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

% ***Judgment reserved on: 16.04.2026***
Judgment pronounced on: 27.04.2026

\+ O.M.P. (COMM) 400/2017

EMR CHOWDARY .....Petitioner

Through: Mr. Arjun Natarajan, Mr. Ayush Kumar & Mr. Nakul Gupta, Advocates.

versus

ENGINEERING PROJECTS INDIA LIMITED .....Respondent

Through: Mr. Manish Paliwal, Ms. Megha Yadav, Ms. Srashti Sahu & Mrs. Trupti Das, Advocates.

\+ O.M.P. (COMM) 408/2017

ENGINEERING PROJECT (INDIA) LIMITED .....Petitioner

Through: Mr. Manish Paliwal, Ms. Megha Yadav, Ms. Srashti Sahu & Mrs. Trupti Das, Advocates.

versus

ASSOCIATED CONSTRUCTION COMPANY .....Respondent

Through: Mr. Arjun Natarajan, Mr. Ayush Kumar & Mr. Nakul Gupta, Advocates.

CORAM:
HON'BLE MR. JUSTICE HARISH VAIDYANATHAN SHANKAR

<u>J U D G M E N T</u>

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1. The present Petitions, being *OMP (COMM) 400/2017* and *OMP (COMM) 408/2017*, have been filed under Section 34 of the **Arbitration and Conciliation Act, 1996**[1], challenging various findings and aspects of the common Arbitral Award dated 05.04.2017, as subsequently modified by the additional/modified award dated 19.08.2017. Since both petitions arise out of the same arbitral proceedings and involve interconnected as well as overlapping issues, they are being decided together by way of this common judgment.

2. At the outset, it is noted that both the present Petitions are in the nature of cross-objections under Section 34 of the A&C Act. It is also an undisputed position that Associated Construction Company is the sole proprietorship concern of EMR Chowdary. Accordingly, for the sake of clarity and consistency throughout this judgment, the expressions "*Associated Construction Company*" and "*EMR Chowdary*" are used interchangeably, wherever the context so requires.

BRIEF FACTS:

3. The dispute arises out of a contract pertaining to the execution of work for blast hole drilling, blasting, excavation, loading, transportation and dumping of overburden at the Gauthamkhani Open Cast Project of the **Singareni Collieries Company Limited**[2] in the State of Andhra Pradesh.

4. **Engineering Projects (India) Limited**[3], a public sector undertaking, intended to participate in the tender floated by the SCCL.

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[1] A&C Act
[2] SCCL
[3] EPI

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5. **Associated Construction Company**[4], through its proprietor EMR Chowdary, approached EPI, expressing its willingness to associate in the execution of the project and sought a copy of the **Notice Inviting Tender**[5].

6. Pursuant thereto, a pre-tender meeting was held between EPI and ACC on 03.10.2003, wherein the parties agreed upon various terms and conditions governing their relationship. It was, *inter alia*, agreed that ACC would undertake the complete execution of the work as per the tender conditions on a back-to-back basis, and that all terms applicable between SCCL and EPI would apply *mutatis mutandis* between EPI and ACC. These understandings between the parties were reduced to writing in the **Minutes of Meeting dated 03.10.2003**[6].

7. ACC submitted its offer to EPI on 06.10.2003, based on which EPI submitted its bid to SCCL. The bid of EPI was accepted by SCCL on 14.01.2004, and EPI, in turn, informed ACC of the acceptance and directed it to commence the work in terms of the understanding between the parties.

8. The SCCL issued a formal work order dated 19.01.2004 in favour of EPI for the execution of approximately 285 **Lakh Bench Cum Work**[7], followed by a target schedule dated 26.03.2004 prescribing the timelines for execution.

9. Thereafter, a **Work Order dated 14.05.2004**[8] was issued by EPI in favour of ACC for execution of the entire scope of work on an item-rate basis, with an estimated value of approximately Rs. 99.21

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[4] ACC
[5] NIT
[6] MoM
[7] LBCM
[8] Work Order

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Crores. The completion period for the said work was stipulated as 36 months in terms of the arrangement between EPI and SCCL, with the execution to be carried out in accordance with the schedule issued by SCCL.

