Before Jaishree Thakur, J.

M/S OMAXE LIMITED—*Appellant*

versus

M/S NHPC LIMITED AND OTHERS—*Respondents*

FAO No.2702 of 2013 & connected cases

April 12, 2019

Arbitration and Conciliation Act, 1996—Ss. 34 and 37—Award by Arbitrator can be set aside only on the grounds stated in Section 34—Award made after verifying record and examining all relevant material—District Judge does not act as Court of appeal—Cannot reassess-reappraise the facts—Even if two views are possible, view taken by Arbitrator cannot be set aside unless it falls within mischief of Section 34—Order of District Judge not sustainable—Appeal allowed.

Held that, once the Arbitrators had applied their mind, the impugned order passed by the Additional District judge is not sustainable in the eyes of law. An award can be set aside under Section 34 of the Act, if it is (a) contrary to the fundamental police of Indian law; (b) contrary to the interests of India; (c) contrary to justice or morality; or (d) patently illegal. In order to hold an award to be opposed to public policy, the patent illegality should go to the very root of the matter and not a trivial illegality. However, an award could be set aside if it is so unfair and unreasonable that it shocks the conscience of the court, only then it would be opposed to public policy.

(Paras 17)

M.K. Ghosh, Advocate with
Tina Garg, Advocate
for the appellant.

Rita Kohli, Senior Advocate with
Rahul K. Sharma, Advocate
for respondent No.1-NHPC.

JAISHREE THAKUR, J.

(1) Through this common order, this court shall decide above captioned three appeals bearing FAO No.2702 of 2013, FAO No.2703 of 2013 and FAO No.9396 of 2014 titled as ***"M/s Omaxe Limited*** versus ***M/s NHPC Limited & others"*** as questions of law in all the

above-mentioned appeals is similar. For brevity, facts are being taken from ***FAO No.2702 of 2013***.

(2) The instant appeal has been directed against the order dated 17.04.2013 passed by the Addl. District Judge, Faridabad whereby the objections filed by respondent No.1-NHPC under Section 34 of the Arbitration and Conciliation Act, 1996 (for short 'the Act') has been allowed and the award passed by the arbitrator has been set aside, while also remanding the matter to the Engineer-in-Charge.

(3) In brief, the facts of the case are, that the appellant and respondent No.1 entered into a contract/agreement dated 20.02.2004 for construction of Multistoried Residential Building of Type 'A' Quarters (Package-II) at NHPC Residential Complex, Faridabad. A total sum of 11,72,49,846/- was awarded for the work. The date of commencement of work was 11.02.2004 and the stipulated date of completion was 10.03.2006 i.e. within 25 months. It is averred that on account of delay on the part of respondent No.1, the work was actually completed on 06.07.2006 i.e. there was delay of 118 days in completion of the project from the stipulated date of completion. It is submitted that as certain disputes arose between the parties, the appellant vide letter dated 01.05.2008 called upon respondent No.1 to appoint an Arbitral Tribunal. On the appointment of the Arbitral Tribunal the appellant filed its statement of claim which was contested. and thereafter an award was passed on 29.10.2010. During the proceedings before the Arbitral Tribunal, an application under Section 16 of the Act was filed by respondent No.1 contending that as per provisions of Clause 53 read with Clause 55.1 of General Conditions of Contract, the decision taken under clauses 7, 8, 10, 13, 17, 18, 21, 23, 24, 29, 32, 33, 34, 37, 38, 39, 40,41 and 44 by the Engineer-in-Charge of respondent No.1 was final and binding on the appellant, and therefore, the Arbitral Tribunal has no jurisdiction to entertain of claims falling under theses clauses. The Arbitral Tribunal after going through the clauses of the agreement and hearing the parties, came to hold that since Clause 53 of General Conditions of Contract provides that the Engineer In Chief is to give his decision in writing and as this was not done, the Tribunal has to decide on the claims raised, after hearing both the parties. The Arbitral Tribunal, after going through the material placed on record, passed a detailed and reasoned award on 29.10.2010 allowing part of the claims of the appellant-contractor. Being aggrieved by the said award, respondent No.1 filed objections under Section 34 of the Act before the District Judge, Faridabad. The appellant filed a detailed reply to the

objections filed by respondent No.1. The objections filed by respondent No.1 were disposed of by an order dated 17.04.2013 and the award dated 29.10.2010 was set aside holding that the Arbitral Tribunal exceeded its jurisdiction in deciding the claim of the appellant. The Additional District Judge further directed the parties to appear before the Engineer-in-Charge, NHPC, NHPC Office Complex, Sector 33 Faridabad on 17.05.2013 for adjudication upon the disputes raised in the arbitration petition filed by the appellant and to dispose of the claim within 45 days of 17.05.2013. Being aggrieved against the order dated 17.04.2013 passed by the Additional District Judge, Faridabad, the instant appeal has been filed.

