IN THE HIGH COURT AT CALCUTTA

Ordinary Original Civil Jurisdiction
Original Side

Present:

The Hon'ble Justice Shekhar B. Saraf

AP/288/2020

IA NO. GA/1/2020

THE CHAIRMAN BOARD OF TRUSTEES FOR SHYAMA PRASAD MOOKHERJEE PORT KOLKATA

VS

UNIVERSAL SEA PORT PRIVATE LTD

AND

EC/98/2022

M/S. UNIVERSAL SEAPORT PRIVATE LIMITED

VS

THE CHAIRMAN, BOARD OF TRUSTEES FOR THE PORT OF KOLKATA

For the Petitioner/Award Debtor	:	Mr. Abhrajit Mitra, Sr. Adv. Mr. Pranit Bag, Adv. Mr. Snehashis Sen, Adv. Mr. Abhishek Banerjee, Adv. Mr. Aditya Sarkar, Adv. Mr. Sourav Ghosh, Adv.
For the Respondent/Award Holder	:	Mr. Ratnanko Banerji, Sr. Adv. Ms. Vidushi Chokhani, Adv. Mr. Vikram Wadehra, Adv. Ms. Nupur Rathi, Adv. Mr. Raunak Bose, Adv. Mr. A. Sen, Adv.

Last heard on: September 26, 2022

Judgment on: November 03, 2022

Shekhar B. Saraf, J.:

1. The petitioner in the instant application [being A.P. 288 of 2020] under Section 34 of the Arbitration and Conciliation Act, 1996 [hereinafter referred to as 'the Act'] is a statutory authority under the Major Ports Trusts Act, 1963. The Board of Trustees for Shyama Prasad Mookerjee Port, Kolkata (earlier known as the Board for the Port of Kolkata), inter alia, carries on the management and administration of the docks and also the lands of such port trust authorities.

2. The respondent is a joint venture company, M/s Universal Seaport Private Limited, incorporated for the purpose of executing a contract for the purpose of supply, operation and maintenance of various cargo handling equipment at berth no. 4B, Haldia Dock Complex at Kolkata Port Trust. The said respondent company is a consortium of M/s. Ocean Connection Pte. Ltd., M/s/ Seapol Ports Private Limited and M/s Euro Maritime Pte. Ltd.

3. The petitioner has challenged the Award [hereinafter referred to as 'Award'] dated January 10, 2020, as further revised by an additional award dated March 14, 2020, passed by a Sole Arbitrator [herein after referred to as 'Arbitrator']. An application for stay of the Award [IA No. GA 1 of 2020 in A.P. No. 288 of 2020] was also filed. An Execution

Application was filed by the Respondent, being E.C. 98 of 2022. All the applications are being conjointly decided.

Relevant Facts

4. The relevant facts for the determination of the dispute are as stated below:

a) The petitioner vide reference Tender Notification No. Ad/EQP/4B-HDC/2012 floated a tender ('Tender') for supply, operation and maintenance of various cargo handling equipment at a specified place that is berth no. 4B, Haldia Dock Complex at Kolkata Port Trust ('KoPT'). The Tender was predominantly for the purpose of handling dry bulk cargo at Berth No 4B, Haldia Dock Complex ('HDC') at KoPT.

b) Clause 5.5 (all references to clauses must be understood to be references to the Tender, unless specified otherwise) pertaining to evaluation of price bid, provided that the tenderers are to submit their price bids as per format (Schedule of Rates) given by Appendix-XV of the Tender. It further stated that the rate to be quoted by the tender-applicants should be less than the ceiling rate of Rs. 52/- per ton. Failing the above mentioned criteria, any bid was bound to be summarily rejected. Lastly, it provided for the lowest bidder to be considered the successful tenderer and to whom the contract would be awarded.

c) The respondent was the successful bidder with the lowest bid of Rs. 51.91/- per ton. Accordingly, a long term agreement for 10 years, dated 22nd June, 2013 ('Agreement'), was entered into between the petitioner and the respondent for the aforesaid purpose at the agreed contractual rate of Rs. 51.91/- per ton. The Agreement incorporated the Tender, besides other documents as part of itself. The Tender is relevant for determination of the said dispute.

d) The terms of the Tender provided for a general escalation clause (Clause 8.2.2.) as well as a price adjustment clause to be utilized for variation in fuel cost (Clause 8.2.1).

e) It must also be noted that clause 8.1 provided for determination of the rate for handling of break bulk cargo, which though not the predominant subject of the Agreement or Tender, may have arisen in certain circumstances. It is here that the Tender incorporated usage of Schedule of Rates ('SoR') issued by Tariff Authority of Major Ports ('TAMP') in order to determine the amount payable to the respondent by the petitioner, for the services availed with respect to providing Mobile Harbour Cranes ('MHC') for handling of break bulk cargo.

f) As per the execution of the contract initiated in July 2013, the respondent company was incorporated to provide the services envisaged under the contract on the agreed terms between the parties.

g) TAMP regularly notifies revised SoRs on the basis of variation in Wholesale Price Index and other factors which set ceilings for the amount that KoPT can pay for services availed and the amount KoPT can charge the end user of the services, i.e. importers and exporters.

h) Upon representations made by the respondent to TAMP and in consonance with the TAMP Guidelines, a revised SoR dated 26th February, 2014 was issued by TAMP, increasing the rate for use of MHC for loading and unloading of dry bulk cargo to Rs. 62.4/- per ton. While the revised and increased tariff was made applicable to the end user it was not uniformly applied to the service provider and the respondent was still paid Rs. 51.91/-.

i) In the year 2016, the petitioner issued a similar tender for work with respect to Berth No. 2 and 8, while the TAMP authorized rate was Rs. 62.4/- per ton. Owing to non-participation of any qualified bidder at the tender ceiling price, KoPT on its own accord re-issued

the tender with a revised ceiling of Rs. 73.70 per ton, exceeding the ceiling mandated by TAMP.

j) Subsequently, KoPT made a representation to TAMP in order to increase the base price to Rs. 89.71/- per ton. This reflects how no contractor was willing to execute the work required at the port at even Rs. 62.4/- per ton and the acknowledgement of this fact by KoPT in revising the rates for the services required. Parallel to this, however, KoPT continued to pay Rs. 51.91/- per ton to the claimant respondent, choosing to not apply the revised notified SoR while it continued to levy the increased tariff on the end user and thereby enjoyed extended profits.

k) On September 15, 2018, the respondent made a representation to the petitioner with respect to the revision of the contractual rate of service owing to a significant revision in the then notified SoR by TAMP.

l) The petitioner disagreed with representations made by the respondent and refused for any revision in the contractual rate based on the revised TAMP SoR. As the petitioner was engaged in several contracts with third parties which were based on higher revised SoRs, the respondent felt itself to be in a disadvantageous

position, being bound to provide the same services in similar conditions but at a much lower price.

m) The willingness of KoPT to award contracts at much higher rates to third parties for doing similar work in similar conditions while limiting the rate applicable to the Claimant and refusing the application of the revised amount to the respondent, aggrieved the respondent.

n) Aggrieved by this disparity and relying on the revised TAMP notification as well as third party contracts of the petitioner, the respondent initiated arbitral proceedings.

o) The Award was passed in favour of the respondents allowing for a claim of Rs. 8,50,91,679/- to be paid within a period of one month, failing which an interest will be levied on the said amount at the rate of 8% per annum.

