2026:AHC-LKO:49405-DB

HIGH COURT OF JUDICATURE AT ALLAHABAD LUCKNOW

APPEAL UNDER SECTION 37 OF ARBITRATION AND CONCILIATION ACT 1996 No. - 41 of 2025

U.P. State Highways Authority

.....Appellant(s)

Versus

M/s Abhijeet Meerut Karnal Toll Road Limited through Chairman/Authorized Signatory

.....Respondents(s)

Along with:

1. Appeal Under Section 37 of Arbitration and Conciliation Act 1996 No.70 of 2023

Abhijeet Meerut-Karnal Toll Road Limited, Kolkata through Jitendra Singh Negi

Versus

Uttar Pradesh State Highways Authority

Counsel for Appellant(s)	:	Apoorva Tewari, Dipak Seth, Harsh Vardhan, Pranjal Krishna
Counsel for Respondent(s)	:	Sudeep Seth, Sr. Adv. with Satvik Misra

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Reserved on : 24.04.2026
Delivered on : 23.07.2026

Chief Justice's Court

HON'BLE ARUN BHANSALI, CHIEF JUSTICE
HON'BLE JASPREET SINGH, J.

(Per : Jaspreet Singh, J.)

This judgment has been divided into segments to facilitate analysis. These are :-

A. EXORDIUM:-

1. This is a batch of two appeals, preferred under Section 37 of the Arbitration and Conciliation Act, 1996 (for short, 'the Act of 1996), whereby the judgment and order dated 31.05.2023, passed by the Commercial Court No.2, Lucknow has been called in question, by which the Section 34 petitions preferred by the appellant of the aforesaid two appeals have been dismissed, as a consequence, the award passed by the Arbitral Tribunal dated 06.05.2017 has been affirmed.

2. Arbitration Appeal No.41 of 2025 has been preferred by the U.P. State Highway Authority (hereinafter referred to as 'UPSHA') while the other appeal bearing Arbitration Appeal No.70 of 2023 has been filed by M/s. Abhijeet Meerut Karnal Toll Road Limited (hereinafter referred to as 'Concessionaire').

3. UPSHA in their appeal assail the award dated 06.05.2017, *inter-alia* on the ground of procedural irregularity and wrongful grant of Claims No.3, 4 and 5. It also challenges the wrongful rejection of counter-Claim No.5, made by UPSHA. Whereas, the concessionaire in its appeal primarily challenges the findings recorded by the Arbitral Tribunal, *inter-alia*, deciding issues No.6, 10 and 12, which led to the rejection of the Claim No.1 and 6 made by the concessionaire in their statement of claim. Appellants of both the appeals had preferred their petitions under Section 34 of the Act of 1996, which were dismissed by

the Commercial Court No.2, Lucknow vide two separate impugned judgments both dated 31.05.2023. UPSHA has preferred Arbitration Appeal No.41 of 2025, whereas the concessionaire has preferred Arbitration Appeal No.70 of 2023. Since, the facts and the dispute is between the same parties and emerges from the same contract, hence, both the appeals were heard together and are being decided by this common judgment.

B. FACTUAL MATRIX

4. UPSHA invited requests of qualification (REQ) for shortlisting of concessionaires for development and operation of Lucknow-Pallia-Shahjahnpur Section (SH-25) 155 kilometers and Meerut-Karnal Road Section (SH-82) 87 kilometers on design, built, finance, operate and transfer basis under public private partnership model. The bid submitted by M/s. Abhijeet Roads Ltd. was accepted and UPSHA issued a letter of award. In furtherance thereof, M/s. Abhijeet Roads Ltd. confirmed the acceptance of letter of award and M/s. Abhijeet Meerut-Karnal Toll Road Limited was incorporated as a special purpose vehicle (SPV) for the execution of the aforesaid project.

5. Under the aforesaid contract, the concessionaire was under an obligation to design, build, finance, operate and transfer the said entire project for the Meerut-Karnal Road Section which was to be completed within 730 days from the appointed date. The concessionaire in consideration thereof was entitled to a concession of 25 years commencing from the appointed date as defined in the contract.

6. The concessionaire is said to have achieved financial closure as defined in the contract, however, it contended that UPSHA did not

achieve its conditions precedent as required under the contract. It was also alleged that UPSHA could not provide the right of way which was the condition precedent and *sine qua none* for faithful and timely completion of the project.

7. The concessionaire had submitted a performance security of Rs.29.16 crores, however, as UPSHA could not complete or achieve its primary obligation under the agreement, despite the passage of 730 days from the date of execution of the agreement. Treating UPSHA to be in default, the concessionaire put UPSHA on notice regarding its contractual default of having failed to achieve the conditions precedent, and invoked Article No.37.2.2 of the Concession Agreement.

8. On 13.01.2014, the concessionaire terminated the agreement solely on account of default committed by UPSHA and invoked the arbitration clause and also appointed its nominee Arbitrator. Responding to the aforesaid, UPSHA appointed its nominee Arbitrator and the International Centre Alternative Dispute Resolution (in short 'ICADR') appointed the Presiding Arbitrator which led to the constitution of the Arbitral Tribunal.

9. Before the Arbitral Tribunal could be constituted, UPSHA encashed the bank guarantee, submitted by the concessionaire, for a sum of Rs.29.16 crores, alleging breach of Concession Agreement by the concessionaire.

10. The Arbitral Tribunal comprising of three members held its first meeting on 26.08.2014. During arbitral proceedings several meetings were held wherein the contracting parties exchanged their pleadings.

UPSHA while responding to the statement of claim filed by the concessionaire, filed its statement of defence which also included counter-claims.

11. The concessionaire being claimant before the Arbitral Tribunal had laid its claim under eight different heads. Similarly, even UPSHA while denying the claims of the concessionaire, introduced its eight counter-claims against the concessionaire. On the aforesaid basis, the Arbitral Tribunal initially framed 11 issues, thereafter two additional issues were framed, thereby 13 issues came to be framed and contested.

12. Parties were permitted to lead both their documentary and oral evidence and were also permitted to file their respective written submissions. The Arbitral Tribunal considered the material on record and gave its findings on all the 13 issues.

13. **Issue No.1** related to the fact whether UPSHA fulfilled its condition precedent within the period specified as provided in Article 4.1.2. The Arbitral Tribunal unanimously concluded that UPSHA did not fulfill its condition precedent as required as per Article 4.1.2 of the Agreement.

13.1 **Issue No.2** related to the fact whether both the parties complied with the mandate of Article 10.3.1 of the Concession Agreement. On the aforesaid issue, the Arbitral Tribunal unanimously held that both the contracting parties had blamed each other for non-compliancies, but, none produced any evidence to indicate that any one party to the contract could comply with the mandate of Article 10.3.1, hence, the Arbitral

Tribunal held that both the parties had failed to comply with the aforesaid mandate.

13.2 **Issue No.3** related to the fact as to whether UPSHA fulfilled its obligations under Articles 10.3.2 and 10.3.4 and while answering Issue No.3, the Arbitral Tribunal unanimously held that UPSHA defaulted in fulfilling its obligation under Article 10.3.2 and 10.3.4.

13.3 **Issue No.4** related to the fact whether UPSHA was justified in encashing the bank guarantee and its counter-claim in this regard was legal? The Arbitral Tribunal unanimously held that encashment/appropriation of the performance bank guarantee was not legal and it was unlawfully encashed by UPSHA.

13.4 Since, the **Issue No.5** was a general issue as to whether the claimant is entitled to the claims as made in the statement of claims, hence, the Arbitral Tribunal left it to be considered later after considering the finding returned on other specific issues.

13.5 **Issue No.6** related to the fact whether the concessionaire could have entered into EPC contract with other parties prior to signing of the Concession Agreement. In this regard, the Arbitral Tribunal held that the concessionaire could not have entered into EPC contract with third parties, prior to signing of the Concession Agreement.

13.6 **Issue No.7** related to the fact as to whether the concessionaire had achieved the financial closure as per Article 24 of the Concession Agreement and **Issue No.8** related to the fact whether the concessionaire achieved financial closure in view of the letter dated 03.01.2015, issued by the Punjab National Bank at Kolkata and as per the Email dated

03.06.2013, which were brought on record as Annexure No.WS-3 and Annexure No.WS-24 respectively. Since, these two issues related to the financial closure of the concessionaire, hence, both were clubbed by the Arbitral Tribunal and it was answered unanimously holding that the concessionaire had achieved financial closure as per Article 24 of the Agreement which was also established from the copy of the letter dated 11.06.2012, issued by the Punjab National Bank as well as the Email dated 03.06.2013.

13.7 **Issue No.9** related to the fact whether the concessionaire abandoned the project, if yes, then would it be a sufficient ground for terminating the Agreement as per Article 37.1.1(d). The Arbitral Tribunal held that the concessionaire did not abandon the project and UPSHA did not have sufficient ground for terminating the Concession Agreement.

13.8 **Issue No.10** related to the fact whether the claims as set up by the concessionaire were entertainable in view of its failure to appoint of a firm of statutory auditors for auditing the accounts as per Article 33 of the Agreement. In this regard, the Arbitral Tribunal held that the concessionaire did not appoint the statutory auditors as per Article 33.2.1 yet the claims of the concessionaire could be considered and decided on its own merits.

13.9 **Issue No.11** was again a general issue framed as to whether UPSHA was entitled to its counter-claims which would be considered after the specific issues are considered.

13.10 Then the **Issue No.12,** as framed subsequently, related to the fact whether the concessionaire fulfilled its condition precedent (other than financial closure) as provided under Article 4.1.3 of the Concession Agreement. In this regard, the Arbitral Tribunal held that the concessionaire did not fulfill its condition precedent (other than financial closure) as provided under Article 4.1.3.

13.11 Lastly, while dealing with the **Issue No.13** which related to the fact whether the concessionaire provided the assistance/cooperation to the respondent and complied with the other Articles of the Agreement as applicable. The Arbitral Tribunal while answering the said issue held that there was no concrete evidence to support the allegation that the concessionaire had failed to provide the requisite assistance to UPSHA as no letter was placed on record calling up the concessionaire for any assistance.

13.12 Thereafter, the general **Issue No.5** which related to the respective claims laid by the concessionaire was considered by the Arbitral Tribunal **(a)** It rejected **Claim No.1** which related to damages on account of UPSHA's failure to procure and achieve the conditions precedent. **(b)** **Claim No.2** as laid by the concessionaire which related to the claim for right of way which was not provided by the respondent and this claim too was turned down by the Arbitral Tribunal. **(c)** **Claim No.3** related to the payment for wrongful encashment of performance bank guarantee and on this account, the Arbitral Tribunal held that the performance bank guarantee was wrongfully encashed and allowed the claim for return of the bank guarantee for a sum of Rs.29.16 crores. **(d)** **Claim No.4** related to the loss of profit on account of compulsive termination. This claim was allowed by a majority holding that the concessionaire suffered a loss of opportunity on account of UPSHA's failure to provide right of way and failure to achieve the condition precedent and under the aforesaid head, a sum of Rs.78.84 crores was granted for loss of profit, however, the minority award was made by the Presiding Arbitrator rejecting the said claim. **(e)** **Claim No.5** related to the amount payable to EPC Contractors which was allowed by the majority award for a sum of Rs.25.53 crores. However, as per the minority view of the Presiding Arbitrator, he rejected the said claim. **(f)** **Claim No.6** related to the termination of payment and in this regard by an unanimous award, the aforesaid Claim No.6 was rejected. **(g)** **Claim No.7** related to the amount payable to the concessionaire, the majority award allowed the same partly by permitting interest on the awarded amount @ 10% per annum with simple interest w.e.f. 14.01.2014 till the date of award i.e. 06.05.2017. **(h)** **Claim No.8** related to the costs of Arbitrators and the Arbitral Tribunal directed the parties to bear their own costs.

13.13 As far as the counter claims of UPSHA were concerned, the **Counter Claims No.1, 2** and **3** were rejected. Insofar as the **Counter Claim No.4**, which related to the appointment of Consulting Engineer Firm and its remuneration is concerned, the Arbitral Tribunal allowed this counter claim to the extent of the share to be borne by the concessionaire for Rs.68.43 crores. **Counter Claim No.5** related to the expenses incurred by UPSHA for land acquisition, forest clearance, utility shifting, consultancy and feasibility cost was also rejected. Similarly, the **Counter-Claims No.6, 7** and **8** were also rejected.

14. Thus, the Arbitral Tribunal passed a split award dated 06.05.2017 by which the concessionaire was partially successful in its claim as under:-

(i) <u>MAJORITY AWARD:-</u>

The concessionaire was granted a sum of Rs.191,50,00,000/- towards **Claims No.4, 5** and **7**. This amount attracted interest @ 10% per annum from the date of award till the day of its actual payment. Concessionaire was also granted a sum of Rs.219,97,47,000/-, which was the amount of the claims inclusive of the interest @ 10% per annum upto the date of award. Thereafter the said amount was to carry interest @ 10% per annum from the date of the award till its actual payment.

(ii) <u>MINORITY AWARD:-</u>

As per the minority award delivered by the Presiding Arbitrator, the concessionaire was entitled to a sum of Rs.29.16 crores towards refund of bank guarantee. The minority award also noticed that the UPSHA was entitled to a sum of Rs.68.43 lacs as counter claim which was the concessionaire's share of remuneration payable to the independent engineering firm (which was allowed by considering the **Counter Claim No.4**). Thus, factoring the aforesaid amount, the concessionaire was held to be entitled to net amount of Rs.28,47,47,000/- and this amount was to carry interest @ 10% per annum from the date of the award till its actual payment.

15. UPSHA and the concessionaire, both being aggrieved by the said award dated 06.05.2017 preferred their separate petitions under Section 34 of the Act of 1996 before the Commercial Court, at Lucknow. The

petition preferred by UPSHA was registered as Arbitration Case No.20 of 2018, whereas the petition preferred by the concessionaire was registered as Arbitration Case No.35 of 2023. Both the arbitration cases bearing No.20 of 2018 and 35 of 2023 were dismissed by the Commercial Court, Lucknow vide its judgment and order dated 31.05.2023 passed separately in the two petitions, but on the same date.

16. Both, UPSHA and the concessionaire being aggrieved further preferred their respective appeals under Section 37 of the Act of 1996 before this Court and as already noticed hereinbefore both the appeals were clubbed and heard together.

C. <u>SUBMISSIONS ON BEHALF OF UPSHA:-</u>

17. Shri Sudeep Seth, learned Senior Counsel ably assisted by Shri Satvik Misra, learned counsel for the appellant has structured his submissions in 5 parts.

(i) <u>PROCEDURAL IRREGULARITIES:-</u>

18. The learned Senior Counsel appearing for UPSHA vehemently urged that the Arbitral Tribunal did not adhere to the basic principle of equal treatment to the parties, enshrined in Section 18 of the Arbitration and Conciliation Act, 1996.

18.1. Elaborating his submissions, Shri Seth pointed out that the first meeting of the Arbitral Tribunal took place on 06.08.2014. After the exchange of pleadings which included counter claims of the appellant-UPSHA, 13 issues were framed by the Arbitral Tribunal. Thereafter the parties led their respective evidences. The Concessionaire concluded its oral submissions on 28.12.2015 and thereafter UPSHA concluded its arguments on 23.02.2016. The matter was fixed on the very next date i.e 24.02.2016 on which date the Concessionaire made its submissions in rejoinder and the hearing was concluded. The Arbitral Tribunal reserved the matter for pronouncement of the award, permitting the respective parties to submit their written synopsis.

18.2. In furtherance of the aforesaid liberty, UPSHA submitted its written synopsis along with its relevant case laws on 21.03.2016 whereas the Concessionaire filed its written submissions on 23.03.2016 along with three new documents which were never part of their pleadings or the evidence.

18.3. In this context, UPSHA, before the Arbitral Tribunal, had raised objections against the attempt of the Concessionaire to introduce new documents through an indirect method of filing it with its written submissions. It was specifically objected that the said documents could not be taken on record, apart from the fact that its admissibility and relevancy was also under cloud.

18.4. The learned Senior Counsel further submitted that the Arbitral Tribunal considering the written submissions and the objections filed by UPSHA, granted time to the Concessionaire to respond to the objections of UPSHA. A clarificatory hearing was done by the Arbitral Tribunal on 05.01.2017 and a view was taken that the documents filed by the Concessionaire would be taken on record, however, the admissibility and relevance of the said documents would be considered while adjudicating the claims/the issues to which the said documents related to.

18.5. It was further urged that the Arbitral Tribunal committed an error in not adjudicating the issue of admissibility and relevancy at the very inception. Had it been done, then UPSHA would have been entitled to make submissions, on this aspect of the matter. However, while considering the issues on merits, the Arbitral Tribunal committed an error in relying upon the said documents without adjudicating on the issue of admissibility and relevancy. This amounted to clear denial of a clear opportunity of hearing and depriving UPSHA of its right to object to the said documents resulting in violation of principles of natural justice.