10. The said work order made reference to, *inter alia*, the MoM, ACC's offer dated 06.10.2003, and the work order dated 19.01.2004 and letter dated 26.03.2004 issued by SCCL, and provided that the terms and conditions applicable between SCCL and EPI would apply *mutatis mutandis* between EPI and ACC on a back-to-back basis, except to the extent otherwise agreed between the parties.

11. Subsequently, in a meeting held on 30.06.2004, in view of the shortfall in achieving the stipulated monthly targets, it was mutually decided between EPI and ACC that the scope of work would be divided, and ACC would execute only 50% of the project.

12. Pursuant thereto, EPI issued a Letter of Intent dated 01.07.2004 in favour of a third party, *namely,* M/s. CGR Associates, for the remaining 50% of the work.

13. EPI thereafter issued **Amendment No. 1 dated 06.07.2004**[9] to the work order, reducing ACC's scope of work by 50% and providing for secured advance for the procurement of dumpers. **Amendment No. 2 dated 30.08.2004**[10] further modified the terms relating to repayment of the secured advance.

14. The work, however, did not proceed as contemplated, and the SCCL terminated the work order issued to EPI on 01.10.2004. Consequently, EPI terminated the work order issued to ACC on 08.10.2004.

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[9] Amendment No.1

[10] Amendment No.2

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15. Following the termination, ACC returned the equipment, including dumpers procured for the execution of the project. Thereafter, the SCCL raised a demand upon EPI towards penalty and differential cost incurred due to termination, and EPI, in turn, raised similar claims against ACC.

16. Disputes having arisen between the parties, EPI invoked the arbitration clause contained in the Agreement.

17. In terms thereof, the Chairman and Managing Director of EPI appointed a Sole Arbitrator *vide* letter dated 24.02.2006 to adjudicate the disputes, claims and counterclaims between the parties.

18. The learned Arbitrator entered upon reference upon accepting the appointment on 02.03.2006.

19. Upon completion of arbitral proceedings, the learned Arbitrator passed the **Arbitral Award dated 05.04.2017**[11]. The claims and counter-claims as adjudicated in the Impugned Award are reproduced hereunder:

> "**<u>12. Summary of the award</u>**
>
> **12.1 The award with regard to various claims filed by EPI is summarized below:**

S. No.	Description	Amount claimed in Rs.	Amount Awarded in Rs.
Claim no. 1	Penalty on unexecuted quantity	2,35,16,330.00.	1,35,41,073.52* *Subject to undertaking by EPI
Claim no. 2	Differential Cost	20,52,46,934.63	9,08,96, 719.00* *Payable by ACC only if EPI pays this amount to SCCL
Claim	Amount	9,61,896.11	(-) 27,92,282.00*

[11] Impugned Award

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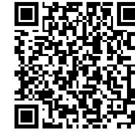

no. 3	recoverable against payment released in excess of contractual payments		*Payable by EPI to ACC. + Interest 34,20,545.00
Claim no. 4	Loss of profit	4,57,56,039.00	NIL
Claim no. 5	Interest payable against unadjusted amount	38,45,637.11	NIL
Claim no. 6	Addl. Expenditure incurred during execution of the project	10,91,406.00	NIL
Claim no. 7	Forfeiture amount of EMD and security	53,37,828.37	50,00,000.00 Mode of recovery as per the verdict of the Hon'ble Court Balance 3,20,059.67* *Included in amount under claim no.3 above.
Claim no. 8	Interest on amount claimed	Will be worked out and submitted during pleadings	1,53,46,550.00* *Subject to undertaking by EPI
Claim no. 9	Amount recoverable on account of cost and expenses of arbitration	As per actuals	NIL
			Plus interest @ 10% per annum from the 4th month from the date of award till the date of actual payment by ACC

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12.2 The award with regard to various counter claims filed by ACC is summarized below:

S. No.	Description	Amount claimed in Rs.	Amount Awarded in Rs.
Claim no. 1	Work done but not paid	36,33,382.85	27,92,282.00 + interest 34,20545.00
Claim no. 2	Loss on machinery	1,99,53,000.00	NIL
Claim no. 3	Loss on workmen etc.	96,43,500.00	NIL
Claim no. 4	Loss on vehicles	86,70,952.00	Hon'ble Court to Decide
Claim no. 5	Loss on establishment	45,70,000.00	NIL
Claim no. 6	Loss on profit and goodwill	8,88,92,646.00	NIL
			Plus interest @ 10% per annum from the 4th month from the date of award till the date of actual payment by EPI

….."

