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

% **Reserved on : 22nd December, 2022**
Pronounced on: 2nd February, 2023

\+ O.M.P. (COMM) 391/2022

FLOWMORE LIMITED ..... Petitioner

Through: Mr. Arvind Verma, Sr. Advocate with Mr. Abhinav Mukerji, Ms. Pratishtha Vij, Mr. Rohan Jaitley, Ms. Neoma Vasdev, Mr. Pratham Mehrotra, Ms. Mahima Chauhan and Ms. Smridhi Sharma, Advocates

versus

M/S SKIPPER LIMITED ..... Respondent

Through: Mr. Nikhil Nayyar, Sr. Advocate with Mr. Saurav Gupta and Ms. Sugandha Batra, Advocates

CORAM:
HON'BLE MR. JUSTICE CHANDRA DHARI SINGH

J U D G M E N T

CHANDRA DHARI SINGH, J.

1. The instant petition under section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter "The Act, 1996") has been filed on behalf of the petitioner seeking the following reliefs:

> *"A. Set aside the Award dated 05.07.2022 passed by the Ld. Sole Arbitrator in Arbitration Case Ref. No.05/02/2020; and*
> *B. Allow and accordingly grant Counter Claim as prayed for by the Petitioner in Arbitration Case Ref. No.05/02/2020;*

C. Award costs in favour of the Petitioner and against the Respondent;
D. Grant any other relief which this Hon'ble Court may deem fit and proper in the facts and circumstances of the case in favour of the Petitioner."

FACTUAL MATRIX

2. The facts necessary for the disposal of the present petition are that the Petitioner is a Public Limited Company that primarily deals in the area of large speciated application pumps and has diversified into the power sector. Flowmore Jagabandhu JV, the Petitioner's joint venture with Jagabandhu Enterprises Ltd. was awarded a contract for the Design, Engineering, Supply, Erection, Testing, and Commissioning of a 132/33 kV, 2 x 50 MVA grid sub-station including the construction of Control Room Building & approach road as well as other civil works for 8 transmission lines by Jharkhand Urja Sancharan Nigam Ltd (hereinafter "JUSNL").

3. The Respondent was engaged by the Petitioner as the manufacturer and supplier of customized towers and other ancillary goods as per the specifications and other details provided the respondent for transmission lines to be erected for its client JUSNL, in various districts vide the Contract/Purchase Order dated 02.03.2019.Prior to this, the respondent vide an e-mail dated 20.02.2019, sent a purchase enquiry to the claimant for the manufacture and supply of structural material for 122/132 KV Sub-station for JUSNL Tender NIT. No. 244 to 249.Pursuant to negotiation and discussion, Purchase Order no. Ref. FL/SkipperjJUSML-PKG-244-249/60 dated 02.03.2019 was issued by the Petitioner in favour of the Respondent, for the supply of fabricated and galvanized HDG

tower parts, stubs, cleats (for both mild steel and HT steel), MS templates, earthing of tower materials, and fasteners for the project.

4. According to the Respondent, as per the contract, the Petitioner was to provide structural drawings, shop sketches, BOM of items to the Respondent. Based on these, the Respondent was to arrange sketches and BOM for approval before mass production. The Respondent was to get all drawings/documents approved directly from JUSNL.

5. According to the Petitioners, as per the mutual agreement between the parties dated 8th March 2019, it was evidently clear that the approvals and drawings were to come from the Respondent.

6. The Supplier was to start manufacturing material only after getting a written Manufacturing Clearance (hereinafter "MC") from the buyer. The quantity cleared in MC only was to be manufactured by the supplier. Any material manufactured without getting the MC from the buyer was to be rejected. Hence, the Respondent had to provide a prototypetype to the Petitioner to conduct an inspection, subsequent to which an advance payment was to be made.

7. The transaction between the parties lasted for a brief duration of 3 months, after which it was prematurely terminated by the Petitioner on 25th July 2019 based on the alleged delay and breach of contractual obligations by the Respondent. Further, the Petitioner engaged with RR Ispat as its supplier on the same day the contract with the Respondent was terminated.

8. In January 2020, an application under Section 9 of the Act, 1996, bearing O.M.P. (I) (COMM.) 3/2020 came to be filed by the Respondent before this Court. By way of consent, vide order dated 27th January, 2020,

the learned Sole Arbitrator was appointed by the this Court in O.M.P. (I) (COMM.) 3/2020 titled 'Skipper Ltd. Vs. Flowmore Ltd'.

9. Thereafter, the learned Sole Arbitrator rendered its Award on 05.07.2022 and awarded a sum of Rs, 8,15,05,674/- to the Claimant/Respondent, aggrieved by which the Petitioner has approached this Court with the instant petition seeking the aforesaid reliefs.

SUBMISSIONS

(on behalf of the petitioner)

10. Mr. Arvind Verma, Learned Senior Counsel appearing on behalf of the petitioner, in support of the instant petition, has submitted that the impugned award dated 5th July, 2022 is ex-facie erroneous, suffers from patent illegality, and is contrary to the fundamental policy of Indian Law. To substantiate the arguments, the Learned Senior Counsel has argued that the learned Arbitrator has completely misappreciated vital evidence and that the impugned award is liable to be set aside.

11. Learned senior counsel appearing on behalf of the petitioner further relied upon ***PSA Sical Terminals Pvt. Ltd. vs. The Board of Trustees of V. O. Chidambranar Port Trust, Tuticorin and Ors.*** **AIR 2021 SC 4661,** wherein the Hon'ble Supreme Court has held that a finding based on no evidence at all or an award that ignores vital evidence in arriving at its decision would be perverse and liable to be set aside on the ground of patent illegality. The relevant portion relied on by the Learned Senior Counsel is reproduced here:-

> *"86. After referring to various international treaties on arbitration and judgments of other jurisdictions, this Court*

in Ssangyong Engineering and Construction Company Limited (supra), observed thus:

> *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 supplied]*

87. As such, as held by this Court in Ssangyong Engineering and Construction Company Limited (supra), the fundamental principle of justice has been breached, namely, that a unilateral addition or alteration of a contract has been foisted upon an unwilling party. This Court has further held that a party to the Agreement cannot be made liable to perform something for which it has not entered into a contract. In our view, re-writing a contract for the parties would be breach of fundamental principles of justice entitling a Court to interfere since such case would be one which shocks the conscience of the Court and as such, would fall in the exceptional category.

88. We may gainfully refer to the following observations of this Court in Bharat Coking Coal Ltd. v. Annapurna Construction[26]*.*

> *"22. There lies a clear distinction between an error within the jurisdiction and error in excess of jurisdiction. Thus, 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, whereas if he has remained inside the parameters of the contract, his award cannot be questioned on the ground that it contains an error apparent on the face of the record."*

89. 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.

90. It will also be apposite to refer to the following observations of this Court in the case of Md. Army Welfare Housing Organization v. Sumangal Services (P) Ltd.