18.6. It was further submitted that in case if the Arbitral Tribunal was relying upon the said documents while dealing with the respective issues to which it related, then it was incumbent upon the Arbitral Tribunal to have considered the issue of admissibility and relevancy and give its clear finding thereon. It was not open for the Arbitral Tribunal to have considered the said documents without adjudicating on its admissibility and relevancy and thereafter deciding an issue against UPSHA on the basis of the very same documents.

18.7. It was further submitted that the Concessionaire submitted documents relating to execution of the EPC contract, in support of its **Claim No.5**. The said documents were noticed and were linked with **Claim No.4** relating to loss of profits. The said documents were also introduced for buttressing the **Claim No.4** relating to equity infusion and permits so obtained by the Concessionaire. Certain certificates of a

Chartered Accountant with cheque numbers were filed with details of equity infusion, for the first time.

18.8. It was urged that these documents were never brought on record despite a clear denial made by UPSHA in its statement of defence relating to equity infusion and financial closure. Even though, the Concessionaire had filed its rejoinder but it did not produce the said documents. Even during the evidence stage, the said documents were not submitted.

18.9. In the aforesaid backdrop, the Arbitral Tribunal itself was divided on the issue that is to say that in the majority award, the said documents were taken note of without adjudicating the issue of admissibility and relevancy whereas in the minority award, it was clearly noticed that the said documents were being discarded.

18.10. It was also urged that this issue of procedural irregularity was also raised by UPSHA in its petition under Section 34 of the Act of 1996. The Commercial Court, though, noticed the said objections but did not give any specific finding thereon nor it recorded any finding as to how the said documents impacted the award.

18.11. It was further urged that under Section 34 of the Act of 1996, it was incumbent on the Court to have noticed the aforesaid aspect of the matter, since it was specifically stated that UPSHA was not given an equal treatment before the Arbitral Tribunal which had resulted in sheer miscarriage of justice and such deprivation was also violative of principles of natural justice. Though it amounted to depriving UPSHA of an adequate and full opportunity to present its case and this aspect was not appropriately considered by the Commercial Court, thus, both the award dated 06.05.2017 and the judgment of the Commercial Court dated 31.05.2023 gets vitiated and are liable to be set aside.

(ii) <u>ENCASHMENT OF PERFORMANCE BANK GUARANTEE-CLAIM NO.3:-</u>

19. The learned Senior Counsel for UPSHA next submitted that the findings returned by the Arbitral Tribunal relating to encashment of performance bank guarantee is against the weight of the pleadings and evidence and contrary to the articles of the Concession Agreement, hence, vitiated.

20. Elaborating his submissions, on the aforesaid point, the learned Senior Counsel submitted that as per the Article 9.1.1, 9.2 and 9.3 read with Schedule-F, the Concessionaire was obligated to submit an irrevocable and unconditional bank guarantee for a sum of Rs.29.16 crores in the form set-out in Schedule-F. The aforesaid performance bank guarantee was liable to be encashed by UPSHA on account of any default of any conditions of the agreement or the Concessionaire failing to achieve the condition precedent, as enumerated in the agreement. The said performance bank guarantee was to remain in force for a period of one year from the appointed date but it was not liable to be released if the Concessionaire was in breach of the agreement.

21. The Concessionaire in his statement of claim had pleaded that the said performance bank guarantee was wrongfully enchased by UPSHA. It was also pleaded that since UPSHA itself was in default and it could not provide 90% of the total area, hence, the breach by the

concessionaire as alleged by UPSHA was imaginative and it was nothing but a failure of UPSHA to achieve its own conditions precedent.

22. It was also pleaded that though UPSHA blamed the Concessionaire for the breach of agreement but the fact was that UPSHA itself could not achieve its condition precedent for reasonably long time, hence, the Concessionaire was compelled to terminate the agreement, while UPSHA in order to cover its default, wrongfully encashed the performance bank guarantee.

23. In the statement of defence, UPSHA had taken a plea regarding the defaults committed by the Concessionaire and alleged that the concessionaire had abandoned the project. Even though the Concessionaire had filed a petition under Section 9 of the Act of 1996 before the District Judge, Lucknow bearing R.S. No.58 of 2013 where an injunction order dated 26.04.2013 was passed, however, the said order was stayed by the High Court vide order dated 07.01.2014.

24. The submission of the learned Senior Counsel was that even if any conclusion was arrived at by the Arbitral Tribunal that UPSHA could not comply with its condition precedent and that the Concessionaire was in default of any of the conditions then in terms of Article 4.2 of the agreement, UPSHA was entitled to recover at least 20% of the performance security amount, Thus, holding that UPSHA had wrongfully encashed the bank guarantee and the findings was returned that the entire amount of Rs.29.16 crores along with interest was to be paid back to the Concessionaire, was against the terms of the contract.

25. It was urged that the Arbitral Tribunal while unanimously deciding issue no.1 in favour of the Concessionaire which related to **Claim No.3** erred in ignoring the aforesaid aspect of the matter especially the impact of Article No.4.2 of the agreement. This aspect was also raised in the petition under Section 34 of the Act of 1996 and the Commercial Court while dealing with it further erred in mixing the issues of encashment of bank guarantee with the loss of profits. The relevant Articles of the agreement and contention of the parties have also not been appropriately appreciated which has resulted in a patent illegal order which deserves to be set aside.

(iii) <u>LOSS OF PROFITS- CLAIM NO.4</u>

26. The learned Senior Counsel for UPSHA while assailing the findings on **Claim No.4** submitted that the Concessionaire claimed loss of profits on account of compulsive termination of the agreement. It was urged that it was the Concessionaire who had terminated the agreement on 13.01.2014 and claimed a loss of profits amounting to Rs.640.50 crores based on a financial model which was part of the financial closure to be achieved by the Concessionaire. This aspect was denied by UPSHA in its statement of defence.

27. It was specifically pleaded that where the Concessionaire itself did not have the necessary funds and the financial closure had not been achieved, hence there was no occasion for accrual of any profits especially when admittedly no work under the agreement was done, hence, the entire claim on the aforesaid count was misconceived.

28. The learned Senior Counsel also attempted to urge that the aforesaid claim of loss of profits had been given up by the Concessionaire during course of the hearing before the Arbitral Tribunal and yet the claim was allowed in favour of the Concessionaire.

29. It was further submitted that apart from the plea of having given up the claim yet if the claim was being considered by the Arbitral Tribunal then there was no worthy or credible evidence led by the Concessionaire in support of its aforesaid claims for loss of profits.

30. The learned Senior Counsel further urged that not only there was lack of credible and reliable evidence in support of the alleged claim of loss of profits but the Arbitral Tribunal erred in considering the documents which had been submitted by the Concessionaire along with its written synopsis after conclusion of the arguments. This consideration of the documents which did not form part of the main evidence or pleadings and not even tested on the anvil of the relevancy and admissibility, could not have been made the basis for granting a sum of Rs.157.57 crores under the aforesaid head of loss of profits.

31. It was pointed out that in the minority award, the Presiding Arbitrator had rejected the aforesaid claim and this aspect was also raised by the UPSHA in its petition under Section 34 of the Act of 1996, however, the Commercial Court merely reiterated the contents of the findings recorded by the Arbitral Tribunal and it upheld the finding on the aforesaid claim without any independent application of judicial mind which vitiates the judgment of the Commercial Court.

32. The learned Senior Counsel submitted that as far as the claim of loss of profits is concerned, before the said claim could have been allowed, it was incumbent for the Concessionaire to establish certain conditions, that there was a delay in completion of the contract and such delay was not attributable to the Concessionaire and that Concessionaire's status as an established contractor handling substantial projects was met with credible evidence to substantiate the claim of loss of profits.

33. It was urged that these conditions in the instant case were not fulfilled and thus the grant of the aforesaid **Claim No.4** by the Arbitral Tribunal is erroneous which has been upheld by the Commercial Court leading to a patent illegality, which deserves to be corrected by setting aside the award by this Court. In support of his aforesaid submission, the learned Senior Counsel relied upon the decision of the Apex Court in **Unibros v. All India Radio : 2023 SCC OnLine SC 1366**.

(iv) AMOUNT PAYABLE TO EPC CONTRACTORS-CLAIM NO.5:-

34. Learned Senior Counsel for UPSHA next submitted that the Concessionaire had sought a sum of Rs.66.96 crores for payments made by it to the EPC contractors. The amount was quantified on the basis of conciliation award made between the Concessionaire and the EPC contractors.

35. It was urged that UPSHA in its statement of defence had refuted the claims of the Concessionaire on the strength of the Articles of the Concession Agreement. It was submitted that as per Article 5.2.2 of the

Agreement, it was incumbent upon the Concessionaire to have first submitted the EPC contracts entered by the Concessionaire, for its review by UPSHA. It was submitted that neither the said contracts were provided to UPSHA for its review nor the independent Engineer, appointed under the contract, was made aware of it. In the aforesaid circumstances, the claim made by the alleged EPC contractors against the Concessionaire could not be passed over and the liability could not be saddled upon UPSHA.

36. It was further urged that the appointment of the EPC contractors was done even prior to the signing of the Concession Agreement. The alleged EPC contracts were entered by the Concessionaire and the third party contractor on 03.12.2011 whereas the agreement between UPSHA and the Concessionaire was signed on 16.12.2011. It was thus urged that since the Concessionaire had breached the terms of the Concession Agreement, hence, any conciliatory award between the Concessionaire and its EPC contractors could not be saddled on UPSHA and this aspect has been completely lost sight of by the Arbitral Tribunal as well as the Commercial Court.

37. The learned Senior Counsel further pointed out that there was an inherent contradiction in the findings recorded by the Arbitral Tribunal which in itself amounts to a patent illegality and for the said reason, the award of the aforesaid claim cannot be sustained.

38. Elaborating the aforesaid aspect, the learned Senior Counsel pointed out that the Arbitral Tribunal while deciding Issue No.6 clearly held unanimously that the Concessionaire could not have entered into

the EPC contracts prior to signing of the Concession Agreement, however, having answered the issue no.6 against the Concessionaire, the Arbitral Tribunal erred in allowing **Claim No.5** in its majority award. Though, in the minority award, the said claim had been turned down but as already indicated above, the Arbitral Tribunal by majority granted a sum of Rs.25.63 crores as overhead expenditure and profit of overhead and loss of profit on this count.

39. It was further submitted that the Arbitral Tribunal has clearly erred in mixing up of the issues and then given a confused finding that even though Concessionaire was not entitled to enter into EPC contracts with third parties before signing of the Concession Agreement and also without approval from UPSHA yet allowing a claim of Rs.25.63 crores under different heads termed as overheads cannot be sustained and is against the reasoning and the weight of the material on record. It was further stated that this issue was brought to the notice of the Commercial Court in the petition under Section 34 of the Act of 1996 but the Commercial Court did not consider this aspect of the matter and also fell in the same error which has vitiated the judgment, thus both the award and the judgment of the Commercial Court deserves to be set aside.

(v). REJECTION OF COUNTER CLAIM NO. 5 RAISED BY UPSHA ON ACCOUNT OF SHIFTING OF LAND UTILITY, LAND ACQUISITION, FOREST CLEARANCE ETC:-

40. Learned Senior Counsel for UPSHA next contended that Article 35.1 of the Concession Agreement permitted UPSHA to claim compensation for all direct losses suffered by UPSHA which was a

consequence of material default or breach of the agreement made by the Concessionaire.

41. Elaborating his submission, the learned Senior Counsel pointed out that in the statement of defence containing Counter Claim No.5 UPSHA had annexed a chart indicating the payments made by UPSHA towards land acquisition, forest clearance, shifting of utilities, hiring of an independent Engineer, consultancy along with details relating to the payments made on the aforesaid count through cheques and the receipts received from various authorities. It was submitted that the Concessionaire while replying to the written statement containing counter claim did not dispute the payments made by UPSHA for the aforesaid purpose.

42. It was further urged that the Arbitral Tribunal rejected the counter Claim No.5 by ignoring the material placed on record and by incorrectly recording a finding that UPSHA did not file any worthy evidence in this regard, while the entire details relating to payments made with cheque numbers was on record as Annexure No.10. Thus, in light of the evidence available on record as Annexure No.10 and rejection of the claim for want of evidence, was a patent error committed by the Arbitral Tribunal. Any finding given by the Arbitral Tribunal ignoring the evidence and incorrectly recording that no evidence had been led is a grave error which vitiated the aforesaid award. The Commercial Court also did not delve into the aforesaid aspect and in a mechanical manner it had affirmed the findings of the Arbitral Tribunal which cannot be sustained.

In support of his aforesaid submissions, the learned Counsel has relied upon a decision of the **Madras High Court in First Post, REP v. R. Vijayambal and Others : 2022 SCC OnLine Madras 134.** He has also relied upon a decision of the Apex Court in **Dakshin Haryana Bijli Vitran Nigam Ltd. v. Navigant Technologies Pvt. Ltd. : (2021) 7 SCC 657** to emphasize the relevance of a dissenting opinion. Relying upon the aforesaid decision it was submitted that the reasoning given by the majority arbitrators is vitiated as it suffers from misreading of and ignoring the material on record whereas the findings given by the Presiding Arbitrator in its minority opinion is based on proper appreciation of facts and evidence.

43. In such circumstances, where the majority opinion suffered from patent illegalities, the award in its entirety deserves to be set aside and the decision of the Commercial Court which is a mere reproduction of the findings of the Arbitral Tribunal without its independent appreciation and assessment stands vitiated too, accordingly, the appeal deserves to be allowed and the award dated 06.05.2017 and the judgment of the Commercial Court dated 31.05.2023 deserved to be set aside.

D- <u>SUBMISSIONS ON BEHALF OF THE CONCESSIONAIRE IN REPLY:-</u>

44. Shri Apoorva Tiwari, learned counsel for the concessionaire has vehemently refuted the submissions advanced on behalf of the UPSHA. It was submitted that the entire thrust of the submissions on behalf of the UPSHA is based on premise that the Arbitral Tribunal has incorrectly appreciated the evidence. It was urged that even the issue of procedural

irregularity raised by the appellant did not have any bearing inasmuch as no prejudice had been caused to UPSHA. It was also urged that the scope of interference in an appeal under Section 37 of the Act of 1996 is quite narrow.

45. He urged that the findings recorded by the Arbitral Tribunal is based on material evidence on record and reasonable inference have been drawn which are not susceptible for interference in a petition under Section 34 of the Act of 1996. If the findings cannot be interfered with in exercise of powers under section 34 of the Act of 1996 then in an appeal under Section 37 of the Act where the scope is even narrower, then the said findings certainly cannot be interfered with.

46. Shri Tiwari structured his submissions in two parts:- **(i)** He has refuted the submissions advanced on behalf of UPSHA, dealing with each of the points of challenge raised by UPSHA; **(ii)** He has also advanced submissions in support of the appeal preferred by the concessionaire whereby the issues nos.10 and 12 relating to the claims raised by the concessionaire under Claim nos.1 and 6 were rejected.

(i) REPLY TO PROCEDURAL IRREGULARITIES:-.

47. Shri Tewari learned counsel for the concessionaire while dealing with the submissions of UPSHA, point-wise, submitted that the ground of procedural irregularity is misconceived. He urged that after the parties had exchanged their written synopsis before the Arbitral Tribunal, a date for clarificatory hearing was fixed by the Arbitral Tribunal on 13.11.2016. The Arbitral Tribunal vide its order dated 05.01.2017 recorded that the documents filed by the concessionaire alongwith its

synopsis were taken on record, however, the issue of admissibility and relevance would be considered while dealing with the merits of the respective claims. It was submitted that before the Commercial Court, UPSHA had contended that principles of natural justice had been violated as the Arbitral Tribunal called for clarificatory hearing almost after 7 to 8 months of the initial reserving of the award. Submission was that the manner and tenor in which the aforesaid ground of procedural irregularities have been projected by UPSHA before this Court, it is different and an improvement of its case placed before the Commercial Court and definitely an after thought without any foundational basis for raising such a ground.

48. He further submitted that adequate opportunity was granted to UPSHA, who availed the same and filed their objections. They were given an opportunity of hearing and it is thereafter that the Arbitral Tribunal returned its findings. Once the procedure of affording an opportunity of hearing was granted, it cannot be said that the principles of natural justice have been violated. A finding of fact returned by the Arbitral Tribunal which is based on material on record, cannot be assailed in a petition under Section 34 of the Act of 1996 as it does not fall under any of the grounds enumerated in the said section.

49. It was further urged that as per UPSHA, the documents which were filed with the written synopsis, though taken on record, had an impact on claim nos.4 and 5 respectively, which related to loss of profits on account of compulsive termination and amount paid by the concessionaire to its EPC Contractors as per the conciliation award,

50. It was also submitted that as far as the issue of loss of profit is concerned, the concessionaire had already demonstrated that it had achieved financial closure. The financial closure could have only been achieved once the concessionaire had the necessary funds including the necessary equity infusion, which was specifically averred by the concessionaire in its statement of claim in paragraph 56.7 and this fact was not disputed by UPSHA in its statement of defence. Thus, where there was actually no dispute regarding the factum of equity infusion and the financial capability of the concessionaire then relying upon the said undisputed facts, if the Arbitral Tribunal had recorded a finding, which was based on admission in the pleadings then such a finding cannot be assailed as being erroneous.