20. Subsequently, upon applications filed by both parties under Section 33 of the A&C Act before the learned Arbitrator, certain modifications were carried *vide* **Modified Award dated 19.08.2017**[12]. The modifications by the learned Arbitrator with effect to claims and counterclaims by the Modified Award are extracted herein below:

"12.1 The award with regard to various claims filed by EPI is summarized below:

S. No.	Description	Amount claimed in Rs.	Amount Awarded in Rs.
Claim no. 1	Penalty on unexecuted quantity	2,35,16,330.00.	1,35,41,073.52* *Subject to undertaking by

[12] Modified Award

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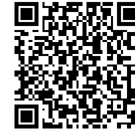

			EPI
Claim no. 2	Differential Cost	20,52,46,934.63	9,08,96, 719.00* *Payable by ACC only if EPI pays this amount to SCCL
Claim no. 3	Amount recoverable against payment released in excess of contractual payments	9,61,896.11	NIL
Claim no. 4	Loss of profit	4,57,56,039.00	NIL
Claim no. 5	Interest payable against unadjusted amount	38,45,637.11	NIL
Claim no. 6	Addl. Expenditure incurred during execution of the project	10,91,406.00	NIL
Claim no. 7	Forfeiture amount of EMD and security	53,37,828.37	50,00,000.00 Mode of recovery as per the verdict of the Hon'ble Court Balance 3,20,059.67* *Included in amount under claim no.3 above.
Claim no. 8	Interest on amount claimed	Will be worked out and submitted during pleadings	1,53,46,550.00* *Subject to undertaking by EPI
Claim no. 9	Amount recoverable on account of cost	As per actuals	**3,73,650.00** + @ 10% from

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	and expenses of arbitration		the date of payment till its realization.

12.2 The award with regard to various counter claims filed by ACC is summarized below:

S. No.	Description	Amount claimed in Rs.	Amount Awarded in Rs.
Claim no. 1	Work done but not paid	36,33,382.85	27,92,282.00 + interest 34,20545.00
Claim no. 2	Loss on machinery	1,99,53,000.00	NIL
Claim no. 3	Loss on workmen etc.	96,43,500.00	NIL
Claim no. 4	Loss on vehicles	86,70,952.00	10,08,949.00 + Interest 12,61,186.00
Claim no. 5	Loss on establishment	45,70,000.00	NIL
Claim no. 6	Loss on profit and goodwill	8,88,92,646.00	NIL
			Plus interest @ 10% per annum from the 4th month from the date of award till the date of actual payment by EPI

……"

21. Aggrieved by the Impugned Award, as modified by the Order dated 19.08.2017, both parties have preferred the present cross Petitions under Section 34 of the A&C Act before this Court.

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SUBMISSIONS ON BEHALF OF PARTIES IN OMP(COMM.) 400/2017:

ACC's Submissions

22. Learned counsel for ACC, in the Petition filed by ACC, would submit that the Impugned Award, as well as the Modified Award, is liable to be set aside as the learned Arbitrator has proceeded on fundamentally erroneous premises in fact and law. He would contend that the MoM was only a preliminary understanding and did not constitute a binding contract, particularly in the absence of any formal agreement approved by SCCL.

23. He would further submit that the learned Arbitrator has erroneously assumed the existence of binding targets from March 2004, despite the work order having come into existence only on 14.05.2004 and no agreed schedule being in place thereafter. He would argue that the learned Arbitrator has, in effect, created contractual obligations by imposing targets which were never agreed upon, and has proceeded on an imaginary schedule despite recording that no revised schedule existed.

24. Learned counsel would contend that such an approach amounts to rewriting the contract, which is impermissible in law. Reliance would be placed by the learned counsel for ACC on ***PSA Sical Terminals Pvt. Ltd. v. Board of Trustees of V.O. Chidambranar Port Trust***[13] to submit that an arbitral tribunal cannot travel beyond the contract or impose obligations *dehors* it. He would also submit that ACC was deprived of an opportunity to deal with such assumed targets, thereby violating principles of natural justice.