(4) Mr. M.K. Ghosh, Advocate with Ms. Tina Garg, Advocate learned counsel appearing on behalf of the appellant-M/s Omaxe Limited argues that the claims as raised by the appellant before the Arbitral Tribunal did not fall within the ambit of Clause 53 or any other sub-clauses mentioned therein and the Arbitral Tribunal was competent to pass the award. It is also contended that the Additional District Judge has failed to consider that a breach of condition of contract and adjudication of assessing damages and such like other issues arising out of the breach are two different and distinct concepts and breach could have been adjudicated only by the Arbitral Tribunal and to that extent the "excepted items" were not excluded from the preview of the Arbitral Tribunal. It is also pointed out that in view of the finding of the Arbitral Tribunal that the appellant was not responsible for the delay in completion of contract and it was attributed to respondent No.1, the Additional District Judge erred in referring the matter to the Engineer-in-Charge for adjudication. It is also argued that while adjudicating objections under Section 34 of the Act, the court cannot go into the reasoning given by the Arbitral Tribunal. It is argued that none of the submissions or judgments made by the appellant have either been noticed or dealt with by the Additional District Judge, Faridabad. While placing reliance upon judgments rendered in ***Asian Techs Ltd.*** versus ***Union of India***[1]***, Board of Trustees for the Port of Calcutta*** versus ***Engineers-De-Space-Age***[2]***, Bharat Drilling & Foundation Treatment (P) Ltd.*** versus ***State of Jharkhand***[3] learned counsel for the appellant argues that clauses similar to clause 39 is only a bar for the department from entertaining the claims, but does not prohibit the Arbitrator from

[1] (2009) 10 SCC 354
[2] (1996) 1 SCC 516
[3] (2009) 16 SCC 705

adjudicating the claims. While placing reliance upon judgment rendered in ***JG Engineers (P) Ltd.*** versus ***Union of India***[4]***,*** learned counsel for the appellant submits that the decision of the Engineer-in-Charge is not final and binding and is subject to further scrutiny by the Arbitrator. Learned counsel further relies upon judgment rendered in ***Navodaya Mass Entertainment Ltd.*** versus ***J.M. Combines***[5], to contend that once the Arbitrator has applied his mind to a matter before him, the court under Section 34 of the Act cannot reappraise the matter as if it were an appeal and even if two views are possible, the view taken by the Arbitrator would prevail. In support of his arguments, learned counsel also relies upon judgment rendered in ***K.N. Sathyapalan (dead) by LRS*** versus ***State of Kerala and another***[6]**.**

(5) Per contra, Ms. Rita Kohli, learned Senior counsel appearing with Mr. Rahul K Sharma, Advocate on behalf of respondent No.1 argues that the order passed by the Additional District Judge, setting the aside the award is well reasoned and no ground is made to interfere with the same. Learned counsel contends that where there was a specific bar to grant relief in respect of certain claims in the agreement between the parties, and adjudication of such claims by the arbitrators amounted to exceeding of jurisdiction. Learned counsel submits that extension was granted to the contractor without penalty and escalation of price was also allowed and the Clause 39.2 specifically bars claims by the contractor for such extended period, as such, the claims allowed by the Arbitral Tribunal were not arbitrable. As per Clause 16, the contractor was barred from making any claims or seeking damages from respondent No.1 in case of delay or providing facility, material etc. by the corporation and would be only entitled to suitable extension of time under Clause 39, which had been allowed. It is also contended that the award dated 29.10.2010 (amended on 28.05.2011) has been rightly set aside by the Additional District Judge, as it was violative of the public policy of India and it has also not taken into consideration the agreement dated 20.02.2004. It is also argued that the Arbitral Tribunal overlooked the fact that it was for the appellant to take the contract of risk policy but it had not done the needful and it was respondent No.1 who had to get the work carried out. It is pointed out that escalation of price was also wrongly allowed in violation of clause 39.2. It is further pointed out that as per clause 53, the decisions taken

[4] (2011) 5 SCC 758
[5] (2015) 5 SCC 698
[6] (2007) 13 Supreme Court Cases 43

by the Engineer-in-Charge were to be final, as such, all the claims awarded to the appellant were specifically barred under the contract. In support of her arguments, learned Senior counsel relied upon judgments rendered in ***Union of India*** versus M***/s Varindera Constructions Ltd. etc.***[7]***, M/s Sharma & Associates Contractors (P) Ltd.*** versus Progressive ***Constructions Ltd.***[8]***, Ramkishan Singh*** versus ***Rocks Buildcon Pvt. Ltd. & anr.***[9]***.***

(6) I have heard learned counsel for the parties and with their valuable assistance have gone through the case file.