51. In this view of the matter, even if the documents were produced and taken on record at a subsequent stage by the Arbitral Tribunal which only contained the cheque numbers and this fact detail could not have much bearing as the cheque numbers only authenticated the fact regarding equity infusion which itself was not disputed. In these circumstances merely taking on record a CA Certificate giving details of the cheque by which the equity infusion was made, cannot be said to have caused any prejudice to UPSHA nor there was any procedural irregularity committed by the Arbitral Tribunal.

52. It was further urged that by merely alleging procedural irregularities it will not help UPSHA unless it could be shown that it was occasioned with consequent failure of justice. In the instant case as already demonstrated the CA Certificate containing the cheque numbers

was merely clarificatory and authenticating document to indicate that equity infusion had been made. Where the fact of equity infusion was not in dispute then even though the said CA Certificate was taken on record subsequently, it cannot constitute any procedural irregularity, especially when it could not be demonstrated as to how the said document, having been taken on record, caused any prejudice or resulted in any consequent failure of justice. Since, the findings recorded by the Arbitral Tribunal were based on the admission in the pleadings and not solely on the basis of the said documents, accordingly, there was no patent illegality and thus the first submission of UPSHA does not deserve consideration.

(ii). REPLY TO GRANT OF CLAIM NO.3:-

53. Shri Tewari, urged that UPSHA's attempt to submit that the findings recorded by the Arbitral Tribunal regarding the encashment of performance bank guarantee to be wrongful, is also misconceived.

54. He submitted that the record would clearly indicate that UPSHA could not complete and achieve its condition precedent. It was an admitted case that unless and until the respective condition precedents were achieved by UPSHA and concessionaire, the appointed date could not be fixed. In absence of the appointed date, it would necessarily imply that there was no commencement of construction work.

55. In this given factual scenario where UPSHA could not fulfill its foundational obligations then it had no right to invoke the performance security. It was submitted that the performance security was only to secure the obligation of the concessionaire during the construction

period. Where the construction period itself had not commenced for lack of fixing of the appointed date, then there was actually no obligation which was to be secured, hence there was no justification for UPSHA to have invoked the performance bank guarantee.

56. It is in this context that the Arbitral Tribunal unanimously held that the action of UPSHA in invoking the performance bank guarantee was wrongful. Hence, the Claim No.3 laid by the concessionaire was held to be justified. There is apparently no patent or jurisdictional error in the findings returned by the Arbitral Tribunal while granting Claim No.3.

57. It was also urged that the Arbitral Tribunal had the exclusive domain to interpret the contractual Articles. Once it was clearly demonstrated that the manner in which the Arbitral Tribunal has interpreted and relied upon the Articles of the contract and recorded clear findings which were based on undisputed facts, then such findings are not assailable under Section 34 of the Act of 1996 and for the very same reason is also not susceptible to any interference under Section 37 of the Act of 1996. Thus, the submission of UPSHA relating to the grant of Claim No.3 is also misconceived and deserves to be rejected.

58. In support of his aforesaid submissions relating to the scope of an appeal under Section 37 of the Act of 1996, Shri Tiwari has relied upon the decisions of Apex Court in **Ssangyong Engineering & Construction Co. Ltd. v. NHAI : (2019) 15 SCC131** and **Ramesh Kumar Jain v. Bharat Aluminum Company Ltd : 2025 SCC OnLine SC 2857**.

(iii). REPLY TO GRANT OF CLAIM NO.4:-

59. Shri Tiwari taking his submission forward submitted that UPSHA itself could not comply with the basic contractual obligation of providing 90% of the right of way. Despite passage of reasonable time, UPSHA could not achieve its condition precedent and admittedly the appointed date could not be fixed, as a consequence, the work could not commence. In such circumstances, in order to mitigate its loss the concessionaire was compelled to terminate the contract. In this backdrop, the contention of UPSHA that the Arbitral Tribunal while granting the aforesaid Claim No.4 had relied upon insufficient and inadmissible evidence and the said material was even filed belatedly, is misconceived.

60. It was urged that the Arbitral Tribunal while recording its finding in so far as the Claim No.4 is concerned, had taken recourse to the recognized financial and economic parameters including opportunity costs of capital, locking period of investment made and expected returns from the project, as per the financial model and it was sufficient evidence upon which a finding of loss of profits could be returned.

61. It was also urged that the concessionaire had furnished a financial model which was taken note of by the lending banks while approving the loan to the concessionaire. The finding given by the Arbitral Tribunal is based on the aforesaid financial model. The word ‘financial model’ was defined in the agreement in Article 48, to mean a financial model adopted by a senior lenders, setting forth the operating costs and revenues including assumptions and presumptions used for making

calculation. It was urged that this financial model was specifically asserted and pleaded in the statement of claim which was not disputed or denied by UPSHA in its statement of defence. The Arbitral Tribunal while dealing with issue no.1 and 3 had recorded a finding that UPSHA had committed default of its obligations. The Arbitral Tribunal also found that the concessionaire had appointed its EPC Contractor and it noted that the concessionaire had rendered all assistance to UPSHA and there was no material to suggest that the concessionaire had abandoned the project coupled with the finding on Issue No. 4, that UPSHA had wrongfully encashed the performance bank guarantee. In such an undisputed factual scenario, it was obvious that concessionaire had suffered loss of profits and opportunity costs as the contract had to be prematurely terminated solely on account of UPSHA not fulfilling its condition precedents.

62. The Arbitral Tribunal considering all the matter on record returned a finding in this regard and awarded loss of profit to the concessionaire based on the said financial model which cannot be said to be erroneous. It also cannot be said that there was no evidence to back the grant of Claim No.4.

63. It was further submitted that there is a difference between a case, where a finding is returned on no evidence, in comparison to a case where there may be scant or weak evidence. In the instant case, the Arbitral Tribunal found that the financial model supported the claim made by the concessionaire relating to loss of profit coupled with the fact that there was no serious denial in the pleadings and in such

circumstances where the fact of investment of equity, payments made to EPC Contractor, wrongful enchashment of bank guarantee by UPSHA all these were not disputed hence, the Arbitral Tribunal found it to be indicative of the fact that the concessionaire had completed his obligations relevant at the time and since UPSHA defaulted on its obligations, hence, the concessionaire had to compulsively terminate the agreement. Thus, the claim was granted and such findings cannot be interfered with in an appeal under Section 37 of the Act of 1996 especially when the same was also considered by the Commercial Court under Section 34 of the Act and no patent illegality or jurisdictional error could be established.

(iv). REPLY TO GRANT OF CLAIM NO.5 :-

64. Shri Tewari further submitted that grant of Claim No.5, relating to payments made to EPC Contractors, could not be interfered with for the reason that undisputedly the concessionaire had appointed EPC Contractors and their payment was never really objected by UPSHA during the subsistence of the project. Independent Engineer appointed under the contract also substantiated the deployment and the active work done by the EPC Contractors. The concessionaire in support of the aforesaid claims had brought on record the conciliation awards indicating the payments made by the concessionaire to the said EPC Contractors and this evidence formed the basis of the finding of the Arbitral Tribunal and under the aforesaid head, the concessionaire had claimed a sum of Rs.64 crores, against which the Arbitral Tribunal granted only a sum of Rs.24 crores.

65. In the statement of claim, specific averments were made inter alia regarding the appointment of EPC Contracts including the fact that the concessionaire had erected an office, laboratory and had also made arrangements for the man power, plant and machinery. These facts were not specifically denied by UPSHA in its statement of defence. The mere fact that the agreement between the concessionaire and its EPC Contractors was prior to the date of concession agreement could not be held against the concessionaire especially when there was no prohibition in the concession agreement that the concessionaire could not enter into EPC contracts prior to signing of the concession agreement.

66. It was also urged that UPSHA had already awarded the letter of award to the concessionaire and signing of the agreement was merely a formality. Where the contract was to be completed within 730 days, in such circumstances, preparing for timely completion of the project would entail, amongst other, appointment of EPC Contractors. Hence, in the aforesaid backdrop, it cannot be said that the contract between the concessionaire and the EPC Contractors were *de hors* the agreement especially when there was actually no dispute that the EPC Contractors had been deployed and they had initiated their activities at the site.

67. In such a factual scenario, the findings returned by the Arbitral Tribunal cannot be faulted. The said findings could not be demonstrated to be erroneous or jurisdictionality defective or patently illegal, hence the same were upheld by the Commercial Court and they are not assailable in an appeal under Section 37 of the Act of 1996.

(v). <u>REPLY TO REJECTION OF COUNTER CLAIM NO.5:-</u>

68. Shri Tewari further urged that the Arbitral Tribunal has rightly rejected the counter Claim No.5 as laid by UPSHA. It was urged that the amount claimed under Counter Claim No.5 related to the amount paid by UPSHA towards land acquisition and other ancillary activities including shifting of utilities and such payment were the sole prerogative of UPSHA.

69. Shri Tewari further submitted that undisputedly it was UPSHA who had to acquire land and pay for shifting of the utilities. In this regard, apart from depositing some sum for land acquisition and not bringing on record any evidence to indicate that after issuance of notification under Section 4 of the Land Acquisition 1894, any further steps were taken. There was no evidence to suggest that any notification under Section 6 of Act of 1894 was issued which clearly indicates that UPSHA itself did not proceed forward for acquiring the land to provide 90% of right of way to the concessionaire, which resulted in UPSHA failing to achieve its condition precedents.

70. In such circumstances, for the own fault of UPSHA, the Arbitral Tribunal could not permit UPSHA to recover the said costs from the concessionaire. Accordingly, the Arbitral Tribunal rightly rejected counter Claim No.5. The findings are based on proper reasoning and material evidence on record and the said findings do not suffer from any patent illegality nor could they be shown to be bad before the Commercial Court and thus, it could not be assailed in an appeal under

Section 37 of the Act of 1996. Consequently, the submissions of UPSHA in this regard must also fail.

E. SUBMISSIONS OF THE CONCESSIONAIRE IN SUPPORT OF ITS APPEAL ASSAILING THE REJECTION OF CLAIMS NO.1 AND 6:-

71. Shri Tewari pointed out that issue no.6 related to the fact as to whether, the concessionaire could enter into an EPC contract prior to signing of the concession agreement. While issue no.10 related to the fact whether the claim of concessionaire were entertainable in view of its failure to appoint statutory auditors as required under Article 33 of the concession agreement and issue no.12 was whether the claimant provided assistance to UPSHA and complied with other Articles of the concession agreement.

72. Shri Tewari submitted that in the entire concession agreement, there was no prohibition for engagement of EPC Contractors after the issuance of letter of award. It was submitted that though Article 5.2.2 of the concession agreement required all project agreements to be submitted to UPSHA for its review, but it did not mean that EPC contracts could not have been entered by the concessionaire before execution of the concession agreement. There was no dispute that EPC Contractors had been deployed and they were performing their activities and this fact was also corroborated in the report submitted by the third party engineering firm engaged to oversee the project. In absence of any clear embargo, the concessionaire could not be penalized for entering into EPC contracts prior to the execution of the concession agreement. Moreover, the letter of award of contract had already been issued by

UPSHA to the concessionaire on 17.11.2011, while the EPC Contracts were entered on 03.12.2011 i.e. after the grant of letter of award and 13 days prior to the signing of the concession agreement which happened on 16.12.2011. Thus, for this act of appointment of EPC Contractors, 13 days prior to the execution of the concession agreement and rejection of some part of the claims by the Arbitral Tribunal by imputing a prohibition in the contract, where there was none, leads to an inference that the Arbitral Tribunal exceeded its jurisdiction by re-writing the contract, which is not within its domain. Accordingly, the finding returned while deciding issue no.6 is patently erroneous.

73. It was also submitted that the Arbitral Tribunal while dealing with the Issue No.10 noticed that the concessionaire had not appointed a statutory auditor in terms of Article 33.21, but by not appointing the statutory auditors, the concessionaire could not be precluded from getting his claims decided on merits. Once such a finding had been recorded then it was not appropriate for the Arbitral Tribunal to have turned down Claims No.1 and 6 relating to recovery of damages from UPSHA for not achieving its condition precedents and further damages for termination payments, recoverable from UPSHA.

74. It was also urged that Issue No.12 related to the fact whether the concessionaire has submitted and provided all assistance to UPSHA and the Arbitral Tribunal had categorically held that the concessionaire had submitted ample evidence regarding submissions of performance security, escrow agreement and a substitute agreement. It was further submitted that all the conditions precedents which were required to be

achieved by the concessionaire had been done and certain conditions which could not be achieved were actually dependent on the fulfillment of condition precedents by UPSHA. In such a situation, the finding recorded by the Arbitral Tribunal that all the condition precedents were not achieved by the concessionaire was not justified. The concessionaire could not be penalized for non fulfillment of condition precedents which was subject to the fulfillment of obligation by UPSHA, while the Concessionaire had performed its own obligations. In another words, the concessionaire could not be held responsible for any fault or non fulfillment of obligation by UPSHA. In view thereof, citing the said default of UPSHA, for denying claims no.1 and 6 to the concessionaire, was a patent illegality committed by the Arbitral Tribunal and it was urged that Claims No.1 and 6 made by the claimants deserved to be allowed after allowing the appeal preferred by the Concessionaire and the appeal preferred by UPSHA deserved to be dismissed.

F. DISCUSSION AND ANALYSIS:-

(I) IN RE: ARPL NO. 41 OF 2025

75. The Court had heard the learned counsel for the respective parties at length and also meticulously perused the material on record.

76. Before proceeding to consider the strength of the submissions advanced by the learned counsel for the respective parties, this Court proposes to first draw a framework within which an appeal under Section 37 of the Act of 1996 can be considered.

77. In this regard, this Court in **UCM Coal Co. Ltd. v. Adani Enterprises Ltd. : 2025 SCC OnLine All 7608,** by taking aid of the

decisions rendered by the Apex Court, encapsulated the scope of an appeal under Section 37 of the Act of 1996 and the relevant paras 63 to 67 are being reproduced hereinafter:-

> “63. At the outset, it will be appropriate to notice the contours of scope and jurisdiction of this Court while dealing with an appeal under Section 37 of the Act of 1996.
>
> 64. The Apex Court in MMTC Ltd. v. Vedanta Ltd., (2019) 4 SCC 163 : (2019) 2 SCC (Civ) 293 has held as under:—
>
>> “11. As far as Section 34 is concerned, the position is well-settled by now that the Court does not sit in appeal over the arbitral award and may interfere on merits on the limited ground provided under Section 34(2)(b)(ii) i.e. if the award is against the public policy of India. As per the legal position clarified through decisions of this Court prior to the amendments to the 1996 Act in 2015, a violation of Indian public policy, in turn, includes a violation of the fundamental policy of Indian law, a violation of the interest of India, conflict with justice or morality, and the existence of patent illegality in the arbitral award. Additionally, the concept of the “fundamental policy of Indian law” would cover compliance with statutes and judicial precedents, adopting a judicial approach, compliance with the principles of natural justice, and Wednesbury [Associated Provincial Picture Houses v. Wednesbury Corpn., [1948] 1 K.B. 223 (CA)] reasonableness. Furthermore, “patent illegality” itself has been held to mean contravention of the substantive law of India, contravention of the 1996 Act, and contravention of the terms of the contract.
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>> 12. It is only if one of these conditions is met that the Court may interfere with an arbitral award in terms of Section 34(2) (b)(ii), but such interference does not entail a review of the merits of the dispute, and is limited to situations where the findings of the arbitrator are arbitrary, capricious or perverse, or when the conscience of the Court is shocked, or when the illegality is not trivial but goes to the root of the matter. An arbitral award may not be interfered with if the view taken by the arbitrator is a possible view based on facts. (See Associate Builders v. DDA [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204]. Also see ONGC Ltd. v. Saw Pipes Ltd. [ONGC Ltd. v. Saw Pipes Ltd., (2003) 5 SCC 705]; Hindustan Zinc Ltd. v. Friends Coal Carbonisation [Hindustan Zinc Ltd. v. Friends Coal Carbonisation, (2006) 4 SCC 445]; and McDermott International Inc. v. Burn Standard Co. Ltd. [McDermott International Inc. v. Burn Standard Co. Ltd., (2006) 11 SCC 181])
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>> 13. It is relevant to note that after the 2015 Amendment to Section 34, the above position stands somewhat modified. Pursuant to the insertion of Explanation 1 to Section 34(2), the scope of contravention of Indian public policy has been modified to the extent that it now means fraud or corruption in

> the making of the award, violation of Section 75 or Section 81 of the Act, contravention of the fundamental policy of Indian law, and conflict with the most basic notions of justice or morality. Additionally, sub-section (2-A) has been inserted in Section 34, which provides that in case of domestic arbitrations, violation of Indian public policy also includes patent illegality appearing on the face of the award. The proviso to the same states that an award shall not be set aside merely on the ground of an erroneous application of the law or by reappreciation of evidence.
>
> 14. As far as interference with an order made under Section 34, as per Section 37, is concerned, it cannot be disputed that such interference under Section 37 cannot travel beyond the restrictions laid down under Section 34. In other words, the court cannot undertake an independent assessment of the merits of the award, and must only ascertain that the exercise of power by the court under Section 34 has not exceeded the scope of the provision. Thus, it is evident that in case an arbitral award has been confirmed by the court under Section 34 and by the court in an appeal under Section 37, this Court must be extremely cautious and slow to disturb such concurrent findings.
>
> 15. Having noted the above grounds for interference with an arbitral award, it must now be noted that the instant question pertains to determining whether the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration. However, this question has been addressed by the courts in terms of the construction of the contract between the parties, and as such it can be safely said that a review of such a construction cannot be made in terms of reassessment of the material on record, but only in terms of the principles governing interference with an award as discussed above.
>
> 16. It is equally important to observe at this juncture that while interpreting the terms of a contract, the conduct of parties and correspondences exchanged would also be relevant factors and it is within the arbitrator's jurisdiction to consider the same. [See McDermott International Inc. v. Burn Standard Co. Ltd. [McDermott International Inc. v. Burn Standard Co. Ltd., (2006) 11 SCC 181]; Pure Helium India (P) Ltd. v. ONGC [Pure Helium India (P) Ltd. v. ONGC, (2003) 8 SCC 593] and D.D. Sharma v. Union of India [D.D. Sharma v. Union of India, (2004) 5 SCC 325 : (2005) 123 Comp Cas 135].]"