[13] (2023) 15 SCC 781

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25. He would further contend that the imposition of a penalty and differential cost is without a contractual basis, particularly when the learned Arbitrator himself records the absence of any agreement to share profit and loss. He would submit that no default can be attributed to ACC in the absence of a mutually agreed schedule and that ACC had duly performed during the limited period where any schedule could arguably be said to exist.

26. He would also submit that the work order does not constitute a binding contract governing *inter se* rights, and that EPI failed to perform its reciprocal obligations, which has not been duly considered. He would further contend that the rejection of counter-claims is arbitrary and unsupported by a proper appreciation of evidence.

27. He would, during the course of oral submissions, submit that the ACC's challenge is confined to Claim Nos. 1, 2, 7 and 9 and Counter Claim Nos. 2, 3, 5 and 6, and that the Impugned Award as well as the Modified Award, to that extent, is vitiated by patent illegality.

28. He would contend that in the absence of any concluded contract, the learned Arbitrator could not have imposed liabilities, and even otherwise, the Impugned award travels beyond the contractual framework in violation of Section 28(3) of the A&C Act and is bereft of reasons in violation of Section 31(3) thereof.

29. He would, therefore, pray that the Impugned Award, as modified, be set aside to the aforesaid extent.

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EPI's Submissions

30. ***Per contra***, learned counsel for EPI would submit that the present Petition is not maintainable within the limited scope of Section 34 of the A&C Act, as ACC seeks to re-agitate issues on merits which have already been adjudicated by the learned Arbitrator upon appreciation of evidence and construction of contractual documents.

31. He would submit that it is well settled that the Court does not sit in appeal over an arbitral award and cannot reappreciate evidence or substitute its own view, unless the findings are perverse or patently illegal. He would rely upon ***Associate Builders v. DDA***[14] and upon ***McDermott International Inc. v. Burn Standard Co. Ltd.***[15], to contend that findings of fact and interpretation of contract by the arbitrator are definite unless perverse.

32. He would further submit, relying on ***NHAI v. ITD Cementation India Ltd.***[16], that the construction of contractual terms falls within the domain of the arbitrator and cannot be interfered with unless the view taken is wholly unreasonable.

33. He would contend that the learned Arbitrator has rightly held that the MoM, read with the subsequent work orders dated 16.01.2004 and 14.05.2004, constitutes a binding contractual framework. He would submit that the work order dated 14.05.2004 was accepted by ACC without *demur* and expressly incorporated the SCCL terms on a back-to-back basis, thereby establishing binding obligations between the parties.

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[14] (2015) 3 SCC 49
[15] (2006) 11 SCC 181
[16] (2015) 14 SCC 21

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34. He would further contend that the plea of ACC regarding the absence of any target schedule is misconceived, as the SCCL work order prescribed the schedule, which stood incorporated by virtue of the *mutatis mutandis* clause. He would submit that the learned Arbitrator has, on appreciation of evidence, recorded a finding of persistent shortfall in performance by ACC, which, being a finding of fact, does not warrant interference under Section 34 of the A&C Act.

35. He would further submit that the learned Arbitrator has not created any new contractual obligations but has merely interpreted the existing contractual framework, and such interpretation cannot be interfered with unless wholly unreasonable. He would further submit that the Impugned award contains detailed reasons and does not suffer from any infirmity under Sections 28(3) or 31(3) of the A&C Act.

36. He would also contend that the allegation of violation of natural justice is vague and without substantiation, and that ACC was afforded full opportunity to present its case. He would submit that the award of penalty is in accordance with the contractual framework, and the learned Arbitrator has awarded only proportionate liability relatable to ACC.

37. It would further be submitted that the counter-claims of ACC have been rightly rejected on the finding that ACC was in breach, which does not warrant interference. He would, however, contend that insofar as Counter Claim No. 4 is concerned, the learned Arbitrator, in the Modified award, has erroneously awarded Rs. 10,08,949/- along with interest, which EPI has independently challenged in OMP *(COMM) 408/2017.*

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38. He would, therefore, submit that the Impugned Award is well reasoned and does not suffer from any perversity or patent illegality, to the extent of the challenge raised by ACC, warranting interference under Section 34 of the A&C Act, and the present Petition is liable to be dismissed.