(7) In the instant case, there is no dispute regarding the contract entered into between the parties or that there was a delay of 118 days in completing the project. The appellant herein made 11 claims, out of which **7** were allowed by the Arbitral Tribunal. The appellant herein filed its claims before the Arbitral Tribunal, which was duly replied by respondent No.1 by filing its written statement and after hearing both the parties, the impugned award came to be passed. In the award, the Arbitral Tribunal decided the preliminary issues as raised by respondent No.1, while observing as under:-

> "Preliminary issues raised by the respondent:
>
> 1. Innovation of Section 16 of Arbitration and Conciliation Act 1996. In this regard, the respondent contended that as per provisions of clause 53 & 51 of Contract, all decisions taken under clauses 7, 8, 10, 13, 17, 18, 21, 23, 24, 29, 32, 33, 34, 37, 38, 39, 40,41 and 44, the decision of the Engineer-in-Charge is final and binding on the claimant and, therefore, the Arbitration Tribunal has no jurisdiction on claims raised by the claimant.
>
> 2. Claimant argued that no finality of decision of Engineer-in-Charge with regards to any of the disputes raised by them subsists in respect of these disputes covered by clauses 53 & 55.1 of the General Conditions of the contract. Further, no quasi-judicial procedure of allowing submissions by the claimant was followed & no opportunity to argue the case was given. Further, an unqualified reference of these disputes to the Arbitration Tribunal in accordance with

[7] 2018(5) RCR (Civil) 411
[8] 2017(5) SCC 743
[9] 2017(2) R.A.J. 312

clause 55 of G.C.C. has been made and, therefore, these claims have to be arbitrated upon by the Tribunal. We have carefully considered the arguments advanced by the parties. We are of the view that such excepted matters have to be decided within the four corners of the contract as also the principles of natural justice after hearing both the parties. Clause 53 of G.C.C. Provides that such decision are to be given in writing. As this was not done, the Tribunal has to proceed to decide on the claims raised, after hearing both parties."

(8) Thereafter, the Arbitral Tribunal decided the claims of the appellant one by one with reasons, while taking into consideration the contract entered into between the parties and the documents produced.

(9) The Additional District Judge allowed the objections filed by respondent No.1 under Section 34 of the Act, while observing as under:

"12. There is absolutely no dispute with any of the authorities relied on behalf of the either party. However, the authorities relied upon by the Ld. counsel for the respondent No.1 do not further the case of the respondent No.1 at all. This court is not sitting as a Court of appeal, rather this court is bound to look into the question whether or not the arbitrators had exceeded their jurisdiction. In the present case, the jurisdiction of the Arbitrators was specifically curtailed under clause 53 of the GCC which specified that the decisions taken by the Engineer-in-Charge for the issues arising out of clause 7, 8, 10, 13, 17, 18, 21, 23, 24, 29, 32, 33, 34, 37, 38, 39, 40, 41 and 44 shall be final and binding on the contractor. Since all the claims raised by the respondent No.1 fall under one or the other provisions, none of the same were the subject matter of arbitration. Therefore, it must be held that the impugned award has been passed regarding disputes not contemplated by and not falling within the terms of the contract between the parties. Since an excess amount has been awarded in clear violation of the contract, the award is certainly violative of the ethics and morality which are part of the public police of India. xxx xxx xxx.

14. In view of the foregoing discussion, this petition is allowed and the impugned award dated 29.10.2010 amended

on 28.05.2011 is set aside forthwith. Since these matters were to be decided by the Engineer-in-Charge, the entire record is ordered to be immediately sent to the Engineer-in-Charge, NHPC for disposal in accordance with law. Both the parties, through their counsel, are directed to appear before the Engineer-in-Charge on 17.5.2011 and the Engineer-in-Charge shall be liable to dispose of the disputes raised by the respondent No.1 before the Arbitral Tribunal within a period of 45 days there from."

(10) Before proceeding to decide the contentions raised by learned counsel for the parties, first of all this court would like to refer to the relevant clauses of the contract entered into between the parties, which are as under:-

"**Clause 53: Finality Clause**

It shall be accepted as an unseparable part of the contract that all the decisions taken under clause Nos. 7, 8, 10, 13, 17, 18, 21, 23, 24, 29, 32, 33, 34, 37, 38, 39, 40, 41 and 44 by the Engineer-in-Charge and also in special conditions wherever applicable which shall be given in writing shall be final and binding on the contractor.