The Award

5. An elaborate discussion of the Award has been undertaken by me at this stage before proceeding with the discussion on the arguments made before the court. The following discussion is set out below:

a) The Arbitrator had initially framed nine issues. However, he noted that the petitioner did not press the Issue No.1 of maintainability of the arbitral proceedings and that the Arbitrator was appointed by consensus of the parties. He further clubbed Issue No(s). 2, 3, 5 and 7, relating to discriminatory pricing and applicability of higher revised SoR rates by TAMP and decided in favour of the respondents. The Issue No(s). 4 and 6 were disposed without awarding any specific sum thereunder. While deciding Issue No(s). 8 and 9, the Arbitrator awarded Rs. 8,50,91,679/- in favour of the respondent by considering the average figure of apparent loss (Rs. 17/- per ton) from the date the respondents first raised the issue of discrimination.

b) The Arbitrator made a reference to the Oxford dictionary, to determine the scope of the term 'trade usage' as habitual or customary practice specially as creating a right or obligation or standard. He concluded that if the respondent demands the revision of their rate in terms of the revision made in case of third parties from time to time following the trade usages, it cannot be said that their demand is beyond the terms of the contract in terms of sub-section 3 of Section 28 of the Act. He further held that the interpretation of the clauses of agreement cannot be confined to the terms of the agreement itself only and after the amendment of 2015, the term 'trade usage' had been incorporated. He held that this point has been set at rest by the Hon'ble High

Court at Calcutta in the case of **Eastern Coalfields Limited vs. Rungta Projects Limited ([2018] SCC OnLine CAL 6555)**.

c) The Arbitrator discussed various clauses wherein the parties have made reference to TAMP rates and stated that '*starting from the Note to Clause 1.1.a of the tender document ending with different clauses, as discussed above, stands on the Tariff Guidelines being in force and the rates, productivity, time etc. are to be settled as mutually agreed upon not only between the importers, but also the contractors and/or approved by Tariff Authority for Major Ports as per Tariff Guidelines'.*

d) The Arbitrator found the petitioner to have fixed the rate of the contractors after keeping a margin from the rates KoPT received from the end users. The rates were revised from time to time. He considered them to be admitted ground realities which formed the trade usage and that the Tribunal must be conscious to take all these facts into account while interpreting the terms of contract between the parties in the instant proceeding.

e) The Arbitrator further embarked on a discussion of how the state functionaries should not discriminate and treat equally in terms of Article 14 of the Constitution of India. Since the guarantee of equal protection embraces the entire realm of "State action", it would

extend not only when an individual is discriminated against in the matter of exercise of his rights or in the matter of imposing liabilities upon him, but also in the matter of granting privileges e.g. granting licences for entering into any business, inviting tender for entering into a contract relating to government business, etc. He relied on Hon'ble Apex Court's decisions in ***Ramana vs. I.A.A. (AIR1979 SC 1628), Kasturi vs. State of J.K. (AIR 1980 SC 1992)*** in support of this finding**.**

f) The Arbitrator concluded by holding that '*there must be a parity of rates for identical work in identical works in identical situation which is very much within the scope of the port to consider the grievance of the parties who are at the receiving end i.e. the end users and the contractors as well and this is again the trade practice which the respondent on several occasions did in consultation with and/or approval of the TAMP'*.

6. It is thus evident that the TAMP rates along with its revisions were concluded to be the rate applicable for handling dry bulk cargo as emanating from the agreement between the parties and trade practice. The entire dispute is with respect to this conclusion.

The Submissions

7. It is apposite now to mention the contentions put forth by counsels appearing on behalf of both parties.

8. Mr. Abhrajit Mitra, learned Senior Advocate, appearing on behalf of the petitioners has put forward the following arguments:

a. He submits that the Agreement specified a rate based on the prevailing SoR fixed by TAMP, when the Agreement was being entered into. He contended that the contractual rate will not be the revised SoR rates. TAMP fixes the ceiling rate less than which the Petitioner cannot charge from end users and more than which the petitioner cannot pay for services received. The Tender expressly states wherever TAMP rates (even revisions) are applicable. Clauses 8.2.1 and 8.2.2 provide for revision of rates (escalation limit placed) in certain specific circumstances. The application of SoR for determination or revision of the rate is not envisaged in the contract and any revision in the contractual price is solely on the basis of the price escalation clause of the contract, that is, clause 8.2.

b. He further relies on ***State of Orissa v. Sudhakar Das ([2000] 3 SCC 27)***, ***Delhi Development Authority vs R.S. Sharma and Co ([2008] 13 SCC 80)*** and ***V.G. George vs Indian Rare Earths ([1999] 3 SCC 762),*** to buttress the point that in absence of specific clauses providing for escalation charges, the arbitrator cannot award any such amount.

c. He submits that not even Courts can re-write the contractual terms by relying on Article 14 of the Constitution of India. He relies on ***Orissa State Financial Corpn. v. Narsingh Ch. Nayak ([2003] 10 SCC 261), Bharathi Knitting Co. v. DHL Worldwide Express Courier ([1996] 4 SCC 704)*** and ***Rajasthan State Industrial Development & Investment Corpn. v. Diamond & Gem Development Corpn. Ltd. (AIR 2013 SC 1241),*** for the said proposition**.** As a resulting corollary, the Arbitrator could not have applied Article 14 of the Indian Constitution to negate contractual terms.

d. Lastly, he contends that Section 28(3) of the Act mandates the Arbitrator to consider the terms of the contract and any award contrary to the agreed terms is liable to be set aside. He relies on ***PSA Sical Terminals Private Limited v. The Board of Trustees of V.O. Chidambranar Port Trust, Tuticorin & Others (MANU/SC/0485/2021), South East Asia Marine Engineering and Constructions Limited v. Oil India Limited, ([2020] 5 SCC 164), State of Chhattisgarh & Another v. SAL Udyog Private Limited, ([2022] 2 SCC 275)*** and ***State of Orissa v. Sudhakar Das ([2000] 3 SCC 27),*** to substantiate the said contention.

e. The bone of his contention is that re-writing the contract is a breach of fundamental principles of justice rendering the Award to

be in conflict with the public policy of India and is patently illegal. Thus, the Award deserves to be set aside.

9. Mr. Ratnanko Banerjee, learned Senior Advocate, appearing on behalf of the respondents has put forward the following arguments:

a. The law as it stands now, with respect to setting aside under Section 34 of the Act, after insertion of Section 34(2A), has narrowed the scope of interference with the Award. The Courts cannot interfere merely on the grounds of erroneous application of law or re-appreciate evidence. The Tender, in several places, provides for applicability of SoR by TAMP and therefore the petitioner cannot selectively choose the provisions of the Agreement to which the SoR fixed by TAMP would apply. The Arbitrator decided on its applicability, which is a decision reached at after deliberation of fact and law. Thus, interference with the Award, would tantamount to re-appreciation of evidence which is barred as per the law laid down in ***Associate Builders v. DDA ([2015] 3 SCC 49), Dyna Technologies Private Limited v. Crompton Greaves Limited ([2019] 20 SCC 1), Ssangyong Engineering and Construction Company Limited v. NHAI ([2019] 15 SCC 131), Grid Corporation of Orissa Limited v. Balasore Technical School ([2000] 9 SCC 552), MMTC v.***

Vedanta Limited ([2019] 4 SCC 163) and ***Bharat Coking Coal Ltd. v. Annapurna Construction ([2003] 8 SCC 154)***.

b. Section 48 of the Port Trust Act, 1963 makes it mandatory for service providers as well as the port trusts to follow the SoR issued by TAMP.

c. He further submits that the Arbitrator was correct in considering the general trade usage and market practice, as Section 28(3) of the Act clearly provides for taking them into account. The amended Section 28(3) indicates a shift in legislative intent, which now allows more leeway for a Tribunal to decide in terms of overall facts and circumstances and applicable law, as compared to the past regime which forbade any deviation from the terms of the contract.