SUBMISSIONS ON BEHALF OF PARTIES IN OMP(COMM.) 408/2017:

EPI's Submissions

39. Learned counsel for EPI would submit that, notwithstanding the various grounds urged in the petition, the challenge is confined to two aspects of the Impugned Award dated 05.04.2017 and the Modified Award dated 19.08.2017.

40. Firstly, he would contend that the learned Arbitrator has exceeded his jurisdiction under Section 33 of the A&C Act by awarding Counter Claim No. 4 in the Modified Award despite having consciously not awarded the same in the Impugned Award on the ground that the issue was *sub judice*. He would submit that such re-adjudication on merits amounts to a review of the award, which is impermissible under Section 33 of the A&C Act.

41. Secondly, learned counsel for EPI would submit that the learned Arbitrator has erred in making the awards under Claim Nos. 1 and 8 conditional upon the outcome of recovery proceedings with SCCL, including directing EPI to furnish an undertaking to ACC. He would contend that such conditional directions are unwarranted and contrary to the contractual framework.

42. He would, therefore, submit that the Impugned Award as well as the Modified Award suffer from patent illegality and are contrary to

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the contractual terms, and are liable to be set aside or modified to the extent challenged.

ACC's Submissions

43. ***Per contra***, learned counsel appearing for ACC, in response to the first prong of challenge raised by EPI, during the oral hearing, fairly conceded that the learned Arbitrator, in the Modified Award, rendered findings on Counter Claim No. 4 despite no such relief having been granted in the Impugned Award. He further submitted that such an exercise may not be strictly in consonance with the limited scope of Section 33 of the A&C Act, and to that extent, the modification may not be sustainable in law.

44. However, learned counsel for ACC would contend that the challenge to the conditional nature of the award under Claim Nos. 1 and 8 is misconceived.

45. Learned counsel for ACC would submit that, in view of the back-to-back contractual arrangement and the application of the principle of *mutatis mutandis*, any recovery or adjustment by SCCL from EPI would necessarily have to be passed on proportionately to ACC. He would submit that the learned Arbitrator has rightly directed EPI to furnish an undertaking to ACC in this regard, and no interference is warranted on this aspect.

ANALYSIS:

46. This Court has carefully considered the submissions advanced on behalf of both sides and, with their able assistance, has perused the Impugned and the Modified Award and the material placed before this Court for the adjudication of both Petitions.

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47. At the outset, it is apposite to note that this Court remains conscious of the limited scope of its jurisdiction while examining an objection petition under Section 34 of the A&C Act. There is a consistent and evolving line of precedents whereby the Hon'ble Supreme Court has authoritatively delineated and settled the contours of judicial intervention in such proceedings.

48. In this regard, a 3-Judge Bench of the Hon'ble Supreme Court, after an exhaustive consideration of a catena of earlier judgments, in ***OPG Power Generation Pvt. Ltd. v. Enexio Power Cooling Solutions (India) Pvt. Ltd***[17], while dealing with the grounds of conflict with the public policy of India, perversity and patent illegality, grounds which have also been urged in the present case, made the following observations, which are reproduced hereunder:

> *"**Relevant legal principles governing a challenge to an arbitral award***
>
> **30.** Before we delve into the issue/sub-issues culled out above, it would be useful to have a look at the relevant legal principles governing a challenge to an arbitral award. Recourse to a court against an arbitral award may be made through an application for setting aside such award in accordance with sub-sections (2), (2-A) and (3) of Section 34 of the 1996 Act. Sub-section (2) of Section 34 has two clauses, (*a*) and (*b*). Clause (*a*) has five sub-clauses which are not relevant to the issues raised before us. Insofar as clause (*b*) is concerned, it has two sub-clauses, namely, (*i*) and (*ii*). Sub-clause (*i*) of clause (*b*) is not relevant to the controversy in hand. Sub-clause (*ii*) of clause (*b*) provides that if the Court finds that the arbitral award is in conflict with the public policy of India, it may set aside the award.
>
> ***Public policy***
>
> **31.** "Public policy" is a concept not statutorily defined, though it has been used in statutes, rules, notification, etc. since long, and is also a part of common law. Section 23 of the Contract Act, 1872 uses the expression by stating that the consideration or object of an agreement is lawful, unless, inter alia, opposed to public policy. That is, a contract which is opposed to public policy is void.
>
> *****

[17] (2025) 2 SCC 417

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37. What is clear from above is that for an award to be against public policy of India a mere infraction of the municipal laws of India is not enough. There must be, inter alia, infraction of fundamental policy of Indian law including a law meant to serve public interest or public good.