Clause 55: Arbitration

55.1 Except as otherwise provided, in clause 53 herein before, all questions, dispute or difference in respect in which the decision has not been final and conclusive arising between the contractor and the Corporation, in relation to or in connection with the contract shall be referred for arbitration in the manner provided as under:

Either of the party may give to the other notice in writing of the existence of such question, dispute or difference, which shall be settled in accordance with the Arbitration and Conciliation Act, 1996.

xxx xxx xxx

Clause 39 : Completion Time and Extensions.

39.1 Time allowed for execution of the work as a whole i.e. Twenty Five (25) Calendar months (including the period of one (1) month for mobilization) from the date of issue of letter of award, as specified in Schedule 'D' or the extended

time, if any, in accordance with these conditions shall be essence of the contract.

39.2 However, if the execution of the work as a whole is delayed beyond the time of completion as specified in Schedule 'D' on account of

i) Increase in the quantity of work to be done under the contract as per clause 18; or

ii) Suspension of work as per clause 35; or

iii) Rebuilding of work as per clause 34; or

iv) "Force Majeure" or

v) Any other clause in absolute discretion of the Engineer-in-charge; then immediately upon the happening of any such event as aforesaid, the contractor shall inform the Engineer-in-charge accordingly, but the contractor shall nevertheless use constantly his best endeavours to prevent and/or make good the delay and shall do all that may be required in this regard. The contractor shall also request, in writing, for extension of time, to which he may consider himself eligible under the contract, within fourteen days of the date of happening of any such events as indicated above.

No claim shall be entertained by the Corporation for such extended period."

(11) A question which arises for consideration is whether the appellant would be entitled to his claim in the face of Clause 39 of the agreement? The appellant raised a claim for various damages as compensation and extra expenditure incurred for breach of contract. It was alleged that the delay in competition of contract was attributable to the respondent No.1, since there was a delay in issuing of drawings, free site was not made available, delay due to issue of cement, steel etc. and delay due to competition of other works by other agencies. The Arbitral Tribunal found that the delay was by respondent No.1 and allowed the claim which was challenged holding it to be contrary to Clause 39 of the agreement. Learned Senior counsel for respondent No.1 argues that the Arbitral Tribunal could not have gone beyond the contract and ignored the Clauses therein, especially Clause 39, which provides for the requisite time for completion of the contract and in case of delay in completing the project, the contractor was only entitled to extension in time with a further stipulation that no claim shall be

entertained for such extended period. In support of the arguments, learned Senior counsel for respondent No.1 relied upon ***Union of India*** versus ***M/s Varindera Constructions Ltd. etc.*** (supra) wherein it has been held that if in an agreement it is specified that there would be no escalation on account of local factors and regulations, then the contractor would have no claim and will be required to pay wages in excess of minimum wages during execution of work. In the presence of such clause, to which contractor voluntarily agreed, any departure was not to be allowed and the contractor would not be entitled to claim any escalation in minimum wages.

(12) A similar question came for consideration before the Hon'ble Supreme Court in the cases of ***Board of Trustees for the Port of Calcutta*** versus ***Engineers-De-Space-Age*** (supra) ***; Bharat Drilling & Foundation Treatment (P) Ltd.*** versus ***State of Jharkhand*** (supra) ***; Asian Techs Ltd.*** versus ***Union of India*** (supra). In the case of ***Board of Trustees for the Port of Calcutta*** versus ***Engineers-De-Space-Age***(supra) the Supreme Court considered the question of interest being allowed by the Arbitrator de hors such provision in the contract;-

> "The short question which arises for consideration in this case and which was canvassed before us by Mr. Salve the learned senior counsel for the appellant was that the Arbitrator had awarded interest pendent lite notwithstanding the prohibition contained in the contract against the payment of interest on delayed payments.
>
> Clause 13(g) of the contract was relied upon in this behalf and that clause reads as under:
>
> No claim for interest will be entertained by the Commissioners with respect to any money or balance which may be in their hands owing to any dispute between themselves and the Contractor or which respect to any delay on the part of the Commissioners in making interim or final payment or otherwise."
>
> In the said case, the Supreme Court came to hold as under:- "The short question, therefore, is whether in view of sub-clause (g) of Clause 13 of the contract extracted earlier the Arbitrator was prohibited from granting interest under the contract. Now the term in sub-clause (g) merely prohibits the Commissioner from entertaining any claim for interest and does not prohibit the Arbitrator from awarding interest.