d. The construction of a contract, he vehemently argued, is for the Arbitrator to decide, unless it is absolutely unreasonable and it shocks the conscience of the Court. He submits that this jurisprudence is derived from the administrative law doctrine - the Wednesbury principle. For support, he relies on ***HRD Corporation v. GAIL India Ltd. ([2018] 12 SCC 471), Eastern Coalfields Ltd. v. Rungta Projects Ltd. (2018 SCC OnLine Cal 6555)*** and

Astonfield Renewables Pvt. Ltd. v. Ravinder Raina (2018 SCC OnLine Del 6665).

e. On request of this court to produce more judicial pronouncements to clarify the law with respect to Section 28(3) of the Act, specifically with regards to 'trade usage', the learned Senior Advocate produced the judgements in ***Board of Trustees of Chennai Port Trust and Ors. v. Ennore Port Limited and Ors. (MANU/TN/3264/2016)*** and ***DLF Home Developer Ltd. and Ors. v. Martin George and Ors. (MANU/KE/1400/2021).***

Issues

10. Upon analysing the arguments put forward by both the parties, I am of the view that the following issues are required to be addressed by me to resolve the dispute between the parties:

A. Whether the SoR rates, with their revisions, were applicable for handling of dry bulk cargo as per Section 28(3) of the Act?

B. Whether the Award dated January 10, 2020 revised by the additional Award dated March 14, 2020, deserves to be set aside?

Analysis of Submissions

11. During the course of the hearing, by way of oral and written pleadings, many judicial precedents were placed before this Court. However, many were repetitive in their exposition of the same principles or distinguishable on facts. I have, while having regard to the principles laid down in all these judgements, mentioned those principles and have avoided unnecessary reiteration of judgements. Judgements which are distinguishable but were heavily relied upon by any side, have been distinguished on facts.

12. Before we proceed with Issue 'A.', it is incumbent to outline the legal position with respect to the scope of interference that Courts can exercise in a setting aside application under Section 34 of the Act.

13. Mr. Ratnanko Banerjee, Senior Advocate, placed judgements to impress upon this court the narrow scope of interference. He relied on the Hon'ble Apex Court's decision in ***Associate Builders (supra)***, which does lay down an exhaustive understanding of all the grounds on which an award can be set aside, including patent illegality which, as per the pre-amendment law (2015), was part of Section 34(2)(b). The crux of the respondent's argument on limited scope of the Court to interfere with the award depends on the following paragraphs:

> *"**33**. It must clearly be understood that when a court is applying the "public policy" test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the arbitrator on*

facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. Thus an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score. Once it is found that the arbitrators approach is not arbitrary or capricious, then he is the last word on facts. In P.R. Shah, Shares and Stock Brokers (P) Ltd. v. B.H.H. Securities (P) Ltd. MANU/SC/1248/2011MANU/SC/1248/2011 : (2012) 1 SCC 594, this Court held:

21. A court does not sit in appeal over the award of an Arbitral Tribunal by reassessing or reappreciating the evidence. An award can be challenged only under the grounds mentioned in Section 34(2) of the Act. The Arbitral Tribunal has examined the facts and held that both the second Respondent and the Appellant are liable. The case as put forward by the first Respondent has been accepted. Even the minority view was that the second Respondent was liable as claimed by the first Respondent, but the Appellant was not liable only on the ground that the arbitrators appointed by the Stock Exchange under Bye-law 248, in a claim against a non-member, had no jurisdiction to decide a claim against another member. The finding of the majority is that the Appellant did the transaction in the name of the second Respondent and is therefore, liable along with the second Respondent. Therefore, in the absence of any ground Under Section 34(2) of the Act, it is not possible to re-examine the facts to find out whether a different decision can be arrived at."

14. However, the paragraph above would be an incomplete understanding of the said judgement. Replication of other portions of the judgement are required for an adept understanding of the law. While Paragraphs 28 and 29 of ***Associate Builders (supra),*** have been set aside by the Apex Court in ***Ssangyong Engineering (supra)***, the below-mentioned portions of ***Associate Builders (supra)*** still continue to enjoy the status of law:

> "***18***. *In Renusagar Power Co. Ltd. v. General Electronic Co. MANU/SC/0195/1994MANU/SC/0195/1994 : 1994 Supp (1) SCC 644, the Supreme Court construed Section 7(1)(b)(ii) of the Foreign Award (Recognition and Enforcement) Act, 1961.*
>
> *7. Conditions for enforcement of foreign awards.--(1) A foreign award may not be enforced under this Act-*
> *(b) if the Court dealing with the case is satisfied that-*
> *(ii) the enforcement of the award will be contrary to the public policy.*
>
> *In construing the expression "public policy" in the context of a foreign award, the Court held that an award contrary to*
> *1. The fundamental policy of Indian law*
> *2. The interest of India*
> *3. Justice or morality,*
>
> *would be set aside on the ground that it would be contrary to the public policy of India. It went on further to hold that a contravention of the provisions of the Foreign Exchange Regulation Act would be contrary to the public policy of India in that the statute is enacted for the national economic interest to ensure that the nation does not lose foreign exchange which is essential for the economic survival of the nation (see para 75). Equally, disregarding orders passed by the superior courts in India could also be a contravention of the fundamental policy of Indian law, but the recovery of compound interest on interest, being contrary to statute only,*

would not contravene any fundamental policy of Indian law (see paras 85, 95).

***19**. When it came to construing the expression "the public policy of India" contained in Section 34(2)(b)(ii) of the Arbitration Act, 1996, this Court in ONGC v. Saw Pipes MANU/SC/0314/2003MANU/SC/0314/2003 : 2003 (5) SCC 705, held-*

31. Therefore, in our view, the phrase "public policy of India" used in Section 34 in context is required to be given a wider meaning. It can be stated that the concept of public policy connotes some matter which concerns public good and the public interest. What is for public good or in public interest or what would be injurious or harmful to the public good or public interest has varied from time to time. However, the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice. Hence, in our view in addition to narrower meaning given to the term "public policy" in Renusagar case [MANU/SC/0195/1994MANU/SC/0195/1994: 1994 Supp (1) SCC 644] it is required to be held that the award could be set aside if it is patently illegal. The result would be--award could be set aside if it is contrary to:

(a) Fundamental policy of Indian law; or
(b) The interest of India; or
(c) Justice or morality, or
(d) in addition, if it is patently illegal.

Illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy. Award could also be set aside if it is so unfair

and unreasonable that it shocks the conscience of the court. Such award is opposed to public policy and is required to be adjudged void.

74. In the result, it is held that:

(A) (1) The court can set aside the arbitral award Under Section 34(2) of the Act if the party making the application furnishes proof that,

(i) a party was under some incapacity, or

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

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

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

(2) The court may set aside the award:

(i)(a) if the composition of the Arbitral Tribunal was not in accordance with the agreement of the parties,

(b) failing such agreement, the composition of the Arbitral Tribunal was not in accordance with Part I of the Act.

(ii) if the arbitral procedure was not in accordance with:

(a) the agreement of the parties, or

(b) failing such agreement, the arbitral procedure was not in accordance with Part I of the Act,

However, exception for setting aside the award on the ground of composition of Arbitral Tribunal or illegality of arbitral procedure is that the agreement should not be in

conflict with the provisions of Part I of the Act from which parties cannot derogate.

(c) If the award passed by the Arbitral Tribunal is in contravention of the provisions of the Act or any other substantive law governing the parties or ***is against the terms of the contract.***

(3) The award could be set aside if it is against the public policy of India, that is to say, if it is 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.

(4) It could be challenged:

(a) as provided Under Section 13(5); and

(b) Section 16(6) of the Act.