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The 2015 Amendment in Sections 34 and 48

42. The aforementioned judicial pronouncements were all prior to the 2015 Amendment. Notably, prior to the 2015 Amendment the expression "in contravention with the fundamental policy of Indian law" was not used by the legislature in either Section 34(2)(*b*)(*ii*) or Section 48(2)(*b*). The pre-amended Section 34(2)(*b*)(*ii*) and its Explanation read:

*****

44. By the 2015 Amendment, in place of the old Explanation to Section 34(2)(*b*)(*ii*), *Explanations 1 and 2* were added to remove any doubt as to when an arbitral award is in conflict with the public policy of India.

45. At this stage, it would be pertinent to note that we are dealing with a case where the application under Section 34 of the 1996 Act was filed after the 2015 Amendment, therefore the newly substituted/added Explanations would apply [***Ssangyong Engg. & Construction Co. Ltd.* v. *NHAI*, (2019) 15 SCC 131**].

46. The 2015 Amendment adds two Explanations to each of the two sections, namely, Section 34(2)(*b*)(*ii*) and Section 48(2)(*b*), in place of the earlier Explanation. The significance of the newly inserted *Explanation 1* in both the sections is two-fold. First, it does away with the use of words : (*a*) "*without prejudice to the generality of sub-clause (ii)*" in the opening part of the pre-amended Explanation to Section 34(2)(b)(ii); and (b) "*without prejudice to the generality of clause (b) of this section*" in the opening part of the pre-amended Explanation to Section 48(2)(*b*); secondly, it limits the expanse of public policy of India to the three specified categories by using the words "*only if*". Whereas, *Explanation 2* lays down the standard for adjudging whether there is a contravention with the fundamental policy of Indian law by providing that a review on merits of the dispute shall not be done. This limits the scope of the enquiry on an application under either Section 34(2)(*b*)(*ii*) or Section 48(2)(*b*) of the 1996 Act.

47. The 2015 Amendment by inserting sub-section (2-A) in Section 34, carves out an additional ground for annulment of an arbitral award arising out of arbitrations other than international commercial arbitrations. Sub-section (2-A) provides that the Court may also set aside an award if that is vitiated by patent illegality appearing on the face of the award. This power of the Court is, however, circumscribed by the proviso, which states that an award

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

48. *Explanation 1* to Section 34(2)(*b*)(*ii*), specifies that an arbitral 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.

49. In the instant case, there is no allegation that the making of the award was induced or affected by fraud or corruption, or was in violation of Section 75 or Section 81. Therefore, we shall confine our exercise in assessing as to whether the arbitral award is in contravention with the fundamental policy of Indian law, and/or whether it conflicts with the most basic notions of morality or justice. Additionally, in the light of the provisions of sub-section (2-A) of Section 34, we shall examine whether there is any patent illegality on the face of the award.

50. Before undertaking the aforesaid exercise, it would be apposite to consider as to how the expressions:
(*a*) "in contravention with the fundamental policy of Indian law";
(*b*) "in conflict with the most basic notions of morality or justice"; and
(*c*) "patent illegality" have been construed.

In contravention with the fundamental policy of Indian law

51. As discussed above, till the 2015 Amendment the expression "in contravention with the fundamental policy of Indian law" was not found in the 1996 Act. Yet, in ***Renusagar Power Co. Ltd.* v. *General Electric Co.*, 1994 Supp (1) SCC 644**, in the context of enforcement of a foreign award, while construing the phrase "contrary to the public policy", this Court held that for a foreign award to be contrary to public policy mere contravention of law would not be enough rather it should be contrary to:
(*a*) the fundamental policy of Indian law; and/or
(*b*) the interest of India; and/or
(*c*) justice or morality.