> The opening words Rs.no claim for interest will be entertained by the Commissioner' clearly establishes that the intention was to prohibit the Commissioner from granting interest on account of delayed payment to the contractor. Clause has to be strictly construed for the simple reason that as pointed out by the Constitution Bench, ordinarily, a person who has a legitimate claim is entitled to payment within a reasonable time and if the payment has been delayed beyond reasonable time he can legitimately claim to be compensated for that delay whatever nomenclature one may give to his claim in that behalf. If that be so, we would be justified in placing a strict construction on the term of the contract on which reliance has been placed. Strictly construed the term of the contract merely prohibits the Commissioner from paying interest to the contractor for delayed payment but once the matter goes to arbitration the discretion of the Arbitrator is not, in any manner, stifled by this term of the contract and the Arbitrator would be entitled to consider the question of grant of interest pendent lite and award interest if he finds the claim to be justified. We are, therefore, of the opinion that under the clause of the contract the Arbitrator was in no manner prohibited from awarding interest pendent lite.*"*

(13) In the case of ***Bharat Drilling & Foundation Treatment (P) Ltd.*** versus ***State of Jharkhand*** (supra) the Supreme Court again considered similar clauses and held as under :-

> "3. Shri Rakesh Dwivedi, learned Senior Counsel appearing for the appellant in all these appeals submitted that the High Court has based its judgment on the reasoning that the claims which were allowed by the arbitrator were barred by the contract Clause 1.21. The relevant sub-clauses thereof are as follows:
>
> 1.21.1 Payments for any additional items of work shall be given by Clause 11 (Eleven) of PWD form F-2 of the contract.
>
> 1.21.2 No claim for idle labour, idle machinery etc. on any account will be entertained.
>
> 1.21.3 No claim shall be entertain for business loss or any such loss.

> 1.21.4 No claim shall be entertained for delays in communicating decision, drawing or specifications by the department. The department may however consider the grant of extension of time in completion of work. If there is any such genuine reason for it.
>
> In case it is not possible for, the department to make the entire site available on the award of the work the contractor has to arrange his working programme accordingly. No claim whatsoever for not giving the site on award of work for giving the site gradually will be entertained however, suitable extension of time may be given at the discretion of the Engineer-in-Charge considering the merits of the case."

(14) In the said case, the Supreme Court while relying upon judgment rendered in ***Port of Calcutta*** versus ***Engineers-De-Space-Age*** (supra) *and* ***Ispat Engg. & Foundry Works*** versus ***SAIL***[10] held that the scope of interference by the court with a reasoned award is very limited, set aside the order of the High Court and award passed by the Arbitrator was restored.

(15) Similarly, in the case of ***Asian Techs Ltd. versusUnion of India (supra)*** the Supreme Court held as under;-

> "13. In this connection we may refer to **clause 70** of the contract which is the arbitration clause. The said clause reads as follows:
>
> 70.Arbitration All disputes, between the parties to the Contract (other than those for which the decision of the CWE or any other person is by the Contract expressed to be final and binding) shall, after written notice by either party to the Contract to the other of them, be referred to the sole arbitration of an Engineer Office to be appointed by the authority mentioned in the tender documents.
>
> **14. Clause 11 of the contract reads as follows:**
>
> 11. Time, delay and Extension (A) Time is of the essence of the contract and is specified in contract documents or in each individual Works Order.
>
> As soon as possible after the contract is let or any substantial Works Order is placed and before work under it

[10] (2001) 6 SCC 347

has begun, the G.E. And the Contractor shall agree upon a Time Progress Chart. The Chart shall be prepared in direct relation to the time stated in the contract documents or the Works Order for completion of the individual items thereof, and/or the Contract or Works order as a whole.

(B) If the works be delayed:

(a) by reason of non-availability of Government stores mentioned in Schedule 13; or

(b) by reason of non-availability or breakdown of Govt. Tools and Plant mentioned in Schedule 'C' then, in any such event, notwithstanding the provisions hereinbefore contained, the G.E. May in his discretion grant such extension of time as may appear reasonable to him and the Contractor shall be bound to complete the works within such extended time. In the event of the Contractor not agreeing to the extension granted by the Garrison Engineer, the matter shall be referred to the Accepting Officer (or CWE in case of contract accepted by Garrison Engineer) whose decision shall be final and binding.

(C) No claim in respect of compensation or otherwise, howsoever arising, as a result of extensions granted under Conditions (A) and (B) above shall be admitted."

In the said case, the Supreme Court came to hold as under;

"18. Apart from the above, it has been held by this Court in **Port of Calcutta v. 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. versusState of Jharkhand**."