65. Similarly, the Apex Court in **UHL Power Co. Ltd. v. State of H.P., (2022) 4 SCC 116 : (2022) 2 SCC (Civ) 401** has observed as under:

> "16. As it is, the jurisdiction conferred on courts under Section 34 of the Arbitration Act is fairly narrow, when it comes to the scope of an appeal under Section 37 of the Arbitration Act, the jurisdiction of an appellate court in examining an order, setting aside or refusing to set aside an award, is all the more circumscribed. In MMTC Ltd. v. Vedanta Ltd. [MMTC Ltd. v. Vedanta Ltd., (2019) 4 SCC 163 : (2019) 2 SCC (Civ)

293], the reasons for vesting such a limited jurisdiction on the High Court in exercise of powers under Section 34 of the Arbitration Act have been explained in the following words : (SCC pp. 166-67, para 11)

“11. As far as Section 34 is concerned, the position is well-settled by now that the Court does not sit in appeal over the arbitral award and may interfere on merits on the limited ground provided under Section 34(2)(b)(ii) i.e. if the award is against the public policy of India. As per the legal position clarified through decisions of this Court prior to the amendments to the 1996 Act in 2015, a violation of Indian public policy, in turn, includes a violation of the fundamental policy of Indian law, a violation of the interest of India, conflict with justice or morality, and the existence of patent illegality in the arbitral award. Additionally, the concept of the “fundamental policy of Indian law” would cover compliance with statutes and judicial precedents, adopting a judicial approach, compliance with the principles of natural justice, and Wednesbury [Associated Provincial Picture Houses Ltd. v. Wednesbury Corpn., [1948] 1 K.B. 223 (CA)] reasonableness. Furthermore, “patent illegality” itself has been held to mean contravention of the substantive law of India, contravention of the 1996 Act, and contravention of the terms of the contract.”

17. A similar view, as stated above, has been taken by this Court in K. Sugumar v. Hindustan Petroleum Corpn. Ltd. [K. Sugumar v. Hindustan Petroleum Corpn. Ltd., (2020) 12 SCC 539], wherein it has been observed as follows : (SCC p. 540, para 2)

“2. The contours of the power of the Court under Section 34 of the Act are too well established to require any reiteration. Even a bare reading of Section 34 of the Act indicates the highly constricted power of the civil court to interfere with an arbitral award. The reason for this is obvious. When parties have chosen to avail an alternate mechanism for dispute resolution, they must be left to reconcile themselves to the wisdom of the decision of the arbitrator and the role of the court should be restricted to the bare minimum. Interference will be justified only in cases of commission of misconduct by the arbitrator which can find manifestation in different forms including exercise of legal perversity by the arbitrator.”

18. It has also been held time and again by this Court that if there are two plausible interpretations of the terms and conditions of the contract, then no fault can be found, if the learned arbitrator proceeds to accept one interpretation as against the other. In Dyna Technologies (P) Ltd. v. Crompton Greaves Ltd. [Dyna Technologies (P) Ltd. v. Crompton Greaves Ltd., (2019) 20 SCC 1], the limitations on the Court while exercising powers under Section 34 of the Arbitration Act has been highlighted thus : (SCC p. 12, para 24)

“24. There is no dispute that Section 34 of the Arbitration Act limits a challenge to an award only on the grounds provided therein or as interpreted by various Courts. We need to be cognizant of the fact that arbitral awards should not be interfered with in a casual and cavalier manner, unless the Court comes to a conclusion that the perversity of the award goes to the root of the matter without there being a possibility of alternative interpretation which may sustain the arbitral award. Section 34 is different in its approach and cannot be equated with a normal appellate jurisdiction. The mandate under Section 34 is to respect the finality of the arbitral award and the party autonomy to get their dispute adjudicated by an alternative forum as provided under the law. If the Courts were to interfere with the arbitral award in the usual course on factual aspects, then the commercial wisdom behind opting for alternate dispute resolution would stand frustrated."

19. In Parsa Kente Collieries Ltd. v. Rajasthan Rajya Vidyut Utpadan Nigam Ltd. [Parsa Kente Collieries Ltd. v. Rajasthan Rajya Vidyut Utpadan Nigam Ltd., (2019) 7 SCC 236 : (2019) 3 SCC (Civ) 552], adverting to the previous decisions of this Court in McDermott International Inc. v. Burn Standard Co. Ltd. [McDermott International Inc. v. Burn Standard Co. Ltd., (2006) 11 SCC 181] and Rashtriya Ispat Nigam Ltd. v. Dewan Chand Ram Saran [Rashtriya Ispat Nigam Ltd. v. Dewan Chand Ram Saran, (2012) 5 SCC 306 : (2012) 50 VST 443 : (2012) 14 GSTR 291], wherein it has been observed that an Arbitral Tribunal must decide in accordance with the terms of the contract, but if a term of the contract has been construed in a reasonable manner, then the award ought not to be set aside on this ground, it has been held thus : (Parsa Kente Collieries case [Parsa Kente Collieries Ltd. v. Rajasthan Rajya Vidyut Utpadan Nigam Ltd., (2019) 7 SCC 236 : (2019) 3 SCC (Civ) 552], SCC pp. 244-45, para 9)

"9.1. … It is further observed and held that 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. It is further observed by this Court in the aforesaid decision in para 33 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. It is further observed that 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.

9.2. Similar is the view taken by this Court in NHAI v. ITD Cementation India Ltd. [NHAI v. ITD Cementation India Ltd., (2015) 14 SCC 21 : (2016) 2 SCC (Civ) 716], SCC para 25 and SAIL v. Gupta Brother Steel Tubes Ltd. [SAIL v. Gupta Brother Steel Tubes Ltd., (2009) 10 SCC 63 : (2009) 4 SCC (Civ) 16], SCC para 29."

(emphasis supplied)

20. In Dyna Technologies [Dyna Technologies (P) Ltd. v. Crompton Greaves Ltd., (2019) 20 SCC 1], the view

taken above has been reiterated in the following words : (SCC p. 12, para 25)

“25. Moreover, umpteen number of judgments of this Court have categorically held that the courts should not interfere with an award merely because an alternative view on facts and interpretation of contract exists. The courts need to be cautious and should defer to the view taken by the Arbitral Tribunal even if the reasoning provided in the award is implied unless such award portrays perversity unpardonable under Section 34 of the Arbitration Act.”

21. An identical line of reasoning has been adopted in South East Asia Marine Engg. & Constructions Ltd. (Seamec Ltd.) v. Oil India Ltd. [South East Asia Marine Engg. & Constructions Ltd. (Seamec Ltd.) v. Oil India Ltd., (2020) 5 SCC 164 : (2020) 3 SCC (Civ) 1] and it has been held as follows : (SCC p. 172, paras 12-13)

“12. It is a settled position that a court can set aside the award only on the grounds as provided in the Arbitration Act as interpreted by the courts. Recently, this Court in Dyna Technologies (P) Ltd. v. Crompton Greaves Ltd. [Dyna Technologies (P) Ltd. v. Crompton Greaves Ltd., (2019) 20 SCC 1] laid down the scope of such interference. This Court observed as follows : (SCC p. 12, para 24)

‘24. There is no dispute that Section 34 of the Arbitration Act limits a challenge to an award only on the grounds provided therein or as interpreted by various Courts. We need to be cognizant of the fact that arbitral awards should not be interfered with in a casual and cavalier manner, unless the Court comes to a conclusion that the perversity of the award goes to the root of the matter without there being a possibility of alternative interpretation which may sustain the arbitral award. Section 34 is different in its approach and cannot be equated with a normal appellate jurisdiction. The mandate under Section 34 is to respect the finality of the arbitral award and the party autonomy to get their dispute adjudicated by an alternative forum as provided under the law. If the Courts were to interfere with the arbitral award in the usual course on factual aspects, then the commercial wisdom behind opting for alternate dispute resolution would stand frustrated.’

13. It is also settled law that where two views are possible, the Court cannot interfere in the plausible view taken by the arbitrator supported by reasoning. This Court in Dyna Technologies [Dyna Technologies (P) Ltd. v. Crompton Greaves Ltd., (2019) 20 SCC 1] observed as under : (SCC p. 12, para 25)

‘25. Moreover, umpteen number of judgments of this Court have categorically held that the Court should not interfere with an award merely because an alternative view on facts and interpretation of contract exists. The Courts need to be cautious and should defer to the view taken by the Arbitral Tribunal even if the reasoning provided in the award is implied unless such award portrays perversity unpardonable under Section 34 of the Arbitration Act."

66. Again, the Apex Court in **Batliboi Environmental Engineers Ltd. v. Hindustan Petroleum Corpn. Ltd., (2024) 2 SCC 375 : (2024) 1 SCC (Civ) 182**, has held as under:—

"32. Post award interference and the extent of the second look by the courts under Section 34 of the A&C Act has been a subject-matter of perennial parley. The foundation of arbitration is party autonomy. Parties have the freedom to enter into an agreement to settle their disputes/claims by an Arbitral Tribunal, whose decision is binding on the parties. [See Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1 : (2021) 1 SCC (Civ) 549, which examines arbitrability and nonarbitrability of subject-matters and claims, which aspect will not be examined in this case.] It is argued that the purpose of arbitration is fast and quick one-stop adjudication as an alternative to court adjudication, and therefore, post award interference by the courts is un-warranted, and an anathema that undermines the fundamental edifice of arbitration, which is consensual and voluntary departure from the right of a party to have its claim or dispute adjudicated by the judiciary. The process is informal, and need not be legalistic [The expression "judicially", does not equate arbitration with formal/court proceedings, and would include a just and fair decision.]. Per contra, it is argued that party autonomy should not be treated as an absolute defence, as a party despite agreeing to refer the disputes/claims to a private tribunal consensually, does not barter away the constitutional and basic human right to have a fair and just resolution of the disputes. The court must exercise its powers when the award is unfair, arbitrary, perverse, or otherwise infirm in law. While arbitration is a private form of dispute resolution, the conduct of arbitral proceedings must meet the juristic requirements of due process and procedural fairness and reasonableness, to achieve a "judicially" sound and objective outcome. If these requirements, which are equally fundamental to all forms of adjudication including arbitration, are not sufficiently accommodated in the arbitral proceedings and the outcome is marred, then the award should invite intervention by the court.

33. To disentangle and balance the competing principles, the degree and scope of intervention of courts when an award is challenged by one or both parties needs to be stated. Reconciliation as a statement of law and in particular application in a particular case has not been an easy exercise. We begin by first referring to the views expressed by this Court in interpreting the width and scope of the post award interference by the courts under Section 34 of the A&C Act.

* * *

37. Explanation to sub-clause (ii) to clause (b) to Section 34(2) of the A&C Act, as quoted above and before its substitution by Act 3 of 2016, had postulated and declared for avoidance of doubt that an award is "in conflict with the public policy of India", if the making of the award is induced or affected by fraud or corruption, or was in violation of Sections 75 or 81 of the A&C Act. Both Sections 75 and 81 of the A&C Act fall under Part III of the A&C Act, which deal with conciliation proceedings. Section 75 of the A&C Act relates to confidentiality of the settlement proceedings and Section 81 deals with admissibility of evidence in conciliation proceedings. Suffice it is to note at this stage that while "fraud" and "corruption" are two specific grounds under "public policy",

these are not the sole and only grounds on which an award can be set aside on the ground of "public policy".

38. Act 3 of 2016 with retrospective effect from 23-10-2015 has substituted the Explanation referred to above, by two new Explanations that are differently worded. [Explanations 1 and 2 to sub-clause (ii) to clause (b) of Section 34(2) of the A&C Act substituted vide Act 3 of 2016 read as under:"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 of the A&C Act inserted vide Act 3 of 2016 reads as under:"34. (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."] Sub-section (2-A) to Section 34 of the A&C Act, which was instituted by Act 3 of 2016 with retrospective effect from 23-10-2015, states that the arbitral award arising out of arbitrations other than international commercial arbitrations can be set aside by the court, if it is vitiated by patent illegality appearing on the face of the award. The proviso to sub-section (2-A) to Section 34 of the A&C Act also states that the award shall not be set aside merely on the ground of erroneous application of law or by reappreciation of evidence. The aforesaid sub-section need not be examined in the facts of the present case, as we are not required to interpret and apply the substituted Explanations to sub-clause (ii) to clause (b) to Section 34(2) of the A&C Act in the present case.

39. The expression "public policy" under Section 34 of the A&C Act is capable of both wide and narrow interpretation. Taking a broader interpretation, this Court in ONGC Ltd. v. Saw Pipes Ltd. [ONGC Ltd. v. Saw Pipes Ltd., (2003) 5 SCC 705] (for short Saw Pipes), held that the legislative intent was not to uphold an award if it is in contravention of provisions of an enactment, since it would be contrary to the basic concept of justice. The concept of "public policy" connotes a matter which concerns public good and public interest. An award which is patently in violation of statutory provisions cannot be held to be in public interest. Thus, expanding on the scope and expanse of the jurisdiction of the court under Section 34 of the A&C Act, it was held that an award can 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.

40. Nevertheless, the decision in Saw Pipes case [ONGC Ltd. v. Saw Pipes Ltd., (2003) 5 SCC 705] holds that mere error of fact or law in reaching the conclusion on the disputed question will not give jurisdiction to the court to interfere. However, this will depend on three aspects:

(a) whether the reference was made in general terms for deciding the contractual dispute, in which case the award can be set aside if the award is based upon erroneous legal position;

(b) this proposition will also hold good in case of a reasoned award, which on the face of it is erroneous on the legal proposition of law and/or its application; and

(c) where a specific question of law is submitted to an arbitrator, erroneous decision on the point of law does not make the award bad, unless the court is satisfied that arbitrator had proceeded illegally.

In Saw Pipes case [ONGC Ltd. v. Saw Pipes Ltd., (2003) 5 SCC 705], the Court set aside the award on the ground that the award had not taken into consideration the terms of the contract before arriving at the conclusion as to whether the party claiming the damages is entitled to the same. Reference was made to the provisions of Sections 73 and 74 of the Contract Act, which relate to liquidated damages, general damages and penalty stipulations. This view had held the field for a long time and was applied in subsequent judgments of this Court in Hindustan Zinc Ltd. v. Friends Coal Carbonisation [Hindustan Zinc Ltd. v. Friends Coal Carbonisation, (2006) 4 SCC 445], Centrotrade Minerals & Metals Inc. v. Hindustan Copper Ltd. [Centrotrade Minerals & Metals Inc. v. Hindustan Copper Ltd., (2006) 11 SCC 245], DDA v. R.S. Sharma & Co. [DDA v. R.S. Sharma & Co., (2008) 13 SCC 80], J.G. Engineers (P) Ltd. v. Union of India [J.G. Engineers (P) Ltd. v. Union of India, (2011) 5 SCC 758 : (2011) 3 SCC (Civ) 128], and Union of India v. L.S.N. Murthy [Union of India v. L.S.N. Murthy, (2012) 1 SCC 718 : (2012) 1 SCC (Civ) 368].

41. In 2006, this Court in McDermott International Inc. [McDermott International Inc. v. Burn Standard Co. Ltd., (2006) 11 SCC 181] despite following the ratio of Saw Pipes [ONGC Ltd. v. Saw Pipes Ltd., (2003) 5 SCC 705], made succinct observations regarding the restrictive role of courts in the post-award interference. In addition to the three grounds introduced in Renusagar Power Co. Ltd. v. General Electric Co. [Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCC 644 : (1994) 81 Comp Cas 171], as noticed above, an additional ground of "patent illegality" was introduced in Saw Pipes Limited, for exercise of the court's jurisdiction in setting aside an arbitral award. This Court, in McDermott International Inc. [McDermott International Inc. v. Burn Standard Co. Ltd., (2006) 11 SCC 181], held that patent illegality, must be such which goes to the root of the matter. The public policy violation should be so unfair and unreasonable as to shock the conscience of the court. Arbitrator where s/he acts contrary to or beyond the express law of contract or grants relief, such awards fall within the purview of Section 34 of the A&C Act. Further, what would constitute public policy is a matter dependent upon the nature of transaction and the statute. Pleadings of the party and material brought before the Court would be relevant to enable the Court to judge what is in public good or public interest, or what would otherwise be injurious to public good and interest at a relevant point. So, this must be distinguished from public policy of a particular government.