*****

55. The legal position which emerges from the aforesaid discussion is that after "the 2015 Amendments" in Section 34(2)(*b*)(*ii*) and Section 48(2)(*b*) of the 1996 Act, the phrase "in conflict with the public policy of India" must be accorded a restricted meaning in terms of *Explanation 1*. The expression "in contravention with the fundamental policy of Indian law" by use of the word "fundamental" before the phrase "policy of Indian law" makes the expression narrower in its application than the phrase "in contravention with the policy of Indian law", which means mere contravention of law is not enough to make an award vulnerable.

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To bring the contravention within the fold of fundamental policy of Indian law, the award must contravene all or any of such fundamental principles that provide a basis for administration of justice and enforcement of law in this country.

56. Without intending to exhaustively enumerate instances of such contravention, by way of illustration, it could be said that:

(*a*) violation of the principles of natural justice;

(*b*) disregarding orders of superior courts in India or the binding effect of the judgment of a superior court; and

(*c*) violating law of India linked to public good or public interest, are considered contravention of the fundamental policy of Indian law.

However, while assessing whether there has been a contravention of the fundamental policy of Indian law, the extent of judicial scrutiny must not exceed the limit as set out in *Explanation 2* to Section 34(2)(*b*)(*ii*).

*****

Patent illegality

65. Sub-section (2-A) of Section 34 of the 1996 Act, which was inserted by the 2015 Amendment, provides that an arbitral award not arising out of international commercial arbitrations, may also be set aside by the Court, if the Court finds that the award is visited by patent illegality appearing on the face of the award. The proviso to sub-section (2-A) 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.

66. In ***ONGC Ltd.* v. *Saw Pipes Ltd.*, (2003) 5 SCC 705**, while dealing with the phrase "public policy of India" as used in Section 34, this Court took the view that the concept of public policy connotes some matter which concerns public good and public interest. If the award, on the face of it, patently violates statutory provisions, it cannot be said to be in public interest. Thus, an award could also be set aside if it is patently illegal. It was, however, clarified that illegality must go to the root of the matter and if the illegality is of trivial nature, it cannot be held that award is against public policy.

67. In ***Associate Builders* v. *DDA*, (2015) 3 SCC 49**, this Court held that an award would be patently illegal, if it is contrary to:

(*a*) substantive provisions of law of India;

(*b*) provisions of the 1996 Act; and

(*c*) terms of the contract [See also three-Judge Bench decision of this Court in ***State of Chhattisgarh* v. *SAL Udyog (P) Ltd.*, (2022) 2 SCC 275**].

The Court clarified that if an award is contrary to the substantive provisions of law of India, in effect, it is in contravention of Section 28(1)(*a*) of the 1996 Act. Similarly, violating terms of the contract, in effect, is in contravention of Section 28(3) of the 1996 Act.

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68. In ***Ssangyong Engg. & Construction Co. Ltd.* v. *NHAI*, (2019) 15 SCC 131** this Court specifically dealt with the 2015 Amendment which inserted sub-section (2-A) in Section 34 of the 1996 Act. It was held that "patent illegality appearing on the face of the award" refers to such illegality as goes to the root of matter, but which does not amount to mere erroneous application of law. It was also clarified that what is not subsumed within "the fundamental policy of Indian law", namely, the contravention of a statute not linked to "public policy" or "public interest", cannot be brought in by the backdoor when it comes to setting aside an award on the ground of patent illegality [See ***Ssangyong Engg. & Construction Co. Ltd.* v. *NHAI*, (2019) 15 SCC 131**]. Further, it was observed, reappreciation of evidence is not permissible under this category of challenge to an arbitral award [See ***Ssangyong Engg. & Construction Co. Ltd.* v. *NHAI*, (2019) 15 SCC 131**].

Perversity as a ground of challenge

69. Perversity as a ground for setting aside an arbitral award was recognised in ***ONGC Ltd.* v. *Western Geco International Ltd.*, (2014) 9 SCC 263**. Therein it was observed that an arbitral decision must not be perverse or so irrational that no reasonable person would have arrived at the same. It was observed that if an award is perverse, it would be against the public policy of India.

70. In ***Associate Builders* v. *DDA*, (2015) 3 SCC 49** certain tests were laid down to determine whether a decision of an Arbitral Tribunal could be considered perverse. In this context, it was observed that where:

(*i*) a finding is based on no evidence; or

(*ii*) an Arbitral Tribunal takes into account something irrelevant to