(16) In the case of ***Asian Techs Ltd. versusUnion of India; Board of Trustees for the Port of Calcutta*** versus ***Engineers-De-Space-Age; Bharat Drilling & Foundation Treatment (P) Ltd.*** versus ***State of Jharkhand*** (supra), the Supreme Court in the clauses similar to in the instant case when a contractor raised a bill for compensation for extra work done/work done beyond the stipulated period on account of delay in supply of material etc. observed that the arbitrator or court can go into the question whether the liability has been satisfied or not. In

the instant case, Clause 39 (Completion Time and Extensions) clearly provides that 'No claim shall be entertained by the Corporation for such extended period.' However, the Supreme Court while considering the similar clause in ***Port of Calcutta's case*** (supra) i.e. 'no claim for interest will be entertained by the Commissioner' has observed that the term of the contract merely prohibits the Commissioner from paying interest to the contractor for the delayed payment, but once the matter goes to arbitration, the discretion of the arbitrator is not, in any manner, stifled by this term of the contract and the arbitrator would be entitled to consider the question of grant interest pendente lite and award interest if he finds the claim to be justified. After going through the aforesaid decisions of the Supreme Court, this court is of the considered opinion that a clause in the agreement entered into between the parties if bars the department/Corporation from entertaining the claims, would not debar the Arbitrators from allowing interest on account of delay in completion of work, which delay has been attributed to the respondent. As such, the arguments addressed by learned counsel for respondent No.1 are not sustainable.

(17) Further, Ms. Rita Kohli learned Senior counsel appearing on behalf of respondent No.1, contends that Clause 53 specially states that claims under the excepted clauses could not have been adjudicated upon by the Arbitrator and the decision taken by the Engineer-in-Charge shall be final and binding. Reliance has been placed in the case of ***M/s Sharma & Associates Contractors (P) Ltd. versusProgressive Constructions Ltd.*** (supra) where it has been held that the arbitration must be in terms of contract agreement and where it is found that the claim was entertained by the arbitrator on the basis of provisions not mentioned in the contract, the approach of the arbitrator will be clearly perverse. It was held that the Arbitrator is a creature of contract between the parties and if he ignores the specific terms of contract, it would be question of jurisdictional error which can be corrected by the court. Reliance is also placed upon the case of ***Ramkishan Singh versusRocks Buildcon Pvt. Ltd. & anr.*** (supra) where it has been held that under Section 28(3) of the Act, there was an obligation on the Arbitrator to take into account the terms of the contract and trade usages applicable to the transaction and if inasmuch the Arbitrator does not abide by mandate of Section 28(3), the impugned award cannot be sustained as it is opposed to fundamental policy of Indian Law.

(18) This issue is no longer res integra since a similar question came for consideration before the Supreme Court in ***JG Engineers (P)***

Ltd. versus ***Union of India*** (supra) wherein the question posed was as under;-

> "13. Clauses (2) and (3) of the contract relied upon by the respondents, no doubt make certain decisions by the Superintending Engineer and Engineer-in-Charge final/final and binding/final and conclusive, in regard to certain matters. But the question is whether clauses (2) and (3) of the agreement stipulate that the decision of any authority is final in regard to the responsibility for the delay in execution and consequential breach and therefore exclude those issues from being the subject matter of arbitration. xxx xxx xxx"

(19) In the said case, the Supreme Court observed as under;

> "22. In view of the above, the question whether appellant was responsible or respondents were responsible for the delay in execution of the work, was arbitrable. The arbitrator has examined the said issue and has recorded a categorical finding that the respondents were responsible for the delay in execution of the work and the contractor was not responsible. The arbitrator also found that the respondents were in breach and the termination of contract was illegal. Therefore, the respondents were not entitled to levy liquidated damages nor entitled to claim from the contractor the extra cost (including any escalation in regard to such extra cost) in getting the work completed through an alternative agency. Therefore even though the decision as to the rate of liquidated damages and the decision as to what was the actual excess cost in getting the work completed through an alternative agency, were excepted matters, they were not relevant for deciding claims 1, 3 and 11, as the right to levy liquidated damages or claim excess costs would arise only if the contractor was responsible for the delay and was in breach.
>
> 23. In view of the finding of the arbitrator that the appellant was not responsible for the delay and that the respondents were responsible for the delay, the question of respondents levying liquidated damages or claiming the excess cost in getting the work completed as damages, does not arise. Once it is held that the contractor was not responsible for the delay and the delay occurred only on account of the omissions and commissions on the part of the respondents, it

> follows that provisions which make the decision of the Superintending Engineer or the Engineer-in-Charge final and conclusive, will be irrelevant. Therefore, the Arbitrator would have jurisdiction to try and decide all the claims of the contractor as also the claims of the respondents. Consequently, the award of the Arbitrator on items 1, 3 and 11 has to be upheld and the conclusion of the High Court that award in respect of those claims had to be set aside as they related to excepted matters, cannot be sustained."