42. A similar view was expressed in Rashtriya Ispat Nigam Ltd. v. Dewan Chand Ram Saran [Rashtriya Ispat Nigam Ltd. v. Dewan Chand Ram Saran, (2012) 5 SCC 306 : (2012) 50 VST 443 : (2012) 14 GSTR 291] with the clarification that where a term of the contract is capable of two

interpretations and the view taken by the arbitrator is a plausible one, it cannot be said that the arbitrator travelled outside the jurisdiction or the view taken the arbitrator is against the terms of the contract. The Court cannot interfere with the award and substitute its view with the award and interpretation accepted by the arbitrator, the reason being the Court does not sit in appeal over the findings and decision of the arbitrator, while deciding an application under Section 34 of the A&C Act. The arbitrator is legitimately entitled to take a view after considering the material before him/her and interpret the agreement. The judgment should be accepted as final and binding.

43. Subsequently, in ONGC Ltd. v. Western Geco International Ltd. [ONGC Ltd. v. Western Geco International Ltd., (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12] (for short Western Geco), a three-Judge Bench of this Court observed that the Court, in Saw Pipes [ONGC Ltd. v. Saw Pipes Ltd., (2003) 5 SCC 705], did not examine what would constitute "fundamental policy of Indian law". The expression "fundamental policy of Indian law" in the opinion of this Court includes all fundamental principles providing as basis for administration of justice and enforcement of law in this country. There were three distinct and fundamental juristic principles which form a part and parcel of "fundamental policy of Indian law". The first and the foremost principle is that in every determination by a court or an authority that affects rights of a citizen or leads to civil consequences, the court or authority must adopt a judicial approach. Fidelity to judicial approach entails that the court or authority should not act in an arbitrary, capricious or whimsical manner. The court or authority should act in a bona fide manner and deal with the subject in a fair, reasonable and objective manner. Decision should not be actuated by extraneous considerations. Secondly, the principles of natural justice should be followed. This would include the requirement that the Arbitral Tribunal must apply its mind to the attending facts and circumstances while taking the view one way or the other. Non-application of mind is a defect that is fatal to any adjudication. Application of mind is best done by recording reasons in support of the decision. As noticed above, Section 31(3)(a) of the A&C Act ["31. Form and contents of arbitral award.—(1)-(2) * * *(3) The arbitral award shall state the reasons upon which it is based, unless—(a) the parties have agreed that no reasons are to be given, or(b) the award is an arbitral award on agreed terms under Section 30"] states that the arbitral award shall state the reasons on which it is based, unless the parties have agreed that no reasons are to be given. Sub-clauses (i) and (iii) to Section 34(2) also refer to different facets of natural justice. In a given case sub-clause to Section 34(2) and sub-clause (ii) to clause (b) to Section 34(2) may equally apply. Lastly, is the need to ensure that the decision is not perverse or irrational that no reasonable person would have arrived at the same or be sustained in a court of law. Perversity or irrationality of a decision is tested on the touchstone of Wednesbury principle of reasonableness [As expounded in Associated Provincial Picture Houses Ltd. v. Wednesbury Corpn., [1948] 1 K.B. 223 (CA).]. At the same time, it was cautioned that this Court was not attempting an exhaustive enumeration of what would constitute "fundamental policy of Indian law", as a straightjacket definition is not possible. 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 on the face of it, is untenable resulting in injustice, the adjudication made by an Arbitral Tribunal that enjoys considerable latitude and play at the joints in making awards, may be challenged and set aside.

44. The decision of this Court in Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] elaborately examined the question of public policy in the context of Section 34 of the A&C Act, specifically under the head “fundamental policy of Indian law”. It was firstly held that the principle of judicial approach demands a decision to be fair, reasonable and objective. On the obverse side, anything arbitrary and whimsical would not satisfy the said requirement.

45. Referring to the third principle in Western Geco [ONGC Ltd. v. Western Geco International Ltd., (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12], it was explained that the decision would be irrational and perverse if (a) it is based on no evidence; (b) if the Arbitral Tribunal takes into account something irrelevant to the decision which it arrives at; or (c) ignores vital evidence in arriving at its decision. The standards prescribed in State of Haryana v. Gopi Nath & Sons [State of Haryana v. Gopi Nath & Sons, 1992 Supp (2) SCC 312 : (1990) 77 STC 1] (for short Gopi Nath & Sons) and Kuldeep Singh v. Delhi Police [Kuldeep Singh v. Delhi Police, (1999) 2 SCC 10 : 1999 SCC (L&S) 429] should be applied and relied upon, as good working tests of perversity. In Gopi Nath & Sons [State of Haryana v. Gopi Nath & Sons, 1992 Supp (2) SCC 312 : (1990) 77 STC 1] it has been held that apart from the cases where a finding of fact is arrived at by ignoring or excluding relevant materials or taking into consideration irrelevant material, the finding is perverse and infirm in law when it outrageously defies logic as to suffer from vice of irrationality. Kuldeep Singh [Kuldeep Singh v. Delhi Police, (1999) 2 SCC 10 : 1999 SCC (L&S) 429] clarifies that a finding is perverse when it is based on no evidence or evidence which is thoroughly unreliable and no reasonable person would act upon it. If there is some evidence which can be acted and can be relied upon, however compendious it may be, the conclusion should not be treated as perverse. This Court in Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] emphasised that the public policy test to an arbitral award does not give jurisdiction to the court to act as a court of appeal and consequently errors of fact cannot be corrected. Arbitral Tribunal is the ultimate master of quality and quantity of evidence. An award based on little evidence or no evidence, which does not measure up in quality to a trained legal mind would not be held to be invalid on this score. Every arbitrator need not necessarily be a person trained in law as a Judge. At times, decisions are taken acting on equity and such decisions can be just and fair should not be overturned under Section 34 of the A&C Act on the ground that the arbitrator's approach was arbitrary or capricious. Referring to the third ground of public policy, justice or morality, it is observed that these are two different concepts. An award is against justice when it shocks the conscience of the court, as in an example where the claimant has restricted his claim but the Arbitral Tribunal has awarded a higher amount without any reasonable ground of justification. Morality would necessarily cover agreements that are illegal and also those which cannot be enforced given the prevailing mores of the day. Here again interference would be only if something shocks the court's conscience. Further, “patent illegality” refers to three sub-heads : (a) contravention of substantive law of India, which must be restricted and limited such that the illegality must go to the root of the matter and should not be of a trivial nature. Reference in this regard was made to clause (a) to Section 28(1) of the A&C Act, which states that the dispute submitted to arbitration under Part I shall be in accordance with the substantive law for the time being in force. The second sub-head would be when the arbitrator gives no reasons in the award in contravention with Section 31(3) of the A&C Act. The third sub-head deals with contravention of

Section 28(3) of the A&C Act which states that the Arbitral Tribunal shall decide all cases in accordance with the terms of the contract and shall take into account the usage of the trade applicable to the transaction. This last sub-head should be understood with a caveat that the arbitrator has the right to construe and interpret the terms of the contract in a reasonable manner. Such interpretation should not be a ground to set aside the award, as the construction of the terms of the contract is finally for the arbitrator to decide. The award can be only set aside under this sub-head if the arbitrator construes the award in a way that no fair-minded or reasonable person would do."

67. Recently, the Apex Court in **AC Chokshi Share Broker (P) Ltd. v. Jatin Pratap Desai, (2025) 5 SCC 321** has held as under:—

"29. The limited supervisory role of courts while reviewing an arbitral award is stipulated in Section 34 of the Act, beyond whose grounds courts cannot intervene and cannot correct errors in the arbitral award. [McDermott International Inc. v. Burn Standard Co. Ltd., (2006) 11 SCC 181, para 52] The appellate jurisdiction under Section 37 is also limited, as it is constrained by the grounds specified in Section 34 and the court cannot undertake an independent assessment of the merits of the award by reappreciating evidence or interfering with a reasonable interpretation of contractual terms by the Arbitral Tribunal. [MMTC Ltd. v. Vedanta Ltd., (2019) 4 SCC 163 : (2019) 2 SCC (Civ) 293, para 14; Konkan Railway Corpn. Ltd. v. Chenab Bridge Project, (2023) 9 SCC 85, para 25] The court under Section 37 must only determine whether the Section 34 court has exercised its jurisdiction properly and rightly, without exceeding its scope. [MMTC Ltd. v. Vedanta Ltd., (2019) 4 SCC 163 : (2019) 2 SCC (Civ) 293, para 14 : ; Bombay Slum Redevelopment Corpn. (P) Ltd. v. Samir Narain Bhojwani, (2024) 7 SCC 218, para 26.]

* * *

31. The term "public policy" in Section 34(2)(b)(ii) has been interpreted by this Court as meaning (a) the fundamental policy of Indian law, or (b) the interest of India, or (c) justice or morality. [Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCC 644 : (1994) 81 Comp Cas 171, para 66] In ONGC v. Saw Pipes Ltd. [ONGC v. Saw Pipes, (2003) 5 SCC 705], this Court further held that an arbitral award can be set aside as being contrary to public policy if it is patently illegal. The illegality must go to the root of the matter and must be so unfair and unreasonable that it shocks the court's conscience; it cannot be of a trivial nature. [Id, para 31; McDermott International Inc. v. Burn Standard Co. Ltd., (2006) 11 SCC 181, para 59.] Such patent illegality includes a situation where the award is in contravention with substantive law. [ONGC v. Saw Pipes Ltd., (2003) 5 SCC 705, para 54; Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204, para 42.1]

32. Further, an award can be set aside as being opposed to the "fundamental policy of India" if it is perverse, [ONGC v. Western Geco International Ltd., (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12, para 39] i.e. the finding is not based on evidence, or the Arbitral Tribunal takes something irrelevant into account, or ignores vital evidence. [Associate Builders v. DDA, (2015) 3 SCC 49, paras 32-33 : (2015) 2 SCC (Civ) 204, para 31] However, an award is not perverse if the finding of fact is a possible view that is based on some reliable evidence. [Kuldeep Singh v. Delhi Police, (1999) 2 SCC 10 : 1999 SCC (L&S) 429, para 10 :

as cited in Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204.]””

78. The Apex Court in **Ramesh Kumar Jain (supra)** had the occasion to consider the meaning of the expression ‘patent illegality’ and by referring to its earlier decision in **Ssangyong Engineering Constructions Company Ltd. v. NHAI : (2019) 15 SCC 131,** explained the same in paragraphs no. 34, 35 36 and the same are being reproduced hereinafter for ease of reference:-

“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]
35. It is important to notice that the ground for interference insofar as it concerns “interest of India” has since been deleted, and therefore, no longer obtains. Equally, the ground for interference on the basis that the award is in conflict with justice or morality is now to be understood as a conflict with the “most basic notions of morality or justice”. This again would be in line with paras 36 to 39 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , as it is only such arbitral awards that shock the conscience of the court that can be set aside on this ground.

36. 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 paras 18 and 27 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , or secondly, that such award is against basic notions of justice or morality as understood in paras 36 to 39 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] . 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 [ONGC v. Western Geco International Ltd., (2014) 9 SCC 263 : (2014) 5

> SCC (Civ) 12] , as understood in Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , and paras 28 and 29 in particular, is now done away with."

79. The Apex Court recently in decision in **Jan De Nul Dredging India (P) Ltd. v. Tuticorin Port Trust : (2026) 3 SCC 186** reiterated the scope of proceedings under Section 34 and appeal under Section 37 of the Act of 1996. The relevant paras 35 to 37 are being reproduced hereainafter for ready reference:-

> "35. The gist of the aforesaid decisions is that the jurisdiction of the court under Section 37 of the Act is akin to the jurisdiction of the court under Section 34 of the Act, and, therefore, the scope of interference by the court in appeal under Section 37 cannot go beyond the grounds on which challenge can be made to the award under Section 34 of the Act. Moreover, the courts exercising powers under Sections 34 and 37, do not act as a normal court, and therefore, ought not to interfere with the arbitral award on a mere possibility of an alternative view.
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> 36. In other words, the scope of interference of the court with the arbitral matters is virtually prohibited, if not absolutely barred. The powers of the appellate court are even more restricted than the powers conferred by Section 34 of the Act. The appellate power under Section 37 of the Act is exercisable only to find out if the court exercising power under Section 34 of the Act, has acted within its limits as prescribed thereunder or has exceeded or failed to exercise the power so conferred. The appellate court exercising powers under Section 37 of the Act has no authority of law to consider the matter in dispute before the Arbitral Tribunal on merits so as to hold as to whether the award of the Arbitral Tribunal is right or wrong. The appellate court in exercise of such power cannot sit as an ordinary court of appeal and reappraise the evidence to record a contrary finding. The award of the Arbitral Tribunal cannot be touched by the court unless it is contrary to the substantive provision of law or any provision of the Act or the terms of the agreement.
>
> 37. Undoubtedly, in the case at hand, the award of the Arbitral Tribunal is not contrary to any substantive provision of law or any provision of the Act. Yet, it has been disturbed by the appellate court, apparently by giving a different interpretation of the clauses of the licence agreement which jurisdiction was not vested in it. Ordinarily, the interpretation given by the Arbitral Tribunal, as affirmed by the court in exercise of powers under Section 34 of the Act ought to have been accepted."

80. Having set the perimeter within which an Appeal under Section 37 of the Act of 1996 is to be considered, now, it will be apposite to examine the respective submissions of the learned counsel for the parties.

81. The learned Senior Counsel for UPSHA had attacked the award and the judgment of the Commercial Court on the premise that it suffered from procedural irregularities which went to the roots of the matter. It was also contended that the said irregularity resulted in violation of principles of natural justice and further it violated the spirit of Section 18 of the Act of 1996, which embodies the doctrine of equal treatment of parties.

82. Examining the aforesaid aspect of the matter, it would reveal that it is not disputed that the first hearing of the Arbitral Tribunal took place on 26.08.2014. Initially, 11 issues were framed by the Arbitral Tribunal on 28.07.2015 and further two issues were framed on 29.07.2015. The arguments of the respective parties was concluded before the Arbitral Tribunal on 24.02.2016. At this stage, the parties submitted their written submissions.

83. In the written submissions filed by the Concessionaire, it was alleged that three new documents were introduced. This was objected to by UPSHA and the Arbitral Tribunal on 17.11.2016, after notice to the parties, held a clarificatory hearing almost after 8 months. As per the record, the Arbitral Tribunal accepted the written submissions of the Concessionaire and took the 3 documents filed with it, on record. However, it clearly noticed that the issue of admissibility and relevance would be considered while dealing with the issues, to which the said documents related.

84. From the perusal of the award made by the Arbitral Tribunal, it would reveal that while dealing with **Claim No.5** of the concessionaire,

the Arbitral Tribunal had noticed and made a reference to the documents filed by the Concessionaire along with its written submissions, which were taken on record, as per the order of the Arbitral Tribunal dated 05.01.2017. However, what is significant to note is that there is no whisper or discussion, even briefly, by the Arbitral Tribunal regarding the admissibility and the relevancy of the said documents. There was a split opinion by the Arbitral Tribunal in this regard. The majority members in their award while referring to the aforesaid **Claim No.5** referred to the said documents but not much reliance has been placed on them while giving its finding in favour of the Concessionaire. Whereas, the minority view took note of the said documents and held that the same were not duly proved, hence, it refrained to consider the said documents and turned down the claim.

85. The aforesaid issue was also raised before the Commercial Court, who considered it but the Court was not convinced. The Commercial Court held that the Arbitral Tribunal had the power to hold a clarificatory hearing. It further held that the Arbitral Tribunal after affording a hearing to the parties through its majority award, allowed part of **Claim No.4**, hence, there was no violation of principles of natural justice.

86. Apparently, considering the submissions advanced by the respective parties, this Court will have to deal the issue of procedural irregularity with two facets in mind:- **(i)** regarding taking the documents on record and leaving the relevancy and admissibility to be considered later, but not done. **(ii)** the other facet being whether any prejudice has been caused to UPSHA.

87. Keeping in mind the aforesaid two facets, this Court finds that after the hearing had concluded and the parties were required to furnish their written submissions, on principle, no new document could have been taken on record. However, the aforesaid principle cannot be applied blindly and it also has to be seen, whether the Arbitral Tribunal possessed jurisdiction and authority to take the said documents at a subsequent stage.

88. In this regard, it can unhesitantly be said that the Arbitral Tribunal is not bound by any technical rules of procedure and it has the right to formulate its own procedure subject to adherence to the principles of natural justice and providing equal treatment to the parties.