> *"43. An Arbitral Tribunal is not a court of law. Its orders are not judicial orders. Its functions are not judicial functions. It cannot exercise its power ex debito justitiae. The jurisdiction of the arbitrator being confined to the four corners of the agreement, he can only pass such an order which may be the subject-matter of reference."*

91. It has been held that an Arbitral Tribunal is not a Court of law. Its orders are not judicial orders. Its functions are not judicial functions. It cannot exercise its powers ex debito justitiae. It has been held that the jurisdiction of the arbitrator being confined to the four corners of the agreement, he can only pass such an order which may be the subject-matter of reference.

12. He has further relied upon the judgment in ***Patel Engg. Ltd. v. North Eastern Electric Power Corpn. Ltd.*, (2020) 7 SCC 167**, where the Hon'ble Supreme Court reiterated what was held in ***Ssangyong Engg. & Construction Co. Ltd. (Supra)***, which is reproduced below:-

> *"20. In Ssangyong Engg. & Construction Co. Ltd. [Ssangyong Engg. & Construction Co. Ltd. v. NHAI, (2019) 15 SCC 131, para 19] , this Court was considering a challenge to an award passed in an international commercial arbitration, between the appellant Company—a foreign entity registered under the laws of Korea, and the respondent, a Government of India undertaking. In para 19*

of the judgment, this Court noted that the expansive interpretation given to "public policy of India" in Saw Pipes Ltd. [ONGC v. Saw Pipes Ltd., (2003) 5 SCC 705] and Western Geco International Ltd. [ONGC v. Western Geco International Ltd., (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12] cases, which had been done away with, and a new ground of "patent illegality" was introduced which would apply to applications under Section 34 made on or after 23-10-2015. In paras 36 and 37 of the judgment, this Court held that insofar as domestic awards are concerned, the additional ground of patent illegality was now available under sub-section (2-A) to Section 34. However, reappreciation of evidence was not permitted under the ground of "patent illegality" appearing on the face of the award.

21. In paras 39 and 40 of Ssangyong Engg. [Ssangyong Engg. & Construction Co. Ltd. v. NHAI, (2019) 15 SCC 131, para 19] , the Court reiterated paras 42.2 and 42.3 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49, paras 40 to 45 : (2015) 2 SCC (Civ) 204] wherein, it was held that the construction of the terms of a contract is primarily for an arbitrator to decide, unless the arbitrator construes a contract in a manner which no fair-minded or reasonable person would take i.e. if the view taken by the arbitrator is not even a possible view to take. In paras 39 and 40, the Supreme Court held as under : (Ssangyong Engg. case [Ssangyong Engg. & Construction Co. Ltd. v. NHAI, (2019) 15 SCC 131, para 19] , SCC pp. 170-71)

> *"39. To elucidate, para 42.1 of Associate Builders v. DDA [Associate Builders v. DDA, (2015) 3 SCC 49, paras 40 to 45 : (2015) 2 SCC (Civ) 204] , namely, a mere contravention of the substantive law of India, by itself, is no longer a ground available to set aside an arbitral award. Para 42.2 of Associate Builders v. DDA [Associate Builders v. DDA, (2015) 3 SCC 49, paras 40 to 45 : (2015) 2 SCC (Civ) 204] , however, would remain, for if an arbitrator gives no reasons for an award and contravenes Section 31(3) of the 1996*

> *Act, that would certainly amount to a patent illegality on the face of the award.*
> *40. The change made in Section 28(3) by the Amendment Act really follows what is stated in paras 42.3 to 45 in Associate Builders v. DDA [Associate Builders v. DDA, (2015) 3 SCC 49, paras 40 to 45 : (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).""*

13. Learned senior counsel appearing on behalf of petitioner submitted that the learned Arbitrator's findings in Paragraph 95 of the Impugned Award, with regard to the Petitioner being responsible for the delayed submission of drawings, are incorrect and erroneous. As per the Petitioner, the aforementioned finding was contrary to the mutual agreement between the parties on 8th March, 2019 vide e-mail, that the Respondent was responsible to arrange and seek approval of the drawings directly from JUSNL.

14. It is further submitted that the learned Sole Arbitrator's finding that the Respondent was not responsible for arranging drawings is presumptuous and does not consider the fact that the Petitioner provided the drawings to the Respondent only because the project was getting delayed by the Respondent and in order to reduce the eventual delay

towards JUSNL, the Petitioner was facilitating the exercise and thus the *bona fide* attempt cannot be construed against the Petitioner.

15. It is submitted that the learned Sole Arbitrator has failed to consider Clause 12 of the Purchase Order which mandated that the Respondent was to ensure the submission of complete and correct documents in line with the Purchase Order specifications and any delay in the final delivery of material on account of delayed submissions of documents would be on the Respondent's account.

16. Furthermore, learned senior counsel appearing on behalf of petitioner submitted that the learned Sole Arbitrator erred in creating a distinction between "tender specifications" and "terms and conditions of GCC (General Conditions of Contract between the petitioner and JUSNL)" since the requirement of the tender itself was to ensure the production of a prototype and thus, it cannot be said that the same was not a tender specification.

17. It is submitted that the learned Sole Arbitrator failed to appreciate that in absence of a prototype, which was essentially a sample, after approval of which manufacturing clearance was to be given, was never produced by the Respondent. Furthermore, since the Respondent failed to produce a prototype, there was no occasion to inspect the same and make the advance payment.

18. It is further submitted that the learned Sole Arbitrator has miserably failed to appreciate that the Respondent had shown no proof of any loss caused to it and in fact, the Respondent was attempting to make unjust gains from the Petitioner.

19. Learned senior counsel appearing on behalf of petitioner submitted that the learned Sole Arbitrator has failed to appreciate that the Claim of the Respondent was fraudulent and the same was evident from the contradictory stand taken by the Respondent in its claim. This is so because, while the Respondent has contended that the advance payment under the Purchase Order was contemplated before the production and inspection of prototype, at the same time, it has also sought to contend that it itself proceeded to manufacture the prototype for towers even though, no advance payment was made to it for towers and that it also manufactured the entire order of stubs and templates without the said payment.