(20) In view of the above, this argument of learned counsel for respondent No.1 is not sustainable. As such, it cannot be said that the arbitrators had exceeded their jurisdiction, while deciding the claims of the appellant.

(21) As it has been observed by this court that the bar of Clause 39 would not extend to the Arbitrators and that the Arbitrators had not exceeded their jurisdiction while deciding the claims of the appellant, in such circumstances, the last question which arises for determination is, where once the Arbitrators applied their mind to the disputes, which arose between the parties, whether the order of the Additional District Judge is valid one? In this regard, reliance can be placed upon judgment rendered by the Double Bench of the Supreme Court in ***Navodaya Mass Entertainment Ltd.*** versus ***J.M. Combines*** (supra) where it was observed as under;-

> "8. In our opinion, the scope of interference of the Court is very limited. Court would not be justified in reappraising the material on record and substituting its own view in place of the Arbitrator's view. Where there is an error apparent on the face of the record or the Arbitrator has not followed the statutory legal position, then and then only it would be justified in interfering with the award published by the Arbitrator.**Once the Arbitrator has applied his mind to the matter before him, the Court cannot reappraise the matter as if it were an appeal and even if two views are possible, the view taken by the Arbitrator would prevail.** (See: Bharat Coking Coal Ltd. VersusL.K. Ahuja, (2004) 5 SCC 109; Ravindra & Associates VersusUnion of India, (2010) 1 SCC 80; Madnani Construction Corporation Private Limited VersusUnion of India & Ors., (2010) 1 SCC 549; Associated Construction VersusPawanhans Helicopters Limited, (2008) 16 SCC 128; and Satna Stone & Lime

Company Ltd. VersusUnion of India & Anr., (2008) 14 SCC"

(22) In view of the above, after going through the award, this court is of the considered view that in the instant case the Arbitral Tribunal consisting of three Arbitrators had gone through the all the relevant material placed before it and after going through the same, allowed only 7 of the 11 claims. Once the Arbitrators had applied their mind, the impugned order passed by the Additional District Judge is not sustainable in the eyes of law. An award can be set aside under Section 34 of the Act, if it is (a) contrary to the fundamental police of Indian law; (b) contrary to the interests of India;(c)contrary to justice or morality; or (d) patently illegal. In order to hold an award to be opposed to public policy, the patent illegality should go to the very root of the matter and not a trivial illegality. However, an award could be set aside if it is so unfair and unreasonable that it shocks the conscience of the court, only then it would be opposed to public policy

(23) In the case in hand, the award of the arbitrator is fair and reasonable. In the case of Claim 1(a), the Arbitral Tribunal, against the claim of Rs.5,44,258/- of the appellant, only allowed amount of Rs. 1.25 lacs, while deducting the benefit derived by the appellant on the policy taken by respondent No.1. With regard to claim No.1(b) which was on the basis of deductions made on account of miscellaneous work; (i) for the recovery of Rs.8,33,000/- for less use of explosive; (ii) for the recovery of Rs.56,864/- on miscellaneous account; (ii) for the recovery of Rs.40,315/- & Rs.37,102/-, the Arbitral Tribunal came to hold that respondent No.1 had rightly made these recoveries from the appellant, as such, these claims were rejected. Regarding claim No.3 of Rs.5,55,640/- on account of non-payment of escalation, the Arbitral Tribunal after verifying from the record, decided to allow Rs. 4 lacs as adequate compensation. Regarding claim no.5 of Rs. 16,27,973/- on account of site establishment due to delay in completion of work, which resulted in extra amount spent on establishment, the Arbitral Tribunal, while considering the claim to be on the higher side, allowed compensation of Rs. 5,00,000/- (i.e. Rs.1,00,000/- per month) for the total delay of approximately 05 months. So far as claim No.6 of Rs.34,00,000/- on account of idle tools and plants etc. for the delayed completion, the Arbitral Tribunal while replying upon the reasoning given for claim No.5 and that major part of T&P were utilized by claimant simultaneously for other works in the same campus, has allowed compensation of Rs. 1,00,000/- per month i.e. total Rs.