89. In the instant case, apparently, the Arbitral Tribunal held a clarificatory hearing on 17.11.2016 and after taking note of the objections of UPSHA, it clearly held that the documents were being taken on record, subject to its relevancy and admissibility, which was to be considered while dealing with the merits of the issues, to which the said documents related. In absence of any prohibition in law and certainly no embargo was placed by the parties, while agreeing on the procedure to be followed during the proceedings, hence, it cannot be said that the Arbitral Tribunal did not possess the jurisdiction or authority to hold a clarifactory hearing and to *prime facie* consider whether the documents filed after conclusion of arguments, could be taken on record.

90. Furthermore, once an order was passed by the Arbitral Tribunal on 05.01.2017, that it was taking the said documents on record, then at that stage, it was open for UPSHA to have raised objections both in context

of its relevancy and admissibility. At this very stage UPSHA could have sought leave to file documents in rebuttal in case it desired to bring some documents on record.

91. There is no material on record to indicate that after 05.01.2017, UPSHA filed any documents in rebuttal or prayed for an opportunity to do so, which was denied by the Arbitral Tribunal. There is no material to suggest that even in proceedings under Section 34 of the Act of 1996 UPSHA had made any specific statement that it attempted to file documents in rebuttal which were not accepted by the Arbitral Tribunal nor any such ground has been taken before this Court in the instant appeal.

92. It is well too settled that the technical rules of procedure are not applicable in arbitration proceedings. Even if the Arbitral Tribunal took certain documents on record after conclusion of the oral hearing but it allowed UPSHA to give its response and vide order dated 05.01.2017, it had clearly made known to the respective parties that the said documents have been taken on record and yet UPSHA did not file any documents in rebuttal. Even before the Commercial Court or before this Court, there is no clear averment or submission that the said documents were inadmissible or not relevant and if so on what count.

93. In this backdrop, merely to submit that the documents were taken on record without adjudicating the relevancy and admissibility of the said documents, may be a procedural infraction, but how it affected the merits of the matter or went to the roots of the matter could not be visibly demonstrated especially when hearing was given before taking

the documents on record and there was no procedural embargo which prevented the Arbitral Tribunal to take the documents on record at a subsequent stage. Thus, for the aforesaid reasons, the first facet of the issue relating to procedural irregularity does not impress this Court.

94. Now, the other facet which requires consideration is as to whether any prejudice has been caused to UPSHA, for the alleged procedural irregularity. If examined in the aforesaid backdrop of facts, it can unequivocally be said that neither UPSHA pleaded any consequent failure of justice nor it could demonstrate as to how UPSHA has been prejudiced by taking the documents on record.

95. If any procedural irregularity which impacts the jurisdiction of the Arbitral Tribunal to try the matter before it or it has the impact of violating principles of natural justice which is occasioned with a failure of justice, can definitely be looked into and in a befitting case, can even be a ground for setting aside the award provided it can be established that one party due to such procedural irregularity was unable to present its case effectively and in its entirety. This particular ingredient is completely missing in the instant case.

96. The learned Senior Counsel for UPSHA could not demonstrate as to how the said three documents merely by being taken on record at a subsequent stage prejudiced UPSHA. It also could not be demonstrated as to which documents in rebuttal was proposed to be submitted by UPSHA and such opportunity was asked for but refused or ignored.

97. Not every procedural irregularity can have the effect of vitiating an award nor would it permit the Court under Section 34 or this Court

under Section 37 of the Act of 1996 to interfere. It will also be relevant to notice that Section 5 of the Arbitration and Conciliation Act, 1996 clearly proscribes judicial intervention in arbitral proceedings, except in limited cases.

98. The learned Senior Counsel for UPSHA may be correct in submitting that the Arbitral Tribunal had observed that it would consider the issue of admissibility and relevance while adjudicating the claims on its merits but it was not done, however, this in itself cannot be a ground to say that the award stands vitiated, simply for the reason that in order to impact the award, it was incumbent upon UPSHA to have clearly demonstrated the prejudice and consequent failure of justice suffered by it which arose by taking the documents on record, which could not be established. Moreover, the Commercial Court also while turning down the aforesaid submission relating to procedural irregularity has taken a view which this Court does not find to be erroneous or suffering from any illegality.

99. Thus, the issue of procedural irregularity as raised by learned Senior Counsel for UPSHA does not impress this Court to intervene in appeal for setting aside the award, accordingly, the first submission on behalf of UPSHA relating to procedural irregularity is turned down.

100. Now, this Court proposes to consider the second submission of the learned Senior Counsel on behalf of the UPSHA relating to encashment of bank guarantee which relates to Claim No.3 as set up by the Concessionaire.

101. In this regard, certain articles of Concession Agreement may first be noticed, which are referrable to performance security.

102. **Article 9** of the Concession Agreement dated 16.12.2011 relates to performance security. In terms of Article 9.1.1, the Concessionaire was obligated to furnish a performance security within 180 days from the date of the agreement by furnishing an irrevocable and unconditional bank guarantee for a sum of Rs.29.16 crores in the form set out in Schedule F.

103. **Article 9.2** provides for a contingency of appropriation of performance security. The said Article provides that on account of Concessionaire's default or failure to meet any condition precedent, UPSHA without prejudice to other rights and remedies in law, was entitled to encash the performance security as damages for such Concessionaire default or its failure to meet any condition precedent.

104. **Article 9.3** provides that the performance security shall remain in force for a period of one year from the appointed date but would be released earlier upon the Concessionaire expending on project construction and aggregates, a sum, which is not less than 20% of the total project costs provided that the performance security shall not be released if the Concessionaire is in breach of the agreement.

105. Before proceeding further, **Article 4.1.2** and **10.3.1** would be of use, hence are being reproduced as under:-

> **"4.1.2** The Concessionaire may, upon providing the Performance Security to the Authority in accordance with Article 9, at any time after 90 (ninety) days from the date of this Agreement or on an earlier day acceptable to the Authority, by notice require the Authority to satisfy any or all of the Conditions Precedent set forth in this Clause 4.1.2 within a period of 30 (thirty) days of the notice, or such longer period not exceeding 60 (sixty) days as may be specified

therein, and the Conditions Precedent required to be satisfied by the Authority shall be deemed to have been fulfilled when the Authority shall have:

(a) procured for the Concessionaire the Right of Way to the Site in accordance with the provisions of Clause 10.3.1;

(b) issued the Fee Notification;

(c) procured approval of the Railway authorities in the form of a general arrangement drawing that would enable the Concessionaire to construct road overbridges/underbridges at level crossings on the Project Highway in accordance with the Specifications and Standards and subject to the terms and conditions specified in such approval; and]

(d) procured all Applicable Permits relating to environmental protection and conservation of the Site:

Provided that the Authority may from time to time by notice extend, for up to an aggregate of 6 (six) months, the period for procuring the approval set forth in Sub-clause (c) above and in that event the land to be covered by overbridges or the affected sections of the Project Highway, as the case may be, shall be included in the Appendix referred to in Clause 10.3 and dealt with in accordance with the provisions thereof, and provided further that upon procurement of such approval, the Concessionaire shall be entitled to a period of 12 (twelve) months therefrom for completion of the overbridges. For the avoidance of doubt, the approval specified in Sub-clause (c) above shall cease to be a Condition Precedent upon the extension of time under this Proviso.

* * *

10.3 Procurement of the Site:

10.3.1 Pursuant to the notice specified in Clause 4.1.2, the Authority Representative and the Concessionaire shall, on a mutually agreed date and time, inspect the Site and prepare a memorandum containing an inventory of the Site including the vacant and unencumbered land, buildings, structures, road works, trees and any other immovable property on or attached to the Site. Such memorandum shall have appended thereto an appendix (the "Appendix") specifying in reasonable detail those parts of the Site to which vacant access and Right of Way has not been granted to the Concessionaire. Signing of the memorandum, in two counterparts (cach of which shall constitute an original), by the authorised representatives of the Parties shall, subject to the provisions of Clause 10.2.2, be deemed to constitute a valid licence and Right of Way to the Concessionaire for free and unrestricted use and development of the vacant and unencumbered Site during the Concession Period under and in accordance with the provisions of this Agreement and for no other purpose whatsoever. For the avoidance of doubt, it is agreed that valid licence and Right of Way with respect to the parts of the Site as set forth in the Appendix shall be deemed to have been granted to the Concessionaire upon vacant access thereto being provided by the Authority to the Concessionaire."

106. The record would reveal that the Concessionaire had submitted the irrevocable bank guarantee as required in terms of the agreement. It is not in dispute that the appointed date as defined in Article 48 of the agreement was never fixed. It is also not disputed that the work under the project was to be completed within 730 days from the appointed date. It is also not in dispute that each of the contracting parties were required to achieve their conditions precedents in terms of Article 4 of the agreement.

107. One of the fundamental condition precedent to be met by UPSHA was to procure for the Concessionaire the right of way to the site, in accordance with the provisions of Article 10.3.1 as mentioned in Article 4.1.2 (a). This important Article 10.3.1 which relates to procurement of the site, as seen above, would reveal, that all the aforesaid compliances were to be met before the work was to commence. It is not in dispute that UPSHA could not comply and procure 90% of the right of way which was a conditions precedent for UPSHA. Since the appointed date would arrive only after the condition precedent were met and the period of 730 days for completion of the work was to be calculated from the appointed date and the performance security was furnished only to secure the obligations of the Concessionaire during the period of commencement of work, hence, in the entirety, it would reveal that performance security which was furnished by the Concessionaire to secure his obligations upon commencement of work and could only be encashed in case if the Concessionaire was in default or it breached the conditions of the agreement.

108. In the instant case where the project related to making a 4 Lane Highway for which procurement of site was sine qua non and it was a clear obligation of UPSHA to procure the site and it entailed acquisition of land which could not be done, accordingly, the commencement date could not be fixed and no work was done. Thus, it could not be inferred that the Concessionaire had committed any default or breached the conditions of the agreement. The Arbitral Tribunal and the Commercial Court both have given clear findings in this regard in favour of the Concessionaire which cannot be said to be perverse or against the weight of material evidence on record.

109. The view taken by the Arbitral Tribunal and the Commercial Court is based on sound reasoning and appreciation of the material on record and this Court in exercise of powers under Section 37 of the Act of 1996 would not sit over the said finding as an Appellate Court, more so, when no patent illegality could be pointed out by the learned Senior Counsel for UPSHA. Thus, for the aforesaid reasons, this Court is not inclined to accept the second submission relating to wrongful encashment of bank guarantee which is referable to **Claim No.3** of the Concessionaire.

110. The Court now proposes to consider the third submission of the learned Senior Counsel for UPSHA relating to **Claim No.4** as claimed by the Concessionaire relating to loss of profits.

111. From the record, it would reveal that **Claim No.4** was considered by the Arbitral Tribunal in paragraph 20 of the award. While dealing with the aforesaid claim, the Arbitral Tribunal noticed that the

Concessionaire was to be handed over 90% of the land required for the project. It also noticed that the Concessionaire had issued several notices to UPSHA pointing out the defaults and also requested UPSHA to fulfill its obligations including by providing the right of way to the site. Since the right of way could not be provided to the Concessionaire, hence, it terminated the agreement vide its letter dated 14.10.2016 and in its statement of claim the concessionaire sought to recover a sum of Rs. 640.5 crores as loss of profits, especially when it was based on projections, assumptions and presumptions.

112. The bedrock of the said profits, as mentioned in the statement of claim, was the financial model, which was part of requirement under the financial closure (as per Article 24 of the agreement). This claim was denied by UPSHA on the premise that since the Concessionaire had not started any work nor completed the work, hence, there was no question of loss of any profits especially when the Concessionaire itself had terminated the agreement.

113. In this context, the record reveals that the majority award has referred to the financial model, which was furnished by the Concessionaire as part of its obligation of completing the condition precedent. The reasoning of the majority award is reflected in para 20.3 of the award and the relevant portion thereof, for clarity is being reproduced hereinafter:-

> “. . . xix. While Claimant has claimed a "loss of opportunity" running into 25 years, and hence estimated loss of profits of Rs 640 crores, that would be dependant on the certainty and surety that Claimant would have completed the project on time and run it for 25 years.
>
> xx. On the other hand, what is certain and undeniable is that his Rs 29.16 crores continues to remain locked-in and in possession with

Respondent for last 35 months and he is thus unable to put it to any useful activity of availing any other opportunity to invest it and circulate it to earn returns.

xxi. Bound by bare Act's section 28(3) calling upon AT while deciding and making award, the AT shall take into account trade usages applicable to the transaction" we may fairly and ethically make use of GOI's benchmark of IRRs on money invested, which is a maximum of 10%

xxii. As for the period of such "loss of opportunity", we may assume that after money invested (Performance Security) is returned to Claimant, he would need at least 2 years to identify, re-locate and get into an alternative business WITH A BROADLY SIMILAR IF NOT BETTER OPPORTUNITY and invest this refunded Rs 29.16 crores.

xxiii. However, in order to further moderate the quantum of costs to be awarded to the Claimant, we may not take into account (for calculation purposes only) the minimum period of two years that Claimant would fairly need to locate, identify and obtain a business enterprise of a broadly similar projects financial cost and returns in which to invest the refunded Performance Security of Rs 29.16 Crores. Hence calculation could well be for 35 months for IRRs that Claimant has lost on this Rs 29.16 Crore.

xxiv. As for further calculation of quantified loss on account of infused equity (which infusion is neither denied nor refuted by Respondent), we may take this same period of 60 months of the Claim for 23 years of projected revenue generation as estimated by Claimant.

20.4 Majority Decision

A. There has been a loss of opportunity suffered by the Claimant on account of Respondent not providing Right of Way and Conditions Precedent, the Claimant deserves to be compensated by the Respondent according to law, usages, and practice.

B. Here we refer to and take guidance of following:

(1) UPSHA's submitted synopsis Enclosure C Page 38. Equivalent citation AIR 1963 Cal 163 Bench SP Mishra J in GambhirmallMahabirprasadvs The Indian Bank and another on 17-06-1960. All benefits as applicable even on guess work can be awarded (Para 66).

(ii) 1997 (i) Arb LR 583 Delhi High Court IA No. 3575 of 1993 & Suit No. 7740 of 1992. SanyubtNirmalaVs Delhi Development Auhority para 57 loss of profit on prolongation of time is allowed as 10% on the affected amount.

(iii) AIR 1985 Supreme Court 607 from Andhra Pradesh, V.D. Tulzapurkar& V Khalid B., Civil Appeal No. 3161(N) of 1971 Dec. 2, 1985. Para no. 8 Loss of Profit on unexecuted amount of work of Rs. 3.00 lacs has been allowed as Rs. 35,000 which works out as 11.67%.

C. Accordingly, ends of justice would be met if compensation of loss of profit Rs. 640 Crores in 23 years arising out of loss of opportunity for the Claimant is calculated for 5 years and by reducing the interest calculated at 8.5% instead of 15%. Hence it comes to Rs 78.84, croreappr.

D. Loss to the Claimant on account of unnecessary and uncalled for encashment of Performance Security of Rs 29.16 crores and preventing Claimant from investing it for 36 months is calculated at 7.5% instead of 10% per month. This would come to apprRs 78.73 crores.

E. Performance Security of Rs29.16 crores to be returned to Claimant by Respondent under claim no. 3. Therefore, this is not included in this claim.

20.5. Majority Award by Sh. I.J. Mamtani and sh. AlpkSinha, Arbitrators.

After considering the documents, submissions, oral hearings and on application of mind award the claims to the Claimant as under:

1. Towards loss of opportunity as in para 21(c) is Rs. 78.84. Crores.

2. Towards return of security deposit of Rs. 29.16 Crores.

Loss of business for not allowing the Claimant to use Rs. 29.16 crore money in trade usage applicable to the transaction Rs. 78.73 Crores.