(B)(1) The impugned award requires to be set aside mainly on the grounds:

(i) ***there is specific stipulation in the agreement that the time and date of delivery of the goods was of the essence of the contract****;*

(ii) in case of failure to deliver the goods within the period fixed for such delivery in the schedule, ONGC was entitled to recover from the contractor liquidated damages as agreed;

(iii) it was also explicitly understood that the agreed liquidated damages were genuine pre-estimate of damages;

(iv) on the request of the Respondent to extend the time-limit for supply of goods, ONGC informed specifically that time was extended but stipulated liquidated damages as agreed would be recovered;

(v) liquidated damages for delay in supply of goods were to be recovered by paying authorities from the bills for payment of cost of material supplied by the contractor;

(vi) there is nothing on record to suggest that stipulation for recovering liquidated damages was by way of penalty or that the said sum was in any way unreasonable.

*(**vii) In certain contracts, it is impossible to assess the damages or prove the same. Such situation is taken care of by Sections 73 and 74 of the Contract Act and in the present case by specific terms of the contract.***

***20**. The judgment in ONGC v. Saw Pipes has been consistently followed till date.*

***21.** In Hindustan Linc Ltd. v. Friends Coal Carbonisation (2006) 4 SCC 445, this Court held:*

*14. The High Court did not have the benefit of the principles laid down in Saw Pipes [MANU/SC/0314/2003MANU/SC/0314/2003 : (2003) 5 SCC 705], and had proceeded on the assumption that award cannot be interfered with even if it was contrary to the terms of the contract. It went to the extent of holding that contract terms cannot even be looked into for examining the correctness of the award. This Court in Saw Pipes [MANU/SC/0314/2003MANU/SC/0314/2003: (2003) 5 SCC 705] **has made it clear that it is open to the court to consider whether the award is against the specific terms of contract and if so, interfere with it on the ground that it is patently illegal and opposed to the public policy of India.***

* * *

> ***42.3***. *(c) Equally, the third subhead of patent illegality is really a contravention of Section 28(3) of the Arbitration Act, which reads as under:*
>
> *"28. Rules applicable to substance of dispute.—(1)-(2)****
> *(3) In all cases, the Arbitral Tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction."*
>
> *This last contravention must be understood with a caveat. An Arbitral Tribunal must decide in accordance with the terms of the contract, but if an arbitrator construes a term of the contract in a reasonable manner, it will not mean that the award can be set aside on this ground.* ***Construction of the terms of a contract is primarily for an arbitrator to decide unless the arbitrator construes the contract in such a way that it could be said to be something that no fair-minded or reasonable person could do."***
>
> **[Emphasis added]**

The Apex Court in ***Associate Builders (supra)*** then proceeded to interpret the clauses of the Agreement, whose interpretation in the arbitral award was contended by the award debtor to be erroneous, to hold that the interpretation was acceptable.

15. Mr. Ratnanko Banerjee, Senior Advocate, also placed reliance on ***Ssangyong Engineering (supra),*** specifically paragraph 34, to

recapitulate on the limited scope of judicial interference with arbitral awards, which is replicated herein:

> *"**34.** What is clear, therefore, is that the expression "public policy of India", whether contained in Section 34 or in Section 48, would now mean the "fundamental policy of Indian law" as explained in paras 18 and 27 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49: (2015) 2 SCC (Civ) 204] i.e. the fundamental policy of Indian law would be relegated to "Renusagar" understanding of this expression. This would necessarily mean that Western Geco [ONGC v. Western Geco International Ltd., (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12] expansion has been done away with. In short, Western Geco [ONGC v. Western Geco International Ltd., (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12] , as explained in paras 28 and 29 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , would no longer obtain, as under the guise of interfering with an award on the ground that the arbitrator has not adopted a judicial approach, the Court's intervention would be on the merits of the award, which cannot be permitted post amendment. However, insofar as principles of natural justice are concerned, as contained in Sections 18 and 34(2)(a)(iii) of the 1996 Act, these continue to be grounds of challenge of an award, as is contained in para 30 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49: (2015) 2 SCC (Civ) 204]."*

This would again be an incomplete exposition of the law. The Apex Court in ***Ssangyong Engineering (supra)*** set aside a majority arbitral award. It was not set aside on the grounds of patent illegality as an

international commercial arbitral award was before them. In fact, the Apex Court held as follows:

> "**76.** *However, when it comes to the public policy of India, argument based upon "most basic notions of justice", it is clear that this ground can be attracted only in very exceptional circumstances when the conscience of the Court is shocked by infraction of fundamental notions or principles of justice. It can be seen that the formula that was applied by the agreement continued to be applied till February 2013 — in short, it is not correct to say that the formula under the agreement could not be applied in view of the Ministry's change in the base indices from 1993-1994 to 2004-2005. Further, in order to apply a linking factor, a Circular, unilaterally issued by one party, cannot possibly bind the other party to the agreement without that other party's consent. Indeed, the Circular itself expressly stipulates that it cannot apply unless the contractors furnish an undertaking/affidavit that the price adjustment under the Circular is acceptable to them. We have seen how the appellant gave such undertaking only conditionally and without prejudice to its argument that the Circular does not and cannot apply. This being the case, it is clear that the majority award has created a new contract for the parties by applying the said unilateral Circular and by substituting a workable formula under the agreement by another formula dehors the agreement.* ***This being the case, a fundamental principle of justice has been breached, namely, that a unilateral addition or alteration of a contract can never be foisted upon an unwilling party, nor can a party to the agreement be liable to perform a bargain not entered into with the other party****. Clearly, such a course of conduct would be contrary to*

> *fundamental principles of justice as followed in this country, and shocks the conscience of this Court.* ***However, we repeat that this ground is available only in very exceptional circumstances, such as the fact situation in the present case.*** *Under no circumstance can any court interfere with an arbitral award on the ground that justice has not been done in the opinion of the Court. That would be an entry into the merits of the dispute which, as we have seen, is contrary to the ethos of Section 34 of the 1996 Act, as has been noted earlier in this judgment.*"
>
> **[Emphasis added]**

16. Mr. Ratnanko Banerjee, Senior Advocate's reliance on ***MMTC v. Vedanta Limited (supra), Bharat Coking Coal Ltd. (supra), Dyna Technologies Private Limited (supra), Grid Corporation of Orissa Limited (supra), Aston field Renewables (supra) and HRD Corporation (supra)*** is merely replication of the scope of judicial interference with respect to arbitral awards. The extracts of Apex Court judgements produced above have covered the same and are not re-produced herein for the sake of brevity. However, I would like to point out that many of these judgements actually go against the case of the respondents. The following are discussed below.