5,00,000/- was award against this claim. Regarding claim No.7 for damages on account of extra expenditure on bank guarantee commission, the Arbitral Tribunal while observed that the delay being generally attributable to respondent No.1, an amount of Rs. 30,000/- was allowed against this claim. With regard to claim No.8 for loss of profit, claim No.9 on account of head office expenses and claim No.10 on account of extra site expenses, the Arbitral Tribunal while observing that the claimant has been adequately compensated qua claim No.5, 6 and 7, no further compensation was allowed against claims No.8 to 10. Lastly, concerning claims No.2, 4 and 11, simple interest @ 9% per annum for the period from 27.07.2009 (i.e. from the date of commencement of the arbitration) to the date of payment was allowed. Under these circumstances, it can be safely concluded that the Arbitral Tribunal has passed a fair and reasonable award and the Arbitrators have duly applied their mind to the claims raised and thereafter, the same were allowed or rejected. So, the award in question cannot be said to be opposed to the public policy and reliance in this regard can be placed upon judgment rendered in ***Navodaya Mass Entertainment Ltd.*** versus ***J.M. Combines*** (supra). As such, the case laws relied upon by learned counsel for respondent No.1 are not applicable to the facts and circumstances of the present case.

(24) Another argument has been raised by the counsel for the appellant that the impugned order of the Additional District Judge, Faridabad is not sustainable, insofar as the court has no power to remand the matter back to the Engineer-in-Charge for a fresh decision. It is argued that a court deciding the objections under Section 34 of the Act has to decide the matter within the parameters as laid down in the said section. It is further argued that in a judgment rendered in ***Kinnari Mullick and another*** versus ***Ghanshyam Das Damani***[11] the Supreme Court has clearly held that the court deciding the objections under Section 34 of the Act does not have power to remit the matter back to the Arbitral Tribunal and the said judgment has been followed in ***Radha Chemicals*** versus ***Union of India***[12]**.**

(25) Learned Senior counsel appearing on behalf of respondent No.1 does not dispute this factual position, but submits that this court should not hear the appeal and should remand it back to the Additional District Judge to decide the matter fresh.

---

[11] (2018) 11 Supreme Court Cases 328
[12] 2018(4) Law Herald (SC) 2913

(26) After hearing both the parties on this issue, this court is of the considered view that the Additional District Judge has erred in remanding the matter back to the Engineer-in-Charge for a decision afresh. The judgments rendered by the Supreme Court in ***Kinnari Mullick and another versusGhanshyam Das Damani*** (supra) and ***Radha Chemicals*** versus ***Union of India*** (supra) have held that under Section 34 of the Act, the court cannot remand the matter back to the Arbitrator.

(27) In circumstances, when the court has set aside the award of the Arbitrator, relegating the parties to the seeking of an appointment of a fresh Arbitrator, the very purpose of the Arbitration and Conciliation Act, 1996 would be rendered infructuous as the Act of 1996 was enacted for the sole purpose of speedy disposal of the disputes. There is remedy of appeal provided under the Act itself, which Section is reproduced as under;-

"37. Appealable orders. –

(1) An appeal shall lie from the following orders (and from no others) to the court authorised by law to hear appeals from original decrees of the court passing the order, namely: -

(a)Granting or refusing to grant any measure under section 9;

(b)Setting aside or refusing to set aside an arbitral award under section 34(2) An appeal shall also lie to a court from an order of the arbitral tribunal-

(a)Accepting the plea referred to in sub-section (2) or sub-section (3) of section 16; or

(b)Granting or refusing to grant an interim measure under section 17.

No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to the Supreme Court."

(28) A reading of the said section would reflect that an appeal shall lie from orders granting or refusing to grant any measure under Section 9;setting aside or refusing to set aside an arbitral award under Section 34.Thus, in a situation where the court set asides the award of the Tribunal and at the same time, remands the matter back to the

Arbitrator for decision afresh, which order is patently without jurisdiction, this court is of the opinion that an appeal could be preferred against the order of the court setting aside the Arbitral Tribunal and the Appellate Court would be competent to go into the issue regarding the validity of the award. In this regard, reference may be made to the judgment that was rendered by the Supreme Court in ***Mahanagar Telephone Nigam Limited*** versus ***Applied Electronics Limited***[13] wherein it has been held as under;

> "26. As is manifest, a person grieved by the award can file objection under Section 34 of the 1996 Act, and if aggrieved on the order passed thereon, can prefer an appeal. The court can set aside the award or deal with the award as provided by the 1996 Act. If a corrective measure is thought of, it has to be done in accordance with the provision as contained in Section 37 of the 1996 Act, for Section 37(1) stipulates for an appeal in case of any grievance which would include setting aside of an arbitral award under Section 34 of the Act."

(29) Therefore, supported by the said judgment, this court has to decide the appeal on merits.

(30) In view of the above discussion, the appeals filed by the appellant are hereby allowed. Consequently, the orders passed by the Additional District Judge are set aside and the awards of the Arbitrator are upheld.

Ritambhra Rishi

[13] (2017) 2 Supreme Court Cases 37