which the Court under Section 34 of the A&C Act, made.*

*71. The Court under Section 37 had only three options:—*

*(a) Confirming the award of the Arbitrator;*

*(b) Setting aside the award as modified under Section 34; and*

*(c) Rejecting the application(s) under Section 34 and 37.*

*72. The learned single Judge has examined the reasoning adopted by the learned Arbitrator in respect of certain claims (claims 3 and 7, particularly) and held that allowing a claim for escalation of cost, was without satisfactory material having been placed on record and is “perverse and contrary to the public policy”. However, it appears that such a holding on part of the Judge is without giving reasons therefor. It has not been discussed as to what the evidence was before the learned single Judge to arrive at such conclusion. This is of course, entirely without reference to the scope delineated by various judgments of this Court as also, the statutory scheme of the A & C Act.*

*73. Having referred to J.G Engineers (P) Ltd. v. UOI and more particularly para 27 thereof, it has been held that the award passed by the learned Arbitrator is “patently illegal, unreasonable, contrary to public policy.” There is no reason forthcoming as to how the holding of the learned Arbitrator flies in the face of public policy.”*

9. In view of the aforesaid enunciation of law, there cannot be quarrel that the Arbitrator is the sole judge for construction of the terms and conditions of the agreement. But, what we find in the instant case, even learned Commercial Court has not made any reference to grounds of challenge relating to price escalation and applicability of Clause 44 and 44.1 of Agreement. Moreover, the Learned District Judge as well as the Sole Arbitrator has failed to consider whether the claimant-respondent is entitled to get payment relating to issue no.2 as the payment relating to issue no.2 has already been paid to contractor respondent.

**10.** The findings of the learned Commercial Court extracted hereunder would unambiguously show that there has been complete non consideration of any of the several grounds urged by the Appellant to question the impugned Award:

*“Looking at the above mentioned facts, and judgments of Hon'ble Supreme Court, this Court is of the opinion that the Arbitrator has legal authority to award the pre-reference period interest, pendente lite interest and post award period interest on the amounts which has been awarded in different heads of the Award.*

*The Applicant Executive Engineer, PWD(R&B), Kailashahar in his application in his ground of challenge of award apart from challenging the award relating to payment of interest, has also raised in dispute No 2 that payment for an amount of Rs.1,20,425/- has also been made for 8276.651 cum @ 14.55 per cum and as such claim as preferred by the claimant-contractor is not maintainable. The applicant in his application has also in dispute Nos 3, 4, 5, 6, 7, 8 & 9 stated above various items for which the claimant-contractor was not entitled to get, but the Learned sole Arbitrator did not consider that. In my considered opinion, so far as grounds of challenge of award relating to dispute Nos 3 to 9, are considered, these are relating to re-examining and re-appraisal of the evidence considered by the Arbitrator. It is also settled principle that award cannot be challenged on the ground that Arbitrator has arrived wrong conclusion. The reasonableness of the reason given by Arbitrator cannot be challenged. The Arbitrator is the sole Judge of the quality of the evidence and it will not be for the Court to take upon itself the task of being a Judge of the evidence before the Arbitrator. Moreover, scope of interference by Courts in regard to arbitral award is limited. Courts do not sit in appeal over the findings and decision of the Arbitration. Hence, the grounds of challenge of award as stated by the applicant in his application as mentioned in dispute Nos 3 to 9, cannot be considered and hence, accordingly rejected.*

*10. In the light of the aforesaid fact and circumstances, I am of the considered view that the Learned sole Arbitrator has correctly passed the arbitral award dated 17.06.2020 awarding penal interest in favour of respondent-contractor and the same does not warrant for interference and it is not liable to be set aside. This Court affirms the Award dated 17.06.2020.”*

**11.** The learned District Judge has failed to test the correctness of the award within the contours of the grounds available under Section 34(2) and 34(2-A) of the of the Arbitration and Conciliation Act, 1996 without

referring to the relevant Clauses of the Agreement. Non-consideration of any of the grounds raised under Section 34 of the Act makes the judgment of the learned Commercial Court unreasoned and unsustainable.

**12.** In view of the discussions made here-in-above, we are of the view that the matter be remitted to the learned District Court, Unakoti District to decide the grounds urged by the appellant and also as to the applicability of Clause 44 of the agreement and as regards to the expected loss of profit or adjustment in accordance with law within a reasonable time preferably 12(twelve) weeks from the date of receipt of the copy of this order since the Arbitration proceeding was initiated way back in the year 2019. Since the matter is remanded to the learned Commercial Court only on the grounds that the impugned Judgment shows complete non application of mind and non consideration of the grounds urged in the Section 34 application, we have consciously refrained from observing any opinion on the grounds urged by the parties in the question of sustainability of the Award rewarded by the Arbitrator at this stage.

The appeal is disposed of in the manner and to the extent as indicated above.

**(ARINDAM LODH, J)**

**(APARESH KUMAR SINGH, CJ)**