17. Judicial principles are not laid down in vacuum, but they are to be understood against a set of facts. None of the judgements discussed in this paragraph help the respondent and reliance upon them, besides

merely repeating general principles, is entirely misplaced. In ***Dyna Technologies Private Limited (supra),*** the Apex Court set aside the arbitral award for being rendered without reasons, thus being unintelligent and unsustainable. In ***Bharat Coking Coal Ltd. (supra),*** Apex Court set aside the award after holding that the arbitrator did not consider relevant clauses of the contract or relevant materials for arriving at a correct fact. The particular paragraph of ***Grid Corporation of Orissa Limited (supra),*** on which the respondents relied in written pleadings but did not stress upon during the hearings, also goes against their case. The relevant extract of the judgement's paragraph is:

> "*4. In the present case, the view taken by the High Court as to the construction of Section 3 of the Orissa Electricity Supply Act appears to us to be correct. In that provision the proceedings which relate to a challenge to the power of the Board to enhance the tariff are subject-matter of arbitration. Such proceedings would abate and not in other cases. The High Court, while considering that the question, whether the Orissa Electricity Supply Board was not entitled to be paid anything by the respondent in respect of their claims relating to the agreement dated 28-4-1961, was outside the scope of arbitration failed to see that the amounts due under the agreement dated 28-4-1961 became part of the agreement entered into subsequent to the joint memo filed before the High Court. In the agreement dated 1-2-1980, clause 27 provided that "the arrears under the old agreement shall be deemed to be arrears under this agreement". Therefore, if the award made by the arbitrator was incorrect in regard to that aspect of the matter, other questions referred to the arbitrator formed an integral part of the same and, therefore, the entire award had to be set aside.* ***Even otherwise in***

> ***respect of each of the questions referred to the arbitrator, the answers given by him would indicate that the same had been given in utter disregard of the contract and****, therefore, the view taken by the Subordinate Judge in this case appears to be correct and the High Court ought to have accepted the same."*
>
> **[Emphasis added]**

18. Mr. Abhrajit Mitra, learned Senior Advocate, on behalf of the petitioner, has again brought a plethora of judicial pronouncements before this Court wherein arbitral awards, made in complete contravention to terms of the contract, have been set aside. In ***State of Chhattisgarh (supra),*** the Apex Court set aside the arbitral award for being patently illegal as the arbitrator completely ignored the binding terms of the contract with respect to recovery of 'supervision charges'. Such illegality was held to be apparent, not just on the face of the award, but also going to the root of the matter. In ***PSA Sical Terminals Private Limited (supra),*** the Apex Court set aside an award as it replaced a 'royalty payment method' with a 'revenue-sharing method', despite the former being clearly intended in the agreement to be the payment method. This was held to be re-writing a contract for the parties which was (a) a breach of fundamental principles of justice (Section 34[2][b][ii] Explanation 1 [iii]) and (b) patently illegal. The Apex Court observed:

> *"85.* ***It has been held that the role of the Arbitrator is to arbitrate within the terms of the contract****. He has no power apart from what the parties have given him under the*

contract. If he has travelled beyond the contract, he would be acting without jurisdiction."

[Emphasis added]

19. In ***South East Asia Marine Engineering (supra),*** the Apex Court explains that as a thumb rule of interpretation, written contracts should be read as a whole and as far as possible as mutually explanatory. This rule was ignored by the Tribunal. The Apex Court held:

> ***"30.*** *From the aforesaid discussion, it can be said that the contract was based on a fixed rate. The party, before entering the tender process, entered the contract after mitigating the risk of such an increase.* ***If the purpose of the tender was to limit the risks of price variations, then the interpretation placed by the Arbitral Tribunal cannot be said to be possible one, as it would completely defeat the explicit wordings and purpose of the contract. There is no gainsaying that there will be price fluctuations which a prudent contractor would have taken into margin, while bidding in the tender.*** *Such price fluctuations cannot be brought under Clause 23 unless specific language points to the inclusion.*
>
> ***31.*** *The interpretation of the Arbitral Tribunal to expand the meaning of Clause 23 to include change in rate of HSD is not a possible interpretation of this contract, as the appellant did not introduce any evidence which proves the same."*
>
> **[Emphasis added]**

20. The petitioners also relied on ***State of Orissa v. Sudhakar Das (supra), Delhi Development Authority (supra) and V.G. George***

(supra), wherein arbitral awards which granted extra/charge and/or escalation charges were set aside. ***State of Orissa v. Sudhakar Das (supra) and V.G. George vs Indian Rare Earths (supra***) are not wholly relevant as post changes to Section 28(3) of the Act, an award would not be set aside merely because escalation charges were awarded in absence of any clause providing the same. The arbitrator now, can look into the trade and allow the same, unless barred by the unambiguous intention between the parties.

21. Upon examination of the Apex court judgements, the following principles emerge:

A. The arbitrator is the ultimate authority of law and facts;

B. Trade usage can be used to pass awards on certain aspects even if the agreement between the parties is silent on the said aspect. For example, the award can allow mobilisation costs, even if the agreement is silent on it, unless the agreement clearly excludes it;

C. Trade usage can never be used to undermine explicit understanding between the parties.

Conclusion

22. The arbitrator is the ultimate authority of law and facts. The symphony of an award can be composed by different notes of contractual

interpretation and trade usages, however, the tunes of trade usages cannot deafen or drown out the chords of univocal understanding between the parties. The legislative mandate and judicial pronouncements have granted the arbitrator a wide mandate to flirt around with interpretation of facts and law. However, such flirtations are to be rejected when met with resistance from the unequivocal understanding between the parties. Such resistance has to be patently evident and must go to the root of the matter.

23. We must now refer to the relevant clauses of the tender document, which is a part of the agreement between the parties. They are hereby extracted:

> "1.1.a) Supply (i.e. delivery at site, installation and commissioning), operation and maintenance of different cargo handling equipment (as given at para at 1.2) for undertaking the following operations on round the clock basis on all the days in a year as given below primarily at berth no. 48 of Haidia Dock Complex, Kolkata Port Trust at the cost, charges, expenses, risk, manpower and arrangements of the contractor.
>
> i) Loading/unloading of cargo to and from the sea going vessels/sea going barges at the berth including operation of Pay loader(s) inside the hatches of the vessel.
>
> ii) Loading of cargo upon non sea going barges at the berth.
>
> iii) Cleaning of rib/frames and sweeping of cargo inside the hatches in case of import cargo, trimming of cargo inside the hatches in case of export cargo including sweeping of deck of the vessel/barges as required.

Note:

Although the scope of work envisages loading / unloading of cargo to and from sea going vessels/sea going Barges and loading of cargo into non sea going vessels/barges, the contractor may also be required to unload cargo from non sea going barges in future with the Mobile Harbour Crane(s) and other equipments to be provided by him under the provisions of this contract. In case of unloading cargo from non sea going barges by use of MHC and other equipments at HDC in future, the rates and conditionality (including Minimum Level of Productivity) for the same would be mutually agreed between the importers and KoPT and / or approved by Tariff Authority for Major Ports as per the Tariff Guidelines, time being in force. KoPT will however consult the contractor for firming up the Minimum Level of Productivity for handling of such cargo and the rate. The said rates so approved by TAMP would be subject to revision.

The contractor will be paid 80% of said rate to be levied by KoPT on importers their agents.

1.1.b) Apart from the functions as given at 1.1.a above, the contractor shall also undertake the following operations/actions at this cost, charges, expenses, risk, manpower and arrangements.

i) To take all the necessary action for ensuring that the cargo during loading/unloading to/from the vessel does not fall into the dock water. In this regard, the contractor shall abide by all directions to be passed by KoPT.

ii) Other associated works (other than those specifically mentioned above) which may be required to be done for undertaking various on-board operations.

1.1.c) The contractor shall supervise all the functions as mentioned at 1.1.a to 1.1.b above at its cost, charges, expenses, risk, manpower and other arrangements.

1.1.d) The contractor shall carry out loading/unloading of cargo and other on-board cargo handling operations with the help of equipment to be supplied and installed as well as manpower to be deployed under the provisions of the contract in close coordination with KoPT, Master of the vessel as well as representatives of other agencies involved.

Note:

The tenderer shall include charges for undertaking all the functions as given at 1.1.a to 1.1.d within the Schedule of Rates to be quoted by him as per Appendix-XV.

5.5. Evaluation of PRICE BID:

The tenderers are to submit their Price Bid as per format (Schedule of Rates) given at Appendix-XV of the Tender Document. The rate to be quoted by the tenderers shall be less than the ceiling rate of Rs. 52/- per ton. In case any tenderer quotes his rate equal to or more than the ceiling rate of Rs. 52/- per ton, his tender will be summarily rejected.