3. Total amount of 1 & 2-Rs.78,84+Rs. 78.73 Rs. 157.57 Crores."

114. The learned Senior Counsel for UPSHA persuaded this Court to consider the reasons given in the minority award and for the sake of reference, the same is being reproduced hereinafter:-

"iv. The Appointed Date was not fixed, construction work did not start, no Bank finance was availed of and no equity was expended on the Project by Claimant. Though loan of Rs.525 crore was sanctioned for the Project vide letter dated 11.06.2012 of Punjab Natonal Bank (Exhibit C-11), the letter dated 03.01.2015 of the Bank states that the loan was approved for the project on 20.04.2012 but viability period of the loan expired on 20.10.2012 (Annexure-WS-3). It was never renewed thereafter. Claimant served notice dated 10.05.2013 requiring respondent to cure the defects, letter dated 19.12.2013 as notice of its intention to terminate the CA and the termination notice dated 13.01.2014 (Exhibits C-65, C-66 and C-67). It is relevant to note that validity of loan was allowed to expire much before even the first letter asking Respondent to cure the defects was written and Claimant took no action to get validity period of loan extended. It has no explanation for it. Conduct of Claimant, thus, raises reasonable doubts about its own seriousness to execute the Project, as alleged by Respondent.

v. In the Majority Award brother Arbitrators have accepted the stand of Claimant that it had infused equity of Rs.59.16 crores on the grounds that it has furnished details about the same which have not ben contested, leave alone refuted, by Respondent. I would respectfully say that the view taken bu them is contrary to the facts on record. In the first instance, the concerned Financial Statements were not even referred in the pleadings or hearings by the Claimant. It hfiled these for thr first time, as Annexure-III with its synopsis of arguments. Responent in its Affidavit dated 17.11.2016 as also in the oral discussion on that day strongly objected to filing of these documents and had pleaded that the same be not taken on record. It had argued that Claimant had nevr appointed any if these were available with Climant it would have submitted the sane along with statement of claims or its replication/rejoineder. These Certificates are afterthoughts, Respondent had alleged. Claimant failed to rebut these allegations in its reply wherein it only hammered the point that there was no infirmity in appointing the Statutory Auditors.

vi. Now, let us examine credibility of these documents. In the first instance, it has already been held while deciding Issue no. 10 above that Statutory Auditors were not appointed by Claimant as per the provisions of Article 33 of the CA Secondly, the Financial Statements were filed for the first time along with synopsis of arguments as Annexure-III and Respondent had strongly objected to their filing the same at a belated stage when even arguments had been concluded. Thirdly, as per Balance Sheets as on March 31, 2014 and March 31, 2015 Share Capital (i.c. Equity) is Rs.15,01,10,000/- only and not Rs.58 crores: as claimed by Claimant. Rs.58.07 is, in fact, the total of Assets and Liabilities respectively on the said dates. Further, perusal of the Balance Sheets as on March 31,2014 and March 31,2015 shows an entry 'Capital Work-in Progrss' to the tune of Rs.57.90, crores under the head "ASSETS" and explanatory Note nov 6 attached therewith shows it to have been spent on 'Roads & Bridges under construction'. It is not understood how such a huge amount has been spent on Roads & Bridges under construction when construction of the Project Highway, admittedly, never started. In the interest of justice Claimant was given an opportunity to explain these Financial Reports and Certificates in the hearing especially scheduled for the purpose on 17.11.2016 though Respondent had vehemently objected to this meeting after pleadings and arguments had been concluded. However, Claimant still failed to furnish any clarification and simply averred that arguments on this Issue are contained in the synopsis.

vii. Despite the facts stated above, and without spending any significant amount on the Project the Claimant is claiming a whopping sum of Rs.640,50,00,000/-(six hundred forty crore and fifty lakh) on account of loss of profit as the income it would have earned over the 23 long years by way of toll collection. As supporting document it has filed only a two page unsigned and uncertified statement, without any explanatory notes, showing the revenue it would have earned until March, 2038. Tribunal found it just impossible to decipher the said statement. However, to ensure that justice is fully met, Claimant was given an opportunity by way of another hearing on 17.11.2016 to explain and elaborate the basis of its quantification of this claim with supporting documents/evidence though it was vehemently objected to by Respondent. However, Claimant still failed to substantiate its claim and merely submitted that the basis for computation for this claim is Financial Model and nothing else. Neither of the parties has, however, produced before the Tribunal any such Financial Model which may substantiate and support computation of the amount of this claim, Thus, the documents filed by Claimant, though at a belated stage, do not arise confidence."

115. From the perusal of the award and the quoted paras above, it would reveal that the majority award has allowed a claim of Rs.157.57 crores under the head of loss of profits. Though, the minority award dismissed the said claim but the fact remains that against a claimed sum of Rs.640.5 crores, an award was made in favour of the Concessionaire for a sum of Rs.157.57 crores.

116. The learned counsel for the Concessionaire while defending the awarded amount argued that the amount awarded is not based on the documents which were filed subsequently with the submissions rather the Arbitral Tribunal considered the financial model which was furnished by the Concessionaire. That being the basis of the finding, cannot be assailed, as the Commercial Court and this Court does not sit as a Court of Appeal. If on the basis of material on record, a finding has been returned, it cannot be said that the finding is not supported by any evidence. In case if the finding is based on evidence, even though scant yet such finding would be immune from challenge before the Court under Section 34 and even from the Appellate Court under Section 37 of the Act of 1996.

117. Be that as it may, the fact remains that the basis of the aforesaid claim is a financial model. The word 'financial model' has been defined in the agreement as under:-

"financial model means the financial model adopted by the learned senior lender, setting forth the capital and operating costs of the project and revenue therefrom on the basis of financial viability of the project has been determined by the senior lenders and includes a description of the assumption and parameters used for making calculations and projections therein"

118. Though, the financial model submitted by the Concessionaire could have been taken into consideration while recording a finding relating to loss of profits but that document alone could not form the basis of quantifying such claims without considering and dealing with other evidence filed by the party making such a claim. In other words, the financial model could only be a piece of corroborative evidence, but in absence of any other cogent evidence, it could not be made the sole basis of quantifying claim relating to loss of profits.

119. The Apex Court in **Unibros (supra)** had the occasion to consider the issue of loss of profits and what it takes to prove such losses. The relevant paras 8, 14, 16 to 20 are being reproduced hereinafter for ease of reference:-

> "8. The appeal is directed towards dismissal of the appellant's claim for compensation relating to loss of profits (Claim No. 12). It is undeniably established that the appellant's claim for loss of profit stems from the delay attributed to the respondent in completing the project. It is further evident that the loss of profit sought in the present case is primarily based on the grounds that the appellant, having been retained longer than the period stipulated in the contract and its resources being blocked for execution of the work relatable to the contract in question, it could have taken up any other work order and earned profit elsewhere.

* * *

> 14. It is elementary, though it has to be restated, that a judicial decision of a superior court, which is binding on an inferior court, has to be accepted with grace by the inferior court notwithstanding that the decision of the superior court may not be palatable to the inferior court. This principle, ex proprio vigore, would be applicable to an arbitrator and a multi-member arbitral tribunal as well, particularly when it is faced with a judicial decision (either under section 34 or section 37 of the Act) ordering a limited remand. In the wake of authority of judicial determination made by the Courts of law, any award of an arbitrator or a tribunal that seeks to overreach a binding judicial decision, in our opinion, does conflict with the fundamental public policy and cannot, therefore, sustain.

* * *

16. To support a claim for loss of profit arising from a delayed contract or missed opportunities from other available contracts that the appellant could have earned elsewhere by taking up any, it becomes imperative for the claimant to substantiate the presence of a viable opportunity through compelling evidence. This evidence should convincingly demonstrate that had the contract been executed promptly, the contractor could have secured supplementary profits utilizing its existing resources elsewhere.

17. One might ask, what would be the nature and quality of such evidence? In our opinion, it will be contingent upon the facts and circumstances of each case. However, it may generally include independent contemporaneous evidence such as other potential projects that the contractor had in the pipeline that could have been undertaken if not for the delays, the total number of tendering opportunities that the contractor received and declined owing to the prolongation of the contract, financial statements, or any clauses in the contract related to delays, extensions of time, and compensation for loss of profit. While this list is not exhaustive and may include any other piece of evidence that the court may find relevant, what is cut and dried is that in adjudging a claim towards loss of profits, the court may not make a guess in the dark; the credibility of the evidence, therefore, is the evidence of the credibility of such claim.

18. Hudson's formula, while attained acceptability and is well understood in trade, does not, however, apply in a vacuum. Hudson's formula, as well as other methods used to calculate claims for loss of off-site overheads and profit, do not directly measure the contractor's exact costs. Instead, they provide an estimate of the losses the contractor may have suffered. While these formulae are helpful when needed, they alone cannot prove the contractor's loss of profit. They are useful in assessing losses, but only if the contractor has shown with evidence the loss of profits and opportunities it suffered owing to the prolongation.

19. The law, as it should stand thus, is that for claims related to loss of profit, profitability or opportunities to succeed, one would be required to establish the following conditions : first, there was a delay in the completion of the contract; second, such delay is not attributable to the claimant; third, the claimant's status as an established contractor, handling substantial projects; and fourth, credible evidence to substantiate the claim of loss of profitability. On perusal of the records, we are satisfied that the fourth condition, namely, the evidence to substantiate the claim of loss of profitability remains unfulfilled in the present case.

20. The First Award was interfered with by the High Court for the reasons noted above. The Arbitrator, in view of such previous determination made by the High Court, could have granted damages to the appellant based on the evidence on record. There was, so to say, none which on proof could have translated into an award for damages towards loss of profit. A claim for damages, whether general or special, cannot as a matter of course result in an award without proof of the claimant having suffered injury. The arbitral award in question, in our opinion, is patently illegal in that it is based on no evidence and is, thus, outrightly perverse; therefore, again, it is in conflict with the “public policy of India” as contemplated by section 34(2)(b) of the Act.”

120. Now applying the principles as noticed above to the instant case, also being conscious of the limited jurisdiction this Court exercises while considering an appeal under Section 37 of the Act of 1996, it would reveal that there are certain undisputed facts between the parties i.e. to say that condition precedent of procuring 90% of the right of way was not achieved by UPSHA. The agreement which was entered between the parties dated 16.12.2011, obligated UPSHA to acquire land and in furtherance thereof, it had issued a notification under Section 4 of the Land Acquisition Act, 1894, however, no further steps were taken in this regard.

121. It is not disputed that till the time the agreement was cancelled, UPSHA had not acquired 90% of the land. This assumes significance for the reason that the Highway was to be constructed within 730 days from the appointed date and the appointed date could only be fixed after condition precedents were achieved, which admittedly were not achieved. The concessionaire had furnished a performance bank guarantee and had made preparations for taking the project forward and all this was done on a legitimate expectation of earning profits.

122. In this backdrop, it can surely be said that the Concessionaire would have suffered loss of profits but considering the claim as laid in the statement of claim under the aforesaid head, the Concessionaire made a claim of Rs.640.50 crores based solely on financial model. This financial model as already noticed above was for the senior lenders to make an appraisal of the project and its viability so that it could lend financial assistance to the Concessionaire. However, from the perusal of

the award, it would reveal that the Arbitral Tribunal merged two issues relating to wrongful encashment of performance guarantee and the issue of loss of profits which were separate and distinct, while giving its finding in respect of loss of profits.

123. While calculating the loss of profits, the Arbitral Tribunal in its majority award has taken note of the amount invested in the form of performance guarantee and it has thereafter taken note of the financial model and it has moved on a premise that the Concessionaire had made equity infusions and thereafter it also observed that since the financial model was for a period of 25 years and there was no certainty that the Concessionaire would complete the entire tenure of 25 years and the Highway would be constructed in 730 days, hence, it made calculations and scaled down the figures by taking estimates for up to 5 years and to that it added the security deposit of Rs.29.16 crores and a figure of Rs.157.57 crores was arrived at, which was awarded.

124. This Court finds that the Concessionaire had led evidence fundamentally on the basis of the financial model. The amount has been scaled down by the Arbitral Tribunal but what is significant to note that this scaling down of the awarded figure is on the assumption of the Arbitral Tribunal and is not based on any particular evidence led by the concessionaire.

125. The award would indicate that while dealing with the aforesaid claim of loss of profits, the Arbitral Tribunal also referred to the documents relating to equity infusion which *inter alia* included documents filed by the concessionaire subsequently with the written

submissions. This was objected to by the learned Senior Counsel for UPSHA while as per the learned counsel for the concessionaire, the said documents were not made the basis for grant of any claim.

126. This Court from the record and from the award finds that the Arbitral Tribunal has recorded its finding in respect of claim relating to loss of profits by mainly relying upon the financial model. As already noticed hereinbefore that the financial model could only be a piece of corroborative evidence and could not be the sole document for grant or quantifying the amount for loss of profits as it was based on future projections which was inclusive of assumptions and presumptions.

127. Now, in case if the financial model is ignored then the only other document which has been mentioned by the Arbitral Tribunal while dealing with the aforesaid claim, are the three documents furnished by the Concessionaire after conclusion of the oral hearing. If the said documents were placed and taken on record on 05.01.2017 then undisputedly no opportunity was availed by the Concessionaire to prove the said documents and the documents remained unproved.

128. Now, in this backdrop, if the submissions of the learned counsel for the Concessionaire is taken to be correct that the documents were not made the basis of the Claim No.4 then the inevitable conclusion would be that there was no worthy evidence on record to support the aforesaid Claim No.4 and then it becomes a case of no evidence and in such cases as per the decision of the Apex Court in **Ramesh Jain (supra)** and **Jan De Nul Dredging (supra),** such findings can be assailed under Section 34 as well as under Section 37 of the Act of 1996.

129. This Court further finds that the Arbitral Tribunal in its majority award has not given any clear reason or the basis on which the awarded sum has been granted. There is no reason to show that if the financial model was relied upon for allowing the claim then it should have been accepted as a whole, however, the Arbitral Tribunal has given its own assumptions to modify and scale down the figures but there is no reflection of any cogent reason to do so. Thus, the said finding is based on presumption which was not pleaded nor any material was available to draw such assumption & especially when the concessionaire did not plead or lead evidence or argue before the Arbitral Tribunal to draw such presumptions.

130. This Court has consciously reproduced the relevant portion of the award indicating the reasoning of the majority Arbitrators while allowing **Claim No.4** and it is found that the said reasoning is quite faulty as the financial model could not solely be made the basis for the grant of claim and in absence of any other evidence.

131. It is not always easy to discern whether the Arbitral Tribunal has considered the evidence appropriately as that would tempt the Court into entering in the domain of re-appreciation of evidence which is not with the scope of Section 34 or Section 37 of the Act of 1996. The Act of 1996 in Section 19 squarely recognizes the powers of the Arbitral Tribunal Vis-à-vis the determination of rules of procedure. Though, the Arbitral Tribunal is not bound by the Civil Procedure Code or the Indian Evidence Act, yet the power of the Arbitral Tribunal to determine the admissibility, relevance, materiality and weight of any evidence is

preserved in sub-section (4) of Section 19 of the Act of 1996. It is in this context that it would be apposite to make a distinction whether the Arbitral Tribunal engaged with a vital piece of evidence and recorded reasons for refusing to assign much material or weight thereto. Upon consideration and taking a holistic view of the material on record, this Court finds that the finding recorded by the Arbitral Tribunal relating to **Claim No.4** suffers from the vice of *ipse dixit* and is a case of no evidence, hence, cannot be sustained and is set aside. For the aforesaid reasons **Claim No. 4** definitely requires a fresh determination.

132. Now, the Court proposes to consider the submissions of learned Senior Counsel for UPSHA relating to grant of **Claim No.5** in respect of payments made to EPC contractors.

133. The gist of the submission relating to the challenge laid to **Claim No.4** is on the premise that the Arbitral Tribunal while dealing with issue no.6 recorded a finding that the Concessionaire could not have entered into EPC contracts prior to the date of the signing of the concession agreement dated 16.12.2011 and in light of this finding, the **Claim No.4** could not have been allowed.

134. Considering the aforesaid aspect of the matter, this Court on perusal of the award finds that the Arbitral Tribunal while dealing with Issue No.5 clearly held that though the Concessionaire could not have entered into the EPC contracts but since there was no prohibition and there was ample evidence to indicate, including the report of the third party Engineering Firm, that EPC contractors had been deployed and they had made some work and this was part of overheads and also can be

considered as loss of profits, hence, **Claim No.5** was allowed for a sum of Rs.25.53 crores.

135. **Article 5** of the Concession Agreement specifically refers to the obligations of the Concessionaire. In terms of **Article 5.1.1**, the Concessionaire was entitled to enter into any EPC contracts, however, the same was required to be first intimated and all drafts were to be submitted before UPSHA as indicated in **Article 5.2**.

136. It is not in dispute that the EPC contracts in question, were entered by the Concessionaire on 03.12.2011 whereas the Concession Agreement was signed on 16.12.2011 i.e. the EPC contracts were signed 13 days prior to the signing of the Concession Agreement.

137. Even if at all, the said agreements may not have been sent to UPSHA for approval but the fact remains that EPC contractors had been engaged. The third party Engineer's report also corroborates the aforesaid facts. Even if at all, the engagement of EPC contractors may not have the approvals of UPSHA but nevertheless any work executed by such third party contractors on behalf of the Concessionaire relating to the project in question, can always be considered as an expense incurred by the Concessionaire for the project in question. For the reasons aforesaid, any act done bonafide by the Concessionaire can always be considered as an expenditure and resulted in a case loss due to premature termination of the contract, a loss which otherwise could have been recouped, if the project would have commenced and reached fruition. Since the project was terminated compulsively as UPSHA could not procure the right of way, hence, it cannot be said that merely because

the Concessionaire did not get the approval for engagement of EPC contracts, the said amount cannot be claimed by the concessionaire from UPSHA.

138. Another significant feature is that the letter of award of contract had already been issued by UPSHA to the Concessionaire on 17.11.2011 which was accepted by the Concessionaire on 18.11.2011. This fact also remains undisputed and taking the aforesaid facts into consideration as well as the fact that certain conciliatory award was passed between the Concessionaire and EPC contractors which were nothing but costs incurred by Concessionaire and in case of premature termination which was compulsive in nature, such direct losses could always be claimed from UPSHA. The conciliatory awards were placed on record by the Concessionaire as part of its evidence which was actually not disputed by UPSHA except for the fact that it relied upon the premise that since the EPC contractors could not be engaged prior to the signing of the agreement, hence, no amount would be payable. Apart from this plea, there was never any direct denial to the conciliatory award or the quantum. There is no dispute to the fact that the said EPC contractors were at the site only in furtherance of the present project in question and the conciliatory award also related to the dispute between the Concessionaire and the third party relating to the project in question. No dispute was raised by UPSHA regarding the quantum, authenticity or admissibility of said conciliatory award.