20. It is submitted that the learned Sole Arbitrator failed to appreciate that the Respondent was bound to offer inspection in terms of the provisions of Section 41 of the Sale of Goods Act, 1930 which is as follows:

> *"41. Buyer's right of examination of goods:*
> *(1) Where goods are delivered to the buyer which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract.*
> *(2) Unless otherwise agreed when the seller tenders delivery of goods to the buyer, he is bound, on request to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract."*

21. It is further submitted that the learned Sole Arbitrator failed to appreciate the decision rendered in ***Nabha Power Ltd. Vs. Punjab State Power Corporation Ltd*. (2018) 11 SCC 508** where it has been held that

the contract entered into by parties is based on the principles of business efficacy which are intended at all events by parties through businessman. The Hon'ble Supreme Court has held that a contract is a commercial document between the parties and it must be interpreted in such a manner as to give efficacy to the contract rather than to invalidate it. The meaning of such a contract must be gathered by adopting a common-sense approach and it must not be allowed to be thwarted by narrow, pedantic, and legal interoperation. The relevant portion of the Judgment is reproduced below:-

> *"47. In Union of India v. D.N. Revri& Co. [Union of India v. D.N. Revri & Co., (1976) 4 SCC 147] , P.N. Bhagwati, J. (as he then was), speaking for the Bench of two Judges said in para 7 as under: (SCC p. 151)*
>
> > *"7. It must be remembered that a contract is a commercial document between the parties and it must be interpreted in such a manner as to give efficacy to the contract rather than to invalidate it. It would not be right while interpreting a contract, entered into between two lay parties, to apply strict rules of construction which are ordinarily applicable to a conveyance and other formal documents. The meaning of such a contract must be gathered by adopting a common sense approach and it must not be allowed to be thwarted by a narrow, pedantic and legalistic interpretation. ..."*
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> *48. Lastly, in Satya Jain v. Anis Ahmed Rushdie [Satya Jain v. Anis Ahmed Rushdie, (2013) 8 SCC 131 : (2013) 3 SCC (Civ) 738] , Ranjan Gogoi, J., elucidated the well-established principles of the classic test of business efficacy to achieve the result of consequences intended by the parties acting as prudent businessmen. It was opined as under: (SCC pp. 143-44, paras 33-35)*
>
> > *"33. The principle of business efficacy is normally invoked to read a term in an agreement or contract so*

as to achieve the result or the consequence intended by the parties acting as prudent businessmen. Business efficacy means the power to produce intended results. The classic test of business efficacy was proposed by Bowen, L.J. in The Moorcock [The Moorcock, (1889) LR 14 PD 64 (CA)] . This test requires that a term can only be implied if it is necessary to give business efficacy to the contract to avoid such a failure of consideration that the parties cannot as reasonable businessmen have intended. But only the most limited term should then be implied—the bare minimum to achieve this goal. If the contract makes business sense without the term, the courts will not imply the same. The following passage from the opinion of Bowen, L.J. in The Moorcock [The Moorcock, (1889) LR 14 PD 64 (CA)] sums up the position: (PD p. 68)

> *'... In business transactions such as this, what the law desires to effect by the implication is to give such business efficacy to the transaction as must have been intended at all events by both parties who are businessmen; not to impose on one side all the perils of the transaction, or to emancipate one side from all the chances of failure, but to make each party promise in law as much, at all events, as it must have been in the contemplation of both parties that he should be responsible for in respect of those perils or chances.'*

34. Though in an entirely different context, this Court in United India Insurance Co. Ltd. v. Manubhai Dharmasinhbhai Gajera [United India Insurance Co. Ltd. v. Manubhai Dharmasinhbhai Gajera, (2008) 10 SCC 404] had considered the circumstances when reading an unexpressed term in an agreement would be justified on the basis that such a term was always and obviously intended by and between the parties thereto. Certain observations in this regard expressed

by courts in some foreign jurisdictions were noticed by this Court in para 51 of the Report. As the same may have application to the present case it would be useful to notice the said observations: (SCC p. 434)

> *'51. ... "... 'Prima facie that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying; so that, if, while the parties were making their bargain, an officious bystander, were to suggest some express provision for it in their agreement, they would testily suppress him with a common "Oh, of course!" ' Shirlaw v. Southern Foundries (1926) Ltd. [Shirlaw v. Southern Foundries (1926) Ltd., (1939) 2 KB 206 : (1939) 2 All ER 113 (CA)] , KB p. 227."*
>
> *xxxxxx*
>
> *"... An unexpressed term can be implied if and only if the court finds that the parties must have intended that term to form part of their contract: it is not enough for the court to find that such a term would have been adopted by the parties as reasonable men if it had been suggested to them: it must have been a term that went without saying, a term necessary to give business efficacy to the contract, a term which, although tacit, formed part of the contract which the parties made for themselves." Trollope and Colls Ltd. v. North West Metropolitan Regl. Hospital Board [Trollope and Colls Ltd. v. North West Metropolitan Regl. Hospital Board, (1973) 1 WLR 601 : (1973) 2 All ER 260 (HL)] , WLR p. 609 C-D : All ER p. 268a-b.'*

(emphasis in original)

35. The business efficacy test, therefore, should be applied only in cases where the term that is sought to be read as implied is such which could have been

clearly intended by the parties at the time of making of the agreement. …"

(on behalf of the respondent)

22. *Per Contra*, Mr. Nikhil Nayyar, learned senior counsel appearing on behalf of the respondent has strenuously opposed the instant petition as being devoid of any merit. It is submitted that the award carefully considers and rightly appreciates the evidence on record. The Respondent submits that the impugned arbitral award carefully considers and rightly appreciates the evidence on record and that the findings returned by the Learned Arbitrator do not warrant any interference by this Court in its limited jurisdiction under Section 34 of the Act, 1996.

23. It is submitted that the averment that the Arbitral Award is erroneous, patently illegal, or contrary to fundamental policy is baseless and infructuous. It is further argued that the Petitioner has failed to establish how the award ignores vital evidence or is based on no evidence.

24. Learned senior counsel appearing on behalf of respondent submitted that the present case is not where the learned Arbitrator gave a complete go-by to the terms and conditions of the agreement. It is submitted that the terms and conditions of the contract were correctly considered, interpreted, and given effect, along with the facts and evidence on record.

25. It is further submitted that the learned Arbitrator carefully considered the facts with respect to the provision of drawings.

26. Learned senior counsel appearing on behalf of the respondent submitted that the Petitioner has failed to place any evidence to the contrary on record. In fact, the Petitioner's witnesses have taken inconsistent stands on the period of alleged delay in the provision of drawings by the Claimant. RW-2 state that the delay was for 5 months calculated from 2nd March, 2019 till 25th July, 2019, however, RW-1 state that the delay was for 2 and half months from 2nd March, 2019 to 30th May, 2019, during the Cross-Examination. The learned Arbitral Tribunal had correctly observed that the Petitioner supplied drawings to the Respondent after a long delay only on 30th May 2019, which was in breach of the Contract and the terms agreed on between the parties. Owing to the delay on part of the Petitioner in the supply of structural drawings, the Claimant could not deliver the first installment of goods from May-June, 2019.

27. It is further submitted that the learned Arbitrator has correctly interpreted the terms of the contract and e-mail dated 8th March 2019, giving effect to the parties' true intention. Reliance of the Petitioner on ***Ssangyong Engineering and Construction Co. Ltd. (Supra)*** to contend that the learned Arbitrator had virtually re-written the terms of the contract and had altered the agreed terms and intention of the parties is therefore erroneous.