8.1. viii) For handling break bulk cargo in terms of Scope of Work of this tender, the following may be noted:-

"At present there is no approved rate for providing MHC for handling Break Bulk cargo at HDC. In case of handling of such cargo by use of MHC at HDC in future, the rates and conditionality (including benchmark productivity level) for the same would be mutually agreed between the importers/exporters and KoPT and approved by Tariff Authority for Major Ports as per the Tariff Guidelines, time being in force. KoPT will consult the contractor for firming up of the Minimum Level of Productivity for handling of such cargo. The said rates so approved by TAMP would be subject to revision."

Conditionality (including benchmark productivity level) for the same would be mutually agreed between the importers/exporters and KoPT and approved by Tariff Authority for Major Ports as per the Tariff Guidelines, time being in force. KoPT will consult the contractor for firming up of the Minimum Level of Productivity for handling of such cargo. The said rates so approved by TAMP would be subject to revision.

The contractor will be paid 70% of such rate to be levied by KoPT on Importers/exporters/their agents for the work to be carried out excluding service tax and Education Cess which will be paid at extra in the manner mentioned above.

8.2.2. General – A general escalation on the accepted rate excluding the component of fuel cost will be allowed by KoPT at the rate of 5% or the rise in wholesale price index whichever is lower in every two years commencing from the date on which the Commissioning Certificate will be furnished by KoPT.

24. The Tender was majorly for handling dry bulk cargo. This is not disputed. A perusal of the terms clearly indicates that the rates for handling dry bulk cargo was in accordance with the rates submitted by the respondent (i.e. Rs. 51.91/- per ton) which was supposed to be lesser than Rs. 52. There is a general escalation clause (Clause 8.2.2) which provides for a cap of 5% increase, excluding the component of fuel cost. The rate decided by the parties was Rs. 51.91/-. The arbitrator notes that reference has been made to TAMP rates at various clauses. These clauses, specifically, are (I) Note to Clause 1.1.a and (II) Clause 8.1.viii. These clauses indicate that they covered works which were not within the regular scope of work of tender, but only works which may, as exceptions, be required to be undertaken by the respondents. Note to Clause 1.1.a deals with unloading cargo from non-sea going barges and Clause 8.1.viii. deals with handling of break bulk cargo. It is with respect to these specific instances wherein reference has been made to TAMP rates. The tender provides for revisions of TAMP rates to be applicable in such specific instances and such revision is also guaranteed in the form of percentages (80% in Note to Clause 1.1.a. and 70% in Clause 8.1.viii) of rates levied by KoPT upon third parties.

25. In my opinion, the arbitrator's interpretation is one that no fair-minded or reasonable person would have taken. If the tender provided for

applicability of TAMP rates and their revisions with respect to works that were only to be undertaken in exceptional situations, but did not provide it for the actual scope of work which was to be undertaken on a regular basis for ten years, the express understanding between the parties that emerges is that TAMP rates and their revisions were ousted with respect to handling of dry bulk cargo (actual scope of work). I am astounded by the interpretation taken by the arbitrator and assertion of the respondents that because TAMP rates and their revisions were applicable in some instances, it must be applied for handling of dry bulk cargo. If anything, the mentioning of TAMP rates and their revisions in the abovementioned clauses, and its absence vis-à-vis handling of dry bulk cargo is only further evidence of the indisputable intent of its ouster. Mr. Ratnanko Banerjee, learned Senior Advocate, during the proceedings made the ingenuous argument that the general escalation clause does not even contemplate changes in the TAMP specified SORs, and therefore the arbitrator could have allowed for revised rates. It was elaborately placed by him that the Agreement never considered a change in TAMP SORs and therefore the general escalation is not relevant when the SORs are revised. The degree of ingenuity of this argument is matched by an equivalent degree of being superfluous. The Agreement did contemplate changes in TAMP specified SORs and limited it to certain circumstances, while specifically excluding it for handling of dry bulk cargo. The respondent's case would actually require me to believe that the parties were diligent enough to expressly mention the application of TAMP rates and their revisions for works not

even part of the actual scope and that may be undertaken under exceptional situations, but they somehow forgot to do the same for the actual scope of work. My bafflement is only further exacerbated when we also notice that the tender in clause 8.2.2. clearly mentions that the general escalation applicable and limits it to 5% for handling of dry bulk cargo, excluding changes in fuel cost for which another formula is also provided.

26. In my understanding, the respondent seems to have had found favour with the arbitrator's sympathies, but unfortunately, they do not find favour with my sympathies and most unfortunately, they do not find favour with the law. It is evident that considerations of discrimination and want of state functionaries to act in due conformance to Article 14 of the Constitution swayed the arbitrator's contractual interpretation. The aforesaid inference can be gauged from paragraph 5(e) of this judgement. Firstly, arbitrators cannot apply the rights envisaged under the fundamental rights of the Constitution of India or equity while granting arbitral awards, and if they do, such awards must be set aside as being patently illegal under Section 34(2A) of the Act. The arbitrator is a creature of contract and must act within the powers granted by it. In ***Board of Control for Cricket in India v. Deccan Chronicle Holdings Ltd. reported in MANU/MH/1437/2021,*** the Bombay High Court while dealing with the arbitrator's power to invoke Article 14 of the Constitution held that:

> *"214. Do different considerations arise when one of the parties is*

'the State' within the meaning of Article 12? Here, the learned Sole Arbitrator held that BCCI is not the State, but held that it nonetheless performs 'public functions'. Would that make a difference in arbitration, a dispute resolution constrained by private law? It would appear not. Certainly, the public law duty to act fairly cannot be imported into a contract by a private law arbitral tribunal to effectively alter its terms so as to create an obligation on the so-called public-duty party that the contract does not envisage: Assistant Excise Commissioner v Issac Peter. This is true even of a statutory contract. In Issac Peter, the Supreme Court held that in case of contracts freely entered into with the State, there is no room to invoke the public law doctrines of fairness and reasonableness 'to alter or add to the terms of the contract, i.e. to cast on the State a contractual burden that the contract itself does not contemplate.' A Division Bench of the Delhi High Court went so far as to say that there is no scope for applying the doctrine of arbitrariness in a private law field. That remedy is a public law remedy. Its avenue is different. A Division Bench of this very court took the same view in ONGC Ltd v Streamline Shipping Co Pvt Ltd. It had no hesitation in setting aside the order under appeal, which held that a particular clause was unconscionable and against public policy. Another Division Bench of the Delhi High Court also took a similar view.

* * *

217. There can be no answer at all to Mr. Mehta's submission. There is no quarrel with the proposition that a court, especially a Constitutional court, is not constrained in the same way as an arbitrator. Public law actions demand public law remedies. The suggestion is not that a public authority can play Jekyll and Hyde or that it is required to demonstrate fairness only in a public law action. The

> *question is what is it that the decision-making body is empowered in law to do. A writ court may well hold against a public body on a public law principle or by invoking Article 14; but an arbitrator, constrained as he or she is by the contract, has no such power. A careful reading of the relevant authorities, from Shrilekha Vidyarthi v. State of U.P. MANU/SC/0504/1991 : (1991) 1 SCC 212 to ABL International Ltd. v. Export Credit Guarantee Corporation of India Ltd. MANU/SC/1080/2003 : (2004) 3 SCC 553 and, more recently, Kailash Nath v. Delhi Development Authority, MANU/SC/0019/2015 : (2015) 4 SCC 136 shows that courts have indeed demanded Article 14 compliance (fairness and non-arbitrariness) - in exercise of unquestionable public law judicial powers. I find absolutely no authority for the proposition that a private-law-bound tribunal has recourse to such power."*

I find myself in complete consonance to the above view. However, Mr. Ratnanko Banerjee, Senior Advocate, attempted to impress upon me that the arbitrator may have alluded to Article 14 of the Constitution and aspects of discrimination, but the Award was actually based on Section 28(3) of the Act, wherein the arbitrator interpreted the Agreement while having regard to trade usage.