139. This Court had the occasion to consider a similar issue where in a contractual dispute being resolved through arbitration, certain third party

rights had accrued and any payment made by one of the contracting parties to such third party contractor was claimed and this Court in **UCM Coal Co. Ltd. (supra)** held as under:-

> “90. An Arbitral Award, which is placed on record of another arbitral proceedings, can be a highly important piece of evidence. Though, its evidentiary value and weight given to such evidence may differ from case to case but the fact remains that it is not as if the said document does not have any evidentiary value at all. The said award passed in favour of the PMC against A.E.L., is relevant evidence and has presumption of its correctness unless it can be shown by a party to be false or incorrect.
>
> 91. As noted above, nothing could be demonstrated on behalf of the appellant to indicate that the findings recorded in the said award between PMC and A.E.L. suffered from any error in the sense that in light of the pleadings and evidence (which was filed by A.E.L. in the current arbitral proceedings including the statement of claims and other evidence as mentioned above) and moreover an award which has the backing of a statute and unless challenged attains a status of a decree, hence, becomes admissible and unless shown to be incorrect, the same would have high probative value.
>
> 92. In the aforesaid background this Court finds that the Arbitral Tribunal is vested with the power and discretion to deal with the evidence and it has been exercised correctly. The Arbitral Tribunal is not bound by strict rules of procedure or evidence, hence, by taking note of the aforesaid material, it has returned findings which per se are supported by the evidence and it cannot be said to be perverse.
>
> 93. It is also an undisputed fact that though the respondent had challenged the award passed in favour of PMC before the Commercial Court at Ahmedabad, however, the said petition filed by the respondent was dismissed by means of order dated 04.05.2023 and the same has attained finality.
>
> 94. In this backdrop, merely because the work order issued by the respondent to PMC indicated that the payments would be made against the invoices but the invoices were not placed on record it would not be sufficient to defeat the claim of the respondent especially when the award passed in the arbitral proceedings between PMC and the respondent was placed on record and this very basis was also used by the appellant to submit the claims before the Ministry of Coal and it clearly delineated that the payment to be made by respondent to PMC was based on milestones. Accordingly, it cannot be said that there was no evidence on record to support the findings returned by the Tribunal or that this aspect has been overlooked by the Commercial Court. It is one thing to say that the finding may not be supported by any evidence and it is another thing to urge that on the basis of the evidence, the inference drawn by the Tribunal is erroneous.”

140. In light of the aforesaid discussions, it cannot be said that the reasoning or the findings are perverse or based on no evidence. Such findings which are based on material on record and a plausible view has

been taken by the Arbitral Tribunal and the same was also affirmed by the Commercial Court, hence, in the given circumstances, this Court is not inclined to accept the submissions of the learned Senior Counsel for UPSHA, which is built on the premise that the claim has been allowed and contradictory finding has been recorded that the said Concessionaire could not have engaged EPC contractors before approval of UPSHA and prior to signing of the Concession Agreement and yet amount payable to such contractors has been awarded. Thus, for all the aforesaid reasons this Court does not find that there is any patent illegality in deciding **Claim No.5**.

141. Lastly, this Court proposes to now consider the submissions relating to rejection of **Counter Claim No.5**.

142. UPSHA while filing its statement of defence, had also introduced 8 counter claims in all. All the counter claims were rejected by the Arbitral Tribunal, however, UPSHA has confined its submissions only to rejection of **Counter Claim No.5**. The rejection of all other counter claims have not been assailed, hence, they are not under consideration of this Court.

143. The submission of learned Senior Counsel for the appellant is that **Article 35.1** permitted UPSHA to recover and claim compensation from the Concessionaire for default. It was urged that in terms of **Article 35.1**, all direct costs incurred by UPSHA could be recovered from the Concessionaire, which was a consequence of a material default or breach of the Concession Agreement by the Concessionaire. In this regard, it was urged that the gist of the **Counter Claim No.5** was recovery of

compensation for the payments made by UPSHA for land acquisition, forest clearance, shifting of utilities, appointment and remuneration paid to the independent Engineers, consultancy and feasibility reports.

144. It was urged that all these acts were directly connected with the project and since the Concessionaire had violated and breached the conditions of the Concession Agreement, hence, losses in shape of the aforesaid payment which was a direct consequence of breach of the agreement deserved to be allowed by the Arbitral Tribunal.

145. It was further urged that as part of the evidence, UPSHA had given a detailed chart relating to the payments made along with the cheques, date and numbers as well as the respective amounts relating to payments towards land acquisition, forest clearance, shifting of utilities. These facts and evidence could not be refuted and thus a clear amount of Rs.49.53,66,822/- was liable to be recovered from the Concessionaire and the Arbitral Tribunal had committed an error in rejecting the aforesaid **Counter Claim No. 5.**

146. It was further urged that the counter claim was rejected on the premise that no clear evidence was led by UPSHA. In light of the chart with sufficient particulars of payments, which included the photocopies of the cheques and receipts, filed along with the evidence, coupled with the fact that the factum of the payments was not seriously disputed and there being no contrary evidence in rebuttal, accordingly, the Arbitral Tribunal was not justified in rejecting the said counter claim.

147. Considering the aforesaid aspect of the matter and from the perusal of the finding recorded by the Arbitral Tribunal while relating to

Counter Claim No.5, it would reveal that the Arbitral Tribunal noticed that there was no evidence regarding payment made under the aforesaid head. It also noticed that the evidence which was placed in support of the aforesaid counter claim was only towards the payment relating to land acquisition and that too up to the stage of issuance of notification under Section 4 of the Land Acquisition Act, 1894. It was also noticed that the counter claim was not supported by the vouchers, bills, books of accounts etc. and thus the counter claim was rejected.

148. Apparently, this Court upon considering the material on record and taking note of the submissions advanced by the learned counsel for the parties finds that the payments made towards land acquisition, forest clearance and shifting of utilities was an act in furtherance of the contractual obligations including for achieving condition precedent by UPSHA. Without acquiring the land, UPSHA could not have achieved ts condition precedent of providing 90% of the right of way.

149. It is also an undisputed fact that that UPSHA had only got a notification issued under Section 4 of the Act of 1894. In law, issuance of notification under Section 4 of the Act of 1894 is merely an intent to acquire. The acquisition is made only upon issuance of notification under Section 6 of the Act of 1894. UPSHA did not issue any notification under Section 6 of the Act of 1894, thus, the acquisition was never done right from signing of the Concession agreement dated 16.12.2011 and till its termination on 13.11.2014 and the acquisition was never complete and there was any material evidence contrary to this on record.

150. Forest clearance was also a necessary concomitant of the acquisition as well as to achieve the obligation of providing 90% of the right of way and so is the situation with regard to shifting of utilities. It would have been a different issue if the conditions precedent would have been achieved and the appointed date would have been fixed as per the Concession Agreement, work would have commenced and upon any material breach of condition at the behest of Concessionaire then direct loss could have been recovered by UPSHA as compensation from the concessionaire.

151. In the instant case, it was found that the condition precedent was never achieved by UPSHA and admittedly 90% of the right of way was never made available to the Concessionaire. For the said reason, the work could not commence and the entire project which was to be completed within 730 days from the appointed date, could not be completed and even the appointed date also could not be achieved uptil 13.01.2014.

152. The Arbitral Tribunal while deciding other issues categorically recorded finding in this regard and thus in terms of Article 35.1, the compensation, which is envisaged under the agreement could have been allowed if the Concessionaire would have committed a material breach and the loss would have been suffered by UPSHA, however, the situation is otherwise.

153. UPSHA was unable to achieve its conditions precedent and therefore to squarely put the blame on the Concessionaire in order to claim the compensation is not justifiable. May be, the Arbitral Tribunal

while rejecting the **Counter Claim No.5** may have given scant reasons but the fact remains that there is no patent illegality in the decision of the Arbitral Tribunal in rejecting the **Counter Claim No.5**.

154. In the given facts and circumstances merely because the finding given by the Arbitral Tribunal may be brief and upon reading of the said finding, it may give an impression that the said counter claim has been rejected for want of evidence but that is not quite correct, inasmuch as, the reference made by the Arbitral Tribunal for the lack of evidence is not in context with the payments made by UPSHA but in context with the material breach attributed solely to the Concessionaire for which no evidence was led to show that the concessionaire had defaulted. Thus, for the aforesaid reasons, this Court is unable to accept the contention of learned Senior Counsel for UPSHA in relation to rejection of **Counter Claim No.5**.

155. Now, before parting with ARPL No. 41 of 2025, it will be important to note that this Court while dealing with the **Claim No.4** held that the findings recorded suffered from vice of *ipse dixit* and are liable to be set aside and further held that **Claim No. 4** required a fresh determination. Now a delicate question arises before this Court whether the entire award should be set aside or certain part of the award can be severed and saved by dissecting it from the offending portion.

156. This very question was referred to a Constitution Bench of the Supreme Court in **Gayatri Balasamy v. ISG Novasoft Technologies Ltd. : (2025) 7 SCC 1**. The Apex Court after considering the provisions of the Act and the law held that the Courts do possess limited powers

under the Act of 1996 to modify the award by applying the doctrine of severability in limited circumstances. What would be the limited scope and circumstances was explained in the majority judgment in **Gayatri Balasamy** (supra). The propositions and guidelines laid down by the Apex Court can be summarized as under:-

(i) Only severable awards are amenable to modification.

A composite or indivisible arbitral award cannot be modified. Modification is permissible only where the claims, or parts of the award, are legally and pragmatically severable from the valid portion. In such cases, the court may sever the invalid part while preserving the remainder of the award. This constitutes one of the essential guardrails laid down by the Supreme Court for the exercise of the limited power to modify an arbitral award.

(ii) The error sought to be corrected must be patent and apparent on the face of the record.

The Supreme Court has clarified that modification is confined to the correction of obvious and self-evident errors, such as clerical, computational, or typographical mistakes. Modification is permissible only where the court has no uncertainty or doubt as to the correction; if the alleged error is debatable or not apparent on the face of the record, the court lacks jurisdiction to modify the award.

(iii) Modification is permissible for correcting or adjusting post-award interest.

Courts may modify an arbitral award where such modification is confined to the correction or adjustment of post-award interest, without disturbing the substantive findings of the Arbitral Tribunal.

(iv) Where modification is impermissible, the matter must be remanded.

In cases where the error cannot be corrected within the aforesaid guardrails and if it would require a review on merits or re-adjudication, the court must refrain from modifying the award and where permissible in law, remand the matter to the Arbitral Tribunal.

157. Considering the aforesaid postulates, this Court finds that the findings regarding the **Claim No.4** which is the offending portion can be severed and the rest of the award can be saved. Accordingly, the finding relating to **Claim No. 4** is set aside and the award shall stand modified to the aforesaid extent and the matter shall stand remitted to the Arbitral Tribunal constituted as per law, for fresh determination of **Claim No.4**, relating to loss of profits, in accordance with the observations made hereinabove and as per law.

(ii) IN RE: ARPL NO.70 OF 2023:-

158. The Concessionaire had also filed a separate appeal primarily assailing the rejection of **Claim No.5** and **Claim No.6** as laid by the Concessionaire in light of the findings recorded by the Arbitral Tribnal while deciding issues nos. 6, 10 and 12.

159. The crux of the submission advanced by Shri Tewari on behalf of the Concessionaire was that actually there was no prohibition for engagement of EPC contracts after the issuance of letter of award but the Arbitral Tribunal erred by interpreting Article 5.2.2 to hold that the Concessionaire was required to first submit all the agreements to UPSHA for its review and only thereafter the EPC contracts could have been entered.

160. It was submitted that once the letter of award had been issued by UPSHA, signing of the Concession Agreement was a mere formality and was a consequence of grant of contract. Since timelines had to be adhered, hence, entering into EPC contracts could not be held to be against the spirit of the agreement. Since it was established that the UPSHA could not achieve its condition precedent and it could not provide the right of way, hence, for the aforesaid reasons, blame could not have been placed on the head of the Concessionaire to deprive it from claiming damages from UPSHA regarding the failure to achieve condition precedent as per **Article 4.1.2** which formed part of **Claim No.1** and the further submission on behalf of the Concessionaire was that for the very same reason, it was also entitled to recover termination payments which was part of **Claim No.4**.

161. Having considered the aforesaid submissions and from the perusal of the material on record, it would reveal that the basic claim laid by the Concessionaire relating to seeking compensation for damages for not achieving the condition precedent by UPSHA, can be seen from more than one angle.

162. One would be, that for not achieving the condition precedent by UPSHA, it definitely, gives a right to the Concessionaire to seek damages, however, that would be contingent on the fact that the said conditions precedent would have been achieved belatedly due to which the Concessionaire may have suffered losses and to that extent the damages may be awarded to the Concessionaire. The other would be that due to non-achieving of conditions precedent by UPSHA, the project itself could not kick-start and in absence of any work done and the agreement having been terminated at this very nascent stage without any work being done, it would only permit the Concessionaire to either seek damages for non-achieving the condition precedent or for loss of profits which has been made part of a separate claim but a contracting party is not entitled to duplicate its claim by utilizing different terminology and heads.

163. In the instant case, admittedly, the Concession Agreement was entered and signed between the parties on 16.12.2011. It is also an admitted case that UPSHA could not provide 90% of the right of way and could not achieve its conditions precedent. It is also not disputed that the Concessionaire did not commence the work as the appointed date had not been fixed. It is also not disputed that at this very stage, the Concessionaire terminated the agreement on 13.01.2014. Thus, the reasoning given by the Arbitral Tribunal in rejecting **Claim No.1** is based on the principle of avoiding multiple and duplication of claims.

164. The Concessionaire could not be permitted to seek damages for the very same default under two or more different heads, hence, once a

reasoning has been given in the award by the Arbitral Tribunal which is a plausible one and it cannot be said that the reasoning adopted and the finding given could not have been arrived at by any prudent person or the finding is based on no evidence, such findings of the Arbitral Tribunal are final and cannot be assailed either under Section 34 or Section 37 of the Act of 1996. Thus, this Court is satisfied that there is no patent illegality committed by the Arbitral Tribunal in rejecting **Claim No.1** of the Concessionaire.

165. As far as the rejection of **Claim No.6** is concerned, upon perusal of the material on record, it would reveal that the Arbitral Tribunal has specifically taken note of **Articles 37.3** which relates to termination payments. The Arbitral Tribunal found on a conjoint reading of **Articles 37.3.1, 37.3.2** that the termination payments were payable only if the operations had commenced. From the perusal of Article 48 of the Concession Agreement which contains the definitions, it also defines the word 'operation period' which means 'the period commencing from commercial operation date till transfer'.

166. **Article 37.3.1** specifically uses the terminology 'upon termination on account of Concessionaire's default during the operation period, the authority shall pay to the Concessionaire by way of termination payment an amount equal to 90% of the debt due less the insurance cover.'

167. From the perusal of the aforesaid Article, it would be clear that the termination payments could only be claimed provided there was any default during the operation period. As already noticed above, that

operation period had not commenced and that no work was done as the conditions precedent were not met and at a very nascent stage, the contract had been terminated, hence, trying to seek another set of claim under a different head which could only arise upon a certain contingency, i.e. only if operation period had commenced, which did not happen, hence, the Concessionaire could not stake such a claim.

168. For the aforesaid reasons, this Court finds that the Arbitral Tribunal did not commit any illegality much less a patent illegality in rejecting the **Claim No.6** relating to termination payments. Hence, as far as the submissions made on behalf of the Concessionaire in respect of Appeal No. 70 of 2023 is concerned, it does not find favour with this Court.

G. SEQUITUR:-

169. For the detailed discussions and the reasons as noticed hereinabove, the Appeal No. 41 of 2025 filed by the UPSHA is partly allowed and the judgment passed by the Commercial Court in Arbitration Case No. 20 of 2018 is set aside and the award dated 06.05.2017 is partly modified to the extent that the findings relating to the Claim No. 4 are set aside and are severed from the remaining part of the Award. **Claim No. 4** relating to loss of profits shall be re-determined by the Arbitral Tribunal in accordance with law and in light of the observations made by this Court. The remaining part of the award dated 06.05.2017 shall remain intact and protected.

170. The appeal filed by the Concessionaire bearing Arbitration Appeal No. 70 of 2023 shall stand **dismissed**, as a consequence the order of the

Commercial Court dated 31.05.2023 passed in Arbitration Case No. 35 of 2023 shall stand affirmed.

171. In the aforesaid facts and circumstances, there shall be no order as to costs.

(Jaspreet Singh, J) (Arun Bhansali, CJ)

July 23, 2026
Rakesh/Asheesh/ank