28. Learned senior counsel appearing on behalf of respondent submitted that the learned Arbitrator carefully considered the facts with respect to the provision of drawings and has meticulously dealt with the documents on record to conclude that the Petitioner took over the responsibility of the supply of structural drawings. It is submitted that the

learned Arbitrator correctly observed that the delay in the provision of drawings and the consequent delay in manufacturing is fully attributable to the Petitioner.

29. It is further submitted that the learned Arbitrator has exhaustively considered the evidence and documents on record while returning his findings, as the Petitioner has contended that the findings with regard to prototype inspection are contrary to the evidence of record and that yet again, the Petitioner seeks that the evidence be re-appreciated in the present proceedings.

30. Learned senior counsel appearing on behalf of respondent submitted that the learned Arbitrator correctly observed that the Respondent herein was not bound by the terms of GCC as the Respondent was neither a party to it nor did it form part of the Contract, and since the terms of GCC were not applicable to the Respondent, the requirement of inspection of prototype was not binding on the Respondent.

31. It is submitted that the learned Arbitrator has correctly observed that the Petitioner did not release the advance payment despite MC having been granted on 19th June 2019, and kept insisting that the Respondent offers prototype inspection to get the advance, which was contrary to the terms of the Contract. The said fact has not been refuted and, as a matter of fact, the Petitioner's witness has admitted that Respondent was not obligated to offer prototype inspection in the absence of advance payment. The learned Arbitrator has also correctly observed that prototype was waived and manufacturing clearance was granted.

32. In view of the above submissions, it is submitted that the findings by the Learned Arbitrator do not warrant any interference by this Court in its limited jurisdiction under Section 34 of the Act, 1996.

ANALYSIS

33. Heard learned senior counsel for the parties and perused the record. This Court has also perused the impugned arbitral award as well as the entire arbitral record brought on record, and has given thoughtful consideration to the submissions advanced by the parties.

34. The challenge to the impugned Arbitral Award *inter alia* has been made on the ground that the Learned Arbitrator has completely misappreciated vital evidence and that the Impugned Award is an Award rendered based on no evidence and is liable to be set aside based on the decision of the Hon'ble Supreme Court in ***PSA Sical Terminals Pvt. Ltd. (Supra)*** wherein it has been held that a finding based on no evidence at all or an award that ignores vital evidence in arriving at its decision would be perverse and liable to be set aside on the ground of patent illegality.

35. Another ground that has been raised by the Petitioner is that the finding that regards attributing the delay to the petitioner is in complete derogation to the contemporaneous understanding and conduct of the parties. It has been argued that the learned Sole Arbitrator erroneously came to the finding in Para 95 of the impugned Award that shifted the responsibility for the delay of the submission of drawings to the Petitioner. It is further submitted that as per the terms settled between the parties on 8th March, 2019 with respect to the supply of drawings, it was

mutually agreed between the parties that the claimant/Respondent was to arrange and seek approval of the drawings directly from JUSNL.

36. Another ground relied on by the learned senior counsel for the petitioner was that the learned Arbitrator has virtually re-written the contract terms by way of his interpretation, and has altered the agreed terms and the intention of the parties.

37. He has referred to the decision by the Hon'ble Supreme Court in ***PSA Sical Terminals Pvt. Ltd. (Supra)*** wherein it has been held that a party to the agreement cannot be made liable to perform something for which it had not entered into a contract and that the re-writing of a contract for the parties would be a breach of fundamental principles of justice, thereby entitling a court to interfere since such a case would be one which shocks the conscience of the court.

38. The main ground taken by the learned senior counsel for the petitioner while assailing the Arbitral Award is that the impugned Arbitral Award is ex-facie erroneous and suffers from patent illegality, contrary to the fundamental policy of Indian Law. The law regarding patent illegality and public policy of India is no more *res integra* and has been authoritatively clarified by the Hon'ble Supreme Court in a number of judicial pronouncements. Before delving into the judicial decisions, it is pertinent to reproduce the relevant portion of Section 34 of the Act, 1996:-

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

(a) the party making the application [establishes on the basis of the record of the arbitral tribunal that]—

(i) a party was under some incapacity; or

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

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

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration: Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

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

(b) the Court finds that—

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

(ii) the arbitral award is in conflict with the public policy of India. *[Explanation 1.—For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,— (i) the making of the award was*

> *induced or affected by fraud or corruption or was in violation of Section 75 or Section 81; or*
> ***(ii) it is in contravention with the fundamental policy of Indian law; or***
> *(iii) it is in conflict with the most basic notions of morality or justice.*
>
> *Explanation 2.—For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.*
>
> ***(2-A) An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the court, if the court finds that the award is vitiated by patent illegality appearing on the face of the award:*** *Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by reappreciation of evidence.]"*

39. In ***Ssangyong Engineering & Construction Co. Ltd. (Supra)***, the Hon'ble Supreme Court while explaining the scope of the expression 'public policy of India' made the following pertinent observations:

> *"23. 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 paragraphs 18 and 27 of Associate Builders (supra), i.e., the fundamental policy of Indian law would be relegated to the "Renusagar" understanding of this expression. This would necessarily mean that the Western Geco (supra) expansion has been done away with. In short, Western Geco (supra), as explained in paragraphs 28 and 29 of Associate Builders (supra), 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 paragraph 30 of Associate Builders (supra).

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25. Thus, it is clear that public policy of India is now constricted to mean firstly, that a domestic award is contrary to the fundamental policy of Indian law, as understood in paragraphs 18 and 27 of Associate Builders (supra), or secondly, that such award is against basic notions of justice or morality as understood in paragraphs 36 to 39 of Associate Builders (supra). Explanation 2 to Section 34(2)(b)(ii) and Explanation 2 to Section 48(2)(b)(ii) was added by the Amendment Act only so that Western Geco (supra), as understood in Associate Builders (supra), and paragraphs 28 and 29 in particular, is now done away with.

26. Insofar as domestic awards made in India are concerned, an additional ground is now available under sub-section (2A), added by the Amendment Act, 2015, to Section 34. Here, there must be patent illegality appearing on the face of the award, which refers to such illegality as goes to the root of the matter but which does not amount to mere erroneous application of the law. In short, what is not subsumed within "the fundamental policy of Indian law", namely, the contravention of a statute not linked to public policy or public interest, cannot be brought in by the backdoor when it comes to setting aside an award on the ground of patent illegality.

27. Secondly, it is also made clear that re-appreciation of evidence, which is what an appellate court is permitted to do, cannot be permitted under the ground of patent illegality appearing on the face of the award.