27. It is also the case of the respondents that the law has shifted slightly and granted more leeway to the Arbitrator to toy around with facts and law. Mr. Banerjee did so by placing the amendment to Section 28 (3) of the Act and the 246th Report of the Law Commission of India

(hereinafter referred to as 'Report') on the basis of which the amendment was made. The part of the Report relied upon by the respondents is hereby extracted:

> *"35. The amendment to section 28(3) has similarly been proposed solely in order to remove the basis for the decision of the Supreme Court in ONGC vs. Saw Pipes Ltd, (2003) 5 SCC 705 – and in order that any contravention of a term of the contract by the tribunal should not ipso jure result in rendering the award becoming capable of being set aside."*

28. The Apex Court has already considered the abovementioned extract of the Report, the changes to Section 28(3) and its effects in ***Ssangyong Engineering (supra)*** and explained the same as provided below:

> "***32.*** *Section 28(3), before the Amendment Act, read as follows:*
>
> *"**28. Rules applicable to substance of dispute**.—(1)-(2)*
> * * *
>
> *(3) In all cases, the Arbitral Tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction."*
>
> *Section 28(3), after amendment, reads as follows:*
>
> *"**28. Rules applicable to substance of dispute**.—(1)-(2)*
> * * *
>
> *(3) While deciding and making an award, the Arbitral Tribunal shall, in all cases, take into account the terms of the contract and trade usages applicable to the transaction."*
>
> *Section 34(2)(b)(ii), after amendment, reads as follows:*
>
> *"**34. Application for setting aside arbitral award**.—(1)*

* * *

(2) An arbitral award may be set aside by the court only if—

***

(b) the court finds that—

***

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

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

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

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

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

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

Sub-section (2-A) of Section 34 was also added, which reads as follows:

*"**34. Application for setting aside arbitral award**.—(1)-(2)*

* * *

(2-A) An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside

by the court, if the court finds that the award is vitiated by patent illegality appearing on the face of the award:

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

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)."*

[Emphasis added]

29. Therefore, the said assertion that the amended section 28(3) of the Act somehow vindicates the conduct of the arbitrator in passing the said Award cannot be countenanced. In fact, in certain exceptional situations wherein unilateral addition or alteration of a contract is done or a party is forced to perform a bargain not entered into with the other party, courts can also set it aside for being against the most basic notions of justice as being a ground under Section 34(2)(b)(ii)

Explanation 1 (iii) of the Act as explained in paragraph 76 of ***Ssangyong Engineering (supra)*** quoted in paragraph 15 above.

30. Section 28(3) does lay down that an arbitral tribunal should take into account the terms of the contract and the trade usages applicable to the transaction. However, in my understanding, from a reading of the law discussed above and the section itself, 'terms of the contract' and 'trade usages' are to be considered conjunctively. The latter may assist in the understanding of the former, in situations wherein the former is ambiguous or completely silent. But, at the cost of repetition, explicit understanding of the parties as emanating from the contract, that too which have a bearing on the fundamental issues of dispute, cannot be ousted in favour of considerations of 'trade usages'. Such an understanding completely undermines party autonomy. It could never be the legislative intent. Nor has it been allowed by courts.

31. The respondents also relied upon ***Board of Trustees of Chennai Port Trust (supra), DLF Home Developer Ltd. (supra)*** and ***Eastern Coalfields Ltd. (supra)***, to justify the arbitrator's consideration of trade usage under Section 28(3) to pass the Award.

32. In ***Board of Trustees of Chennai Port Trust (supra),*** the Court upheld the arbitral award which granted abortive costs, mobilisation costs and de-mobilisation costs on the grounds that as per trade usage, actual costs incurred by a person towards a work as per the contract is

to be reimbursed. It must be noted that the contract was silent on such costs and therefore the case is distinguishable on facts. In ***DLF Home Developer Ltd. (supra),*** the Court does say that contravention of a clause in an agreement cannot make the arbitral award one against the fundamental policy of India. However, the Court cites ***Ssangyong Engineering (supra)*** and ***Associate Builders (supra)*** to hold the same, while with the same breadth also stating that terms of a contract is for the arbitrator to decide, unless done in a manner that no fair-minded person or reasonable person would. The Court further goes on to examine the clauses of the agreement and thereby adjudges the interpretation done by the arbitrator to be a reasonable one. It does not, in any manner, say that the arbitrator can simply ignore the express terms of the contract while granting the award. This case is also distinguishable on facts.

33. In ***Eastern Coalfields Ltd. (supra),*** this Court refused to set aside an arbitral award which was contended to be passed in a whimsical and arbitrary manner, after disregarding clauses of the contract. The award-debtors had contested it by citing two judgements, one of which was ***ONGC v. Western Geco International Ltd. reported in (2014) 9 SCC 263***. This Court ruled that arbitral award was not passed in a capricious or arbitrary manner. The decision considers that while the clause did limit the liability of the award debtor and only allowed, after termination, payment for work 'satisfactorily' completed, which was to be decided by one of the parties. However, there were actual expenses

made for mobilisation and de-mobilisation, which were reasonable claims allowed for in the arbitral award, taking into account the pre-mature termination of the contract. Additionally, the Court indicates that there was nothing to show that the work was dissatisfactory and held that the arbitral award to have properly considered the commercial usages and ground realities as per Section 28(3) of the Act.

34. Firstly, ***Eastern Coalfields Ltd. (supra)*** involves pre-mature termination, mobilisation and demobilization expenses actually made, none of which are present in the current facts and circumstances. Thereby, it is distinguishable from the facts of this case. Secondly and more importantly, the setting aside was pushed for and adjudicated upon after relying on the law laid down in ***ONGC v. Western Geco International Ltd. (supra),*** with respect to whimsical and capricious manner of passing arbitral awards. This law was overruled in ***Ssangyong Engineering (supra),*** the relevant portion for which has already been extracted in paragraph 15 of this judgement. Awards cannot be set aside or challenged for being 'whimsical or capricious'. ***Eastern Coalfield Ltd. (supra)*** does not decide on whether award, which uses trade usage to go against express understanding between the parties, is patently illegal or not. ***Ssangyong Engineering (supra)*** was decided after ***Eastern Coalfield Ltd. (supra)*** and has clarified the said position. The law has changed and therefore, ***Eastern Coalfields Ltd. (supra)*** is distinguishable on law and facts.

35. In the facts and circumstances, I am inclined to hold that the interpretation made by the arbitrator is one that no reasonable or fair minded person could have reached. The Award is patently illegal and liable to be set aside as provided for under Section 34(2A) of the Act. Furthermore, a unilateral alteration of an agreement is being forced upon an unwilling party. It is an exceptional case wherein the conscience of the court is shocked at the conduct of the Arbitrator, which is against the most basic notions of justice as explained in paragraph 15 of this judgement. The jurisprudence on arbitration bows down to party autonomy. A bargain which has been entered into and with express terms, cannot be reneged on the mere pretext that other people were getting higher prices for similar work. The Agreement was for a long term which clearly took into regard and mitigated the risk of price fluctuation. The arbitrator could not have applied constitutional rights or principles of equity to grant relief. Even if the award was independent of such constitutional considerations, it must be set aside for reasons discussed above.