28. To elucidate, paragraph 42.1 of Associate Builders (supra), namely, a mere contravention of the substantive law of India, by itself, is no longer a ground available to set aside an arbitral award. Paragraph 42.2 of Associate Builders (supra), however, would remain, for if an arbitrator gives no reasons for an award and contravenes Section

> *31(3) of the 1996 Act, that would certainly amount to a patent illegality on the face of the award.*
> *xxxxxx*
> *30. What is important to note is that a decision which is perverse, as understood in paragraphs 31 and 32 of Associate Builders (supra), while no longer being a ground for challenge under "public policy of India", would certainly amount to a patent illegality appearing on the face of the award. Thus, a finding based on no evidence at all or an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside on the ground of patent illegality. Additionally, a finding based on documents taken behind the back of the parties by the arbitrator would also qualify as a decision based on no evidence inasmuch as such decision is not based on evidence led by the parties, and therefore, would also have to be characterised as perverse."*

40. In the instant case, it is pertinent to elaborate the meaning of the 'Fundamental Policy of Indian Law', as the Petitioner has taken a plea that the impugned arbitral award is contrary to the fundamental policy of Indian Law and hence, being opposed to the Public Policy of India.

41. In the case of ***Associate Builders vs. Delhi Development Authority,* (2015) 3 SCC 49,** the Hon'ble Supreme Court clarified the meaning and scope of *"Fundamental Policy of Indian Law'* in the context of Section 34 of the Arbitration Act in the following manner:

> *"28. In a recent judgment,* ***ONGC Ltd. v. Western Geco International Ltd., 2014 (9) SCC 263,*** *this Court added three other distinct and fundamental juristic principles which must be understood as a part and parcel of the fundamental policy of Indian law. The Court held-*
>
> > *35. What then would constitute the "fundamental policy of Indian law" is the question. The decision in ONGC [ONGC Ltd. v. Saw Pipes Ltd., (2003) 5 SCC*

705] does not elaborate that aspect. Even so, the expression must, in our opinion, include all such fundamental principles as providing a basis for administration of justice and enforcement of law in this country. Without meaning to exhaustively enumerate the purport of the expression "fundamental policy of Indian law", we may refer to three distinct and fundamental juristic principles that must necessarily be understood as a part and parcel of the fundamental policy of Indian law. The first and foremost is the principle that in every determination whether by a court or other authority that affects the rights of a citizen or leads to any civil consequences, the court or authority concerned is bound to adopt what is in legal parlance called a "judicial approach" in the matter. The duty to adopt a judicial approach arises from the very nature of the power exercised by the court or the authority does not have to be separately or additionally enjoined upon the for a concerned. What must be remembered is that the importance of a judicial approach in judicial and quasi-judicial determination lies in the fact that so long as the court, tribunal or the authority exercising powers that affect the rights or obligations of the parties before them shows fidelity to judicial approach, they cannot act in an arbitrary, capricious or whimsical manner. Judicial approach ensures that the authority acts bona fide and deals with the subject in a fair, reasonable and objective manner and that its decision is not actuated by any extraneous consideration. Judicial approach in that sense acts as a check against flaws and faults that can render the decision of a court, tribunal or authority vulnerable to challenge.

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38. Equally important and indeed fundamental to the policy of Indian law is the principle that a court and so also a quasi judicial authority must, while

determining the rights and obligations of parties before it, do so in accordance with the principles of natural justice. Besides the celebrated audi alteram partem rule one of the facets of the principles of natural justice is that the court/authority deciding the matter must apply its mind to the attendant facts and circumstances while taking a view one way or the other. Non-application of mind is a defect that is fatal to any adjudication. Application of mind is best demonstrated by disclosure of the mind and disclosure of mind is best done by recording reasons in support of the decision which the court or authority is taking. The requirement that an adjudicatory authority must apply its mind is, in that view, so deeply embedded in our jurisprudence that it can be described as a fundamental policy of Indian law.

39. No less important is the principle now recognised as a salutary juristic fundamental in administrative law that a decision which is perverse or so irrational that no reasonable person would have arrived at the same will not be sustained in a court of law. Perversity or irrationality of decisions is tested on the touchstone of Wednesbury principle of reasonableness. Decisions that fall short of the standards of reasonableness are open to challenge in a court of law often in writ jurisdiction of the superior courts but no less in statutory processes wherever the same are available. 40. It is neither necessary nor proper for us to attempt an exhaustive enumeration of what would constitute the fundamental policy of Indian law nor is it possible to place the expression in the straitjacket of a definition. What is important in the context of the case at hand is that if on facts proved before them the arbitrators fail to draw an inference which ought to have been drawn or if they have drawn an inference which is on the face of it, untenable resulting in miscarriage of justice, the adjudication even when made by an Arbitral Tribunal

> *that enjoys considerable latitude and play at the joints in making awards will be open to challenge and may be cast away or modified depending upon whether the offending part is or is not severable from the rest."*
> *xxxxxx*
> *31. The third juristic principle is that a decision which is perverse or so irrational that no reasonable person would have arrived at the same is important and requires some degree of explanation. It is settled law that where:*
> *1. a finding is based on no evidence, or*
> *2. an arbitral tribunal takes into account something irrelevant to the decision which it arrives at; or*
> *3. ignores vital evidence in arriving at its decision, such decision would necessarily be perverse.*
> *xxxxxx*
> *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....."*

42. It is therefore clear that the decisive test is that *first*, the learned arbitrator had to adopt a judicial approach; *second*, the principles of natural justice had to be upheld; *third*, the decision must not have been egregious, or rather, perverse.

43. In ***R vs. Northumberland Compensation Appeal Tribunal. Ex Parte Shaw*, 1952 1 All ER 122**, Lord Denning made the following pertinent observations:

> *"Leaving now the statutory tribunals, I turn to the awards of the arbitrators. The Court of King's Bench never interfered by certiorari with the award of an arbitrator, because it was a private tribunal and not subject to the prerogative writs. If the award was not made a rule of court, the only course available to an aggrieved party was to resist an action on the award or to file a bill in equity. If the award was made a rule of court, a motion could be made to the court to set it aside for misconduct of the arbitrator on the ground that it was procured by corruption or other undue means: see the statute 9 and 10 Will. III, c. 15. At one time an award could not be upset on the ground of error of law by the arbitrator because that could not be said to be misconduct or undue means, but ultimately it was held in Kent v. Elstob, (1802) 3 East 18, that an award could be set aside for error of law on the face of it. This was regretted by Williams, J., in Hodgkinson v. Fernie, (1857) 3 C.B.N.S. 189, but is now well established."*

44. The Privy Council in ***ChampseyBhara Company vs. The Jivraj Balloo Spinning and Weaving Company Ltd.,*** **AIR 1923 PC 66**, held as follows:

> *"The law on the subject has never been more clearly stated than by Williams, J. in the case of* ***Hodgkinson v. Fernie (1857) 3 C.B.N.S. 189****:-*
>
> > *"The law has for many years been settled, and remains so at this day, that, where a cause or matters in difference are referred to an arbitrator a lawyer or a layman, he is constituted the sole and final judge of all questions both of law and of fact …… The only exceptions to that rule are cases where the award is the result of corruption or fraud, and one other, which though it is to be regretted, is now, I think firmly established viz., where the question of law necessarily arises on the face of the award or upon some paper accompanying and forming part of the award. Though*

> *the propriety of this latter may very well be doubted, I think it may be considered as established."*
>
> *xxxxxx*
>
> *Now the regret expressed by Williams, J. in Hodgkinson v. Fernie has been repeated by more than one learned Judge, and it is certainly not to be desired that the exception should be in any way extended. An error in law on the face of the award means, in their Lordships' view, that you can find in the award or a document actually incorporated thereto, as for instance, a note appended by the arbitrator stating the reasons for his judgment, some legal proposition which is the basis of the award and which you can then say is erroneous. It does not mean that if in a narrative a reference is made to a contention of one party that opens the door to seeing first what that contention is, and then going to the contract on which the parties' rights depend to see if that contention is sound. Here it is impossible to say, from what is shown on the face of the award, what mistake the arbitrators made. The only way that the learned judges have arrived at finding what the mistake was is by saying: "Inasmuch as the Arbitrators awarded so and so, and inasmuch as the letter shows that then buyer rejected the cotton, the arbitrators can only have arrived at that result by totally misinterpreting Cl.52." But they were entitled to give their own interpretation to Cl. 52 or any other article, and the award will stand unless, on the face of it they have tied themselves down to some special legal proposition which then, when examined, appears to be unsound. Upon this point, therefore, their Lordships think that the judgment of Pratt, J was right and the conclusion of the learned Judges of the Court of Appeal erroneous."*

45. The Hon'ble Supreme Court in ***Associate Builders (supra)***, while explaining the meaning and scope of patent illegality, held as follows:

> *"42. In the 1996 Act, this principle is substituted by the "patent illegality" principle which, in turn, contains three subheads*

42.1 (a) A contravention of the substantive law of India would result in the death knell of an arbitral award. This must be understood in the sense that such illegality must go to the root of the matter and cannot be of a trivial nature. This again is a really a contravention of Section 28(1)(a) of the Act, which reads as under:

> *"28. Rules applicable to substance of dispute.— (1) Where the place of arbitration is situated in India,— (a) in an arbitration other than an international commercial arbitration, the arbitral tribunal shall decide the dispute submitted to arbitration in accordance with the substantive law for the time being in force in India;"*

42.2 (b) a contravention of the Arbitration Act itself would be regarded as a patent illegality- for example if an arbitrator gives no reasons for an award in contravention of section 31(3) of the Act, such award will be liable to be set aside.

42.3 (c) Equally, the third sub-head 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.— (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.

46. A relevant portion of the Impugned Arbitral Award has been reproduced below, to apply the test as to whether the Learned Arbitrator had indeed misappreciated, or ignored relevant evidence.

> *119. It is a case of the Claimant that it is entitled to recover an amount of Rs.l5,13,77,660/- (ex-work price excluding GST as applicable)being the principal outstanding as on 24.07.2019 against goods not taken delivery of. This amount is based on the revised performa invoice dated 24.07.2019 (at page 242 of SOC) sent by the Claimant to the Respondent/Counter Claimant being 10% ofthe value of the work done till the said date. The performa invoice sought only 10% of the advance amount as envisaged under Clause 16 of the Purchase Order. This advance was due on grant of manufacturing clearance. What needs to be examined from the correspondence between the parties is as to whether the material as claimed by the Claimant was ready for delivery or not. It is the case of the Respondent that there was no material on record to show that the material claimed to be undelivered was ready. It is urged by the Ld. Senior Counsel for the Respondent/Counter Claimant that CW -1 in its cross-examination recorded on21.11.2020 in answer to question no. 10 admits that multiple contracts for similar goods have been executed by the Claimant and that CW-2 in his cross-examination recorded on 05.12.2020in answers to question nos. 23 and 24 admits that the raw material purchased by the Claimant did not pertain to a single contract and was for a combination of the contract. Therefore, it cannot be said that the goods alleged to be ready and the raw material purchased was exclusively for the Respondent/ Counter Claimant. According to the Respondent/Counter Claimant, the quantification is incorrect and deserve rejection. No balance sheet showing any ledger accounts for goods and material purchased for the Respondent/Counter Claimant has not been placed on record and the claim is wholly without any evidence.*
>
> *xxxxxx*

> *123. It is an admitted position that the work for three transmission lines was kept on hold and therefore there is a clearly a reduction in the scope of work from eight transmission lines to five transmission lines. However, Clause 30 of the Purchase Order clearly gives the right to the Respondent/Counter Claimant to amend the purchase order or any part thereof without assigning any reason. Clause 40 gives the right to the Respondent/ Counter Claimant to change the quantity during execution of the contract. Knowingly, the Claimant entered into such contract containing the said provisions and therefore the Respondent/Counter Claimant was within its right to reduce the quantity. Consequently, I do not deem it appropriate to award the claim ofRs.1,25,85,390/- being 10% of the value of the balance work which was reduced/amended, as the Respondent/Counter Claimant was within its right to do so.*

47. A clear reading of the precedents cited proves that under the limited scope of Section 34, the present case does not warrant the interference of this Court, as the grounds stated by the Petitioner in the instant petition do not meet the scope of this section. In the instant case, the Petitioner claimed that the Arbitrator misappreciated the evidence on record, but a careful reading of the Award proves that the Arbitrator has rightly relied on relevant evidence to adjudicate. Accordingly, with reference to the aforesaid judgments and the impugned Arbitral Award, the Petitioner cannot have the benefit of the *'ground of patent illegality*' to assail the impugned Arbitral Award under Section 34 of the Act, 1996.

48. Reiterating as previously observed, "patent illegality" is an illegality that goes to the root of the matter but excludes the erroneous application of the law by an arbitral tribunal or re-appreciation of evidence by an appellate court. In this instant case, the Arbitral Award

was a well-reasoned award, with the findings being clearly arrived at based on all the documents/evidence on record.

49. The learned Arbitrator has clearly considered all the relevant evidence of record, and the ground of "misappreciation of evidence" does not stand validated as per the submissions of the Petitioner and under the observation of the Court. The impugned Award is in no way in contravention of the Arbitration and Conciliation Act, 1996, to reason that the Award is patently illegal.

50. Further in ***Ssangyong Engineering & Construction Co. Ltd. (Supra),*** the Hon'ble Supreme Court went on to say that reappreciation of evidence cannot be permitted under the ground of patent illegality in a Section 34 petition under Act, 1996. The relevant portion has been reiterated below:-

> *38. "Secondly, it is also made clear that reappreciation of evidence, which is what an appellate court is permitted to do, cannot be permitted under the ground of patent illegality on the face of award."*

51. This is so because the decision of the Arbitral Tribunal is final and this Court is not required to carry out an exercise of re-adjudicating the disputes. An arbitral award may be impeached on the ground of patent illegality but as explained by the Hon'ble Supreme Court in ***Delhi Airport Metro Express Pvt Ltd vs. Delhi Metro Rail Corporation*** **(2022) 1 SCC 131**:-

> *"28. The limited grounds available to Courts for annulment of arbitral awards are well known to legally trained minds. However, the difficulty arises in applying the well-established principles for interference to the facts of each case that come up before the courts. There is a disturbing*

tendency of Courts of setting aside arbitral awards, after dissecting and reassessing factual aspects of the cases to come to a conclusion that the award needs intervention and thereafter, dubbing the award to be vitiated by either perversity or patent illegality, apart from the other grounds available for annulment of the award.

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

52. This was earlier enunciated in ***State of Jharkhand v. HSS Integrated SDN*, (2019) 9 SCC 798**. The relevant paragraph of the judgment is reiterated below:

> *"6.2. This Court has observed and held that the Arbitral Tribunal is the master of evidence and the findings of fact which are arrived at by the arbitrators on the basis of the evidence on record are not to be scrutinised as if the Court was sitting in appeal."*

53. The Petitioner had raised a ground that the learned Arbitrator's interpretation of the Purchase Contract was wrongful. The petitioner claims that the learned Arbitrator in complete derogation of the contemporaneous conduct of the parties to the Contract has arrived at the perverse finding that the Petitioner is responsible for the delay and the breaches. The Court relies on ***Foo Jong Peng and others v Phua Kiah Mai and another*** **[2012] 4 SLR 1267,** where the Hon'ble Supreme Court of Singapore delved into the interpretation of contracts by the Learned Arbitrator during the Arbitral process. The relevant portion of the judgment is reiterated below:-

> "36. *In summary, although the process of the implication of terms does involve the concept of interpretation, it entails a specific form or conception of interpretation which is separate and distinct from the more general process of interpretation (in particular, interpretation of the express terms of a particular document). Indeed, the process of the implication of terms necessarily involves a situation where it is precisely because the express term(s) are missing that the court is compelled to ascertain the presumed intention of the parties via the "business efficacy" and the "officious bystander" tests (both of which are premised on the concept of necessity). In this context, terms will not be implied easily or lightly. Neither does the court imply terms based on its idea of what it thinks ought to be the contractual relationship between the contracting parties. The court is concerned only with the presumed intention of the contracting parties because it can ascertain the subjective intention of the contracting*

parties only through the objective evidence which is available before it in the case concerned. In our view, therefore, although the Belize test is helpful in reminding us of the importance of the general concept of interpretation (and its accompanying emphasis on the need for objective evidence), we would respectfully reject that test in so far as it suggests that the traditional "business efficacy" and "officious bystander" tests are not central to the implication of terms. On the contrary, both these tests (premised as they are on the concept of necessity) are an integral as well as indispensable part of the law relating to implied terms in Singapore."

54. Further, in the case of ***Ssangyong Engineering & Construction Co. Ltd. (Supra)***, the Hon'ble Supreme Court made the following pertinent observations:

"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, 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).

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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."

55. The principle is that if arbitrators use the contract itself to determine a dispute, clauses should, in principle, be construed *contra proferentem*, meaning that they should be interpreted against the party that drafted it.

56. The rule of *contra proferentem* can be regarded as a 'general canon' of interpretation that exists independently of national legal systems. In ***ICC Case No. 7110*, (1999) 10 ICC Bulletin 39, 44**, the Arbitral Tribunal made it clear that it is a 'general principle of interpretation widely accepted by national legal systems and by the practice of International Arbitral Tribunals, including ICC Arbitral Tribunals, that in case of doubt or ambiguity, contractual provisions, terms or clauses should be interpreted against the drafting party.

57. In the instant case, The Petitioner had drafted the Purchase Contract in which the Respondent was a signatory. The Learned Arbitrator having observed various interpretations of the contract, chose to endorse the interpretation that is favorable to the Respondent. The application of the rule of *contra proferentem* validates the learned Arbitrator's findings and observations regarding the interpretation of the contract so as to decide the question of breach of the contract. The relevant portion of the award is produced below:-

> *"103. Clause 16 of the Purchase Order categorically provides that 10% advance payment of basic amount against submission of advance bank guarantee during the manufacturing clearance of equivalent amount of advance payment shall be made by the Respondent/ Counter Claimant to the Claimant. The Claimant furnished the advance bank guarantee on 07.06.2019. The manufacturing clearance is granted by the Respondent/Counter Claimant on 19.06.2019. Prior to submission of advance bank guarantee, the Claimant had on 11.03.2019 sent a performa invoice for Rs.2,34,94,200/- for advance for eight lines. Vide email dated 12.03.2019, the Respondent stated that the advance will be released after visit to the Ranchi Office for further technical discussion and get personally*

drawings/documents approval from JUSNL and during manufacturing clearance. After the meeting at Ranchi Office on ,02.04.2019 the said Performa invoice was again sent on 10.04.2019 with a request to release of advance payment. At this stage, the Claimant sought the format of advance bank guarantee along with its validity. On 31.05.2019,the Claimant sent the revised performa invoice forRs.2,34,94,200/- and requested to release of the payment. Thereafter, the advance bank guarantee was furnished on 07.06.2019 vide e-mail dated 08.06.2019 valid up to 31.01.2020stating that the original bank guarantee is being sent to the Respondent/ Counter Claimant's Ahmedabad office. On19.06.2019, when the manufacturing clearance was granted, the Claimant sent a revised performa amounting to Rs.1,28,74,632/-since while granting manufacturing clearance on 19.06.2019manufacturing for three lines was kept on hold, out of the originally envisaged eight transmission lines. On 04.07.2019 a further revised performa invoice for Rs.1 ,09,06,097 I- for stubs and templates was again sent on the basis of the manufacturing clearance for the same, which document is however not placed on record. The Claimant also sent· yet another revised performa invoice for Rs.1,13,09,133/- for stubs and templates after including freight charges. Thereafter, on 24.07.2019 another performa invoice for five lines equivalent of 10% of manufacturing clearance for HT Steel, MS Steel and bolts and nuts was sent by the Claimant to the Respondent/ Counter Claimant.

104. It is relevant to refer to Clause 38 of the Purchase Order which states that the Claimant shall start the manufacturing of the material only after getting written manufacturing clearance from the Respondent/Counter Claimant. The quantity cleared in manufacturing clearance shall only be manufactured by the Claimant. Any material manufactured without the manufacturing clearance from the Respondent/Counter Claimant was liable to be rejected.

105. Thus, a cogent reading of Clauses 1, 10, 16 and 38 of the Purchase Order dated 02.03.2019 indicates that the 10%

advance payment of basic amount was to ·be released by the Respondent/ Counter Claimant during manufacturing clearance but before starting the manufacturing of the quantities so cleared for manufacture. From the sequence of events that transpired between 30.05.2019 up to 19.06.2019 between the parties, it is evident that the Respondent/Counter Claimant waived prototype type inspection, granted manufacturing clearance and therefore the stage had been set for release of the 10% advance payment to the claimant on submission of advance bank guarantee. The submission of the Ld. Counsel for the Respondent/Counter Claimant that requirement of manufacturing and inspection of prototype type was not waived which is evident from the Claimant's email of 01.06.2019 at 01:20pm cannot be sustained in view ofthe e-mail dated 19.06.2019 of the Respondent/Counter Claimant requesting the Claimant to start 'mass production'. The Ld. Counsel for the Respondent/Counter Claimant has also placed reliance on the e-mail of the Claimant dated 23.07.2019 sent at11:39 am indicating that the "raw material was lined up for stubs" to submit that since the entire stubs and templates were not manufactured the Claimant's claim ought to be rejected on this ground. However, as stated above, the stage of advance payment was when the Claimant furnished the bank guarantee in terms of Clause 16 and during the manufacturing clearance and not after completion of manufacturing."

58. The impugned Arbitral Award is not in contravention of the law, and has incorporated the evidence that was submitted before the Arbitral Tribunal to give well-balanced reasoning to it. The Petitioner was rightfully found to be guilty of breach of contract, which resulted in the Respondent incurring losses. The relevant portion of the award is reproduced below:

> *"115. From the aforesaid factual matrix, it is evident that the issue that blocked the further progress was non-release of advance payment to the Claimant as a result of which the Claimant refused to give inspection call in terms of Clause 10 of the Purchase Order. After carefully going through the Purchase Order dated 02.03.2019 and particularly clauses 1, 10, 16 and 38 read with the amendments carried out on 08.03.2019 between the parties, it is clear that even though inspection of prototype type was specifically not provided in the contract but the same was within the scope of Claimant's work. The process of inspection of prototype type is impliedly part of the contract. Clauses 16 and 38 envisaged issuance of manufacturing clearance, which could only be done after approval of prototype type. By grant of manufacturing clearance the Respondent/ Counter Claimant waived the requirement of prototype inspection. The advance amount was payable during manufacturing clearance but before manufacturing would start as is evident from Clauses 16 and 38 of the Purchase Order. The Respondent/ Counter Claimant having failed to release the advance payment despite asking for bank details and requesting the Respondent/ Counter Claimant to revise the perform a invoice for advance payment on various dates, clearly shows that it was the Respondent/Counter Claimant who was guilty of breach of the contract. Furthermore, the Respondent/Counter Claimant who had taken the responsibility of providing drawings did not provide the drawing till as late as 30.05.2019 i.e. three months after the issuance of the Purchase Order. It was thus not possible for the Claimant to have completed the work within the timeline envisaged in the Purchase Order. The delay on this account is also attributable to the Respondent/Counter Claimant and the Claimant cannot be faulted for the same."*

59. It is, thus, clear that a reading of the Impugned Arbitral Award proves that where a multiplicity of views regarding the interpretation of the Contract exists, the Learned Arbitrator chose one view that falls

within the principles of jurisprudence and gave ample reasoning for the same.

60. The issue before this Court is to adjudicate whether the Learned Arbitrator had adopted a judicial approach while giving out the Award. The Court may only interfere where the Arbitrator has failed in adopting a judicial approach during the Arbitration Proceedings, analysis of the contract, and thus while giving the Award. Where it is evident that the Learned Arbitrator had worked well within his limits and there has not been any arbitrary exercise of power, there is no scope of interference of this Court. The relevant paragraph of the impugned Award is reproduced herein below for proper adjudication of the instant petition:-

> *"125. In the present facts and circumstances of the case, I am of the view that the Claimant is entitled to a reasonable rate of interest considering it's a commercial transaction and the funds of the Claimant were blocked for the work done during the subsistence of the contract. Accordingly, it is deemed appropriate that on an amount of Rs.8,15,05,674/- the Respondent/ Counter Claimant is also liable to pay interest@ 10% per annum from 01.02.2020,the date of disposal of finished goods as scrap till the date of this award. This is so because the contract was terminated by the Respondent/Counter Claimant on 25.07.2019 and the Claimant ought to have taken immediate measures for mitigation of its losses but chose to wait till 01.02.2020 i.e. six months later. In addition, the Respondent/Counter Claimant shall be liable and the Claimant shall be entitled for future interest @8% from the date of award till actual payment on the awarded amount.*

61. Therefore, as discussed in the foregoing paragraphs, in the present petition, the Learned Arbitrator had clearly referred to the evidence on

record, as reproduced above, and made his observations within the ambit of the contract.

CONCLUSION

62. In light of the facts, submissions and contentions in the pleadings, this Court find that the Petitioner has failed to corroborate with evidence how the Learned Arbitrator's finding regarding the breach of the Purchase Order is contrary to the Public Policy of India. Even if the submissions of the Petitioner *qua* patent illegality in the Impugned Arbitral Award is accepted, then also no ground has been made out to set aside the Award inasmuch as the threshold to interfere and set aside an Arbitral Award has not been met.

63. It is settled law that the ground of Patent illegality gives way to setting aside an Arbitral Award with a very minimal scope of intervention. A party cannot simply raise an objection on the ground of patent illegality if the Award is simply against them. Patent illegality requires a distinct transgression of law, the clear lack of which thereof makes the petition simply a pointless effort of objection towards an Award made by a competent Arbitral Tribunal.

64. The Court is unable to subscribe to the submissions made by the learned counsel for the Petitioner. The Petitioner has failed to show that the arbitral award has been passed by the Learned Arbitrator by misappreciating evidence. Further, the petitioner has not been able to prove that the impugned Arbitral Award is patently illegal, and contrary to the fundamental policy of Indian Law, and hence is liable to be set aside.

65. The Court is of the view that on the application of the rule of *contra proferentem*, the Purchase Order was fittingly interpreted by the Learned Arbitrator, leaving no scope for the interference of this Court on the Award. The Learned Arbitrator rightfully found the Petitioner to be guilty of breach of contract, which resulted in the Respondent incurring losses, and hence validates the award of a sum of Rs, 8,15,05,674/- to the Respondent.

66. The Court disagrees with the Petitioner's submission that the Respondent had shown no proof of any loss caused to it and that the Respondent was attempting to make unjust gains from the Petitioner. The Learned Arbitrator has accurately considered the documents on record to conclude that the Respondent has indeed incurred loss due to the Petitioner's actions, and hence is liable to be compensated.

67. In view of the above discussion of facts and law, this Court finds no reason to set aside the Impugned Arbitral Award.

68. The petition is, accordingly, dismissed.

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

70. The judgment be uploaded on the website forthwith.

(CHANDRA DHARI SINGH)
JUDGE

FEBRUARY 2, 2023
Dy/AS