36. Another inconsistency appears from the additional award dated March 14, 2020 wherein the arbitrator refused to grant revision of rate for the period from 10.1.2020 till 22.06.2023. It is to be noted that the arbitrator had only awarded amount from the period the issue of discrimination was first raised by the respondents (that is, 15.09.2018 till 7.12.2019). Therefore, the respondents preferred an application under Section 33(4) of the Act to the arbitrator, for revision of rate of

payment for the remainder of the duration as per the Agreement (10.1.2020 till 22.06.2023). The arbitrator declined the said prayer as per the additional award dated March 14, 2020 and noted that:

> "……the revision of rate is not within the scope of this tribunal as the same is made by the statutory authority like TAMP and in terms of agreement for the future claim during the tenure of the rest of the contract period the claimant is to follow the procedure in terms of Clause 7.17 of the tender document as they did in the instant case by placing their demands before the respondent authority and the respondent authority after considering the same may forward the matter to the TAMP Authority for consideration for revision of the rate."

The arbitrator acknowledged that the tribunal lacked the power to revise the rates and that TAMP has the said power for the period being 10.1.2020 till 22.06.2023. Either the Arbitrator possessed the power to apply revised rates for any period, or he did not. His confession that he did not have the power for the period being 10.1.2020 till 22.06.2023 is contradictory to the exercise of his power for the earlier period. The Arbitrator's approach is self-contradictory and anomalous. Furthermore, the reasoning in the additional award is still partly incorrect as even though the respondents placed their demands before the authority, revised rates were never applied to them and could not be applied unless the parties again agreed to the said revision. Anyway, without much deliberation on this aspect, it suffices to say that the

Award is required to be set aside for reasons mentioned in the preceding paragraphs.

37. The above paragraph does act as a prelude to the respondent's contentions left to be dealt with. The contention that Section 48 of the Port Trust Act, 1963 makes it mandatory for service providers as well as the port trusts to follow the SoR issued by TAMP and that arbitrators can decide on disputes governed by statutory provisions. There is no violation of the provisions as such in the current circumstances. The automatic applicability of revised rates and passing down of benefits is not contemplated by the Port Trust Act, 1963. In fact, this passing down of benefits was ensured by the Tender in only specific instances, such as 80% in Note to Clause 1.1.a. and 70% in Clause 8.1.viii of rates levied by KoPT upon third parties. But, it was specifically not applicable for handling of dry bulk cargo. Therefore, the arbitrator went completely amiss with his interpretation. Secondly, applicability of TAMP rates based on the Post Trust Act, 1963 will anyway be ousted if it is outside the scope of the contract. This Court in ***Steel Authority of India v. Vizag Seaport Private Limited, reported in 2022 SCC OnLine Cal 2299***, while deciding on the applicability of demurrage charges on the basis of TAMP provisions, even though it was not provided for in the contract, ruled against it. It set aside the arbitral award on the ground of patent illegality. The relevant portions are hereby extracted:

> *"**16.** Now the question before this Court whether the petitioner is liable to pay any demurrage charges as claimed by the*

respondents and as awarded by the majority member of the Arbitral Tribunal or whether the respondent is not entitled to get any demurrage charges as held by the Ld. minority member of the Arbitral Tribunal.

* * *

***21**. There is no provision in clause 5.12 of the short term contract that demurrage is payable in accordance with TAMP scale of rates. In clause 3.3 of the short term contract the respondents confirms that 40500 sq.mtrs of area will be utilized for handling the cargo and mechanized handling facilities, drains, roads, railway-tracks, buildings. Amenities and other systems associated with providing integrated terminal services as per this agreement. It is crystal clear that the said area is also provided to the petitioner for stacking cargo and dispatch of cargo by rail wagons to the steel plant of the petitioner. In clause 4.1 of the agreement the Integrated Terminal Service Charges has been specified. In the said clause it is also mentioned that the subsequent year on year escalation in the ITSC from the end of the first year of operation is detailed in Annexure-1 and in the said Annexure also there is no mention of payment of demurrage as per the TAMP scale of rates.*

* * *

***26.** In the instant case also the majority arbitrators have passed and award in favour of the respondent by directing the petitioner for payment of demurrage charges by relying upon the Major Port Trust Act, 1963 and in terms of TAMP order which is absolutely outside of the contract as in the contract there is no provision for levy of demurrage.*

* * *

33. <u>This being the case, it is clear that the majority award has created a new contract by applying provisions of</u>

Major Port Act, 1963 and TAMP order as there is no provision under the contract for demand of demurrage charges against the petitioner*. The majority award also not considered that in the agreement rate of schedule of ITSC and penalty clause are provided.*

* * *

38. *Admittedly, there is no clause in the in the agreement or there is any correspondance between the parties with regard to imposition of demurrage upon the petitioner. Under clause 4.0 the responsibilities of the petitioner (SAIL) is provided. Penalty made clause is 4.2 and in the said clause also there is no provision for demurrage. There is nothing in the short term agreement with regard to applicability of Major Port Trust Act, 1963 or TAMP order. In the year 2011 itself the TAMP has decided that "As such giving reduction in approved tariff to SAIL is purely out of the contractual necessity and compulsion to retain SAIL cargo at VPT/VSPL. Thus there is absolutely no discretion from our end in granting reduction in tariff to SAIL."*

* * *

40. *The patent illegality is permissible ground for reviewing a domestic award vide ruling in Delhi Airport Metro Express Pvt. Limited v. Delhi Metro Rail Corporation Ltd. What would constitute patent illegality has been elaborately discussed in Associate Builder's case, (2015) 3 SCC 49 (supra), wherein it has been held that patent illegality falls under the head of "Public Policy". Failure on the part of Majority Arbitral Tribunal to decide in accordance with the contract governing the parties would be opposed to Public Policy and awarding the claim contrary to the terms of the contract goes to the root of the matter. Ignoring the terms of contract, amounts to gross contravention of section 28 (3) of the Arbitration and Conciliation Act, 1996 that enjoins the Arbitral Tribunal to*

> *take into account the terms of the contract, while making the award. To sum up, in the instant case the majority members of the Arbitral Tribunal have passed an award on 30.08.2015 by directing the petitioner to pay an amount of Rs. 19,68,46,018/- along with interest at the rate of 8 % from the date of reference till the date of award and 6 % from the date of award till realization. Ignoring the terms of contract in making the award warrants invocation of the Award vested under Section 34 of Arbitration and Conciliation Act, 1996."*
>
> **[Emphasis added]**

I find myself in harmony to the aforesaid view. Provisions of Major Port Act, 1963 cannot be utilised to go beyond the categorical understanding between the parties as emanating from the agreement.

38. Issue (A.) is accordingly decided in the negative. Therefore, as a corollary, Issue (B.) is decided in the affirmative. The Award dated dated January 10, 2020, as further revised by an additional award dated March 14, 2020, are set aside on grounds mentioned above. The applications, being A.P. 288 of 2020 and No. GA 1 of 2020 in A.P. No. 288 of 2020 are accordingly decided and disposed of. Since the award is set aside, E.C. 98 of 2022 becomes infructuous and is disposed of accordingly.

39. I would like to appreciate the painstaking efforts and superlative advocacy displayed by Mr. Abhrajit Mitra appearing for the petitioner

and Mr. Ratnanko Banerjee appearing for the respondent. Both counsels have done an exemplary job for their respective clients and made my task easier with their clarity of thought and impeccable presentation in court.

40. The arbitration petition is accordingly allowed. There shall be no order as to costs.

41. Urgent Photostat certified copy of this order, if applied for, should be made available to the parties upon compliance with the requisite formalities.

(Shekhar B. Saraf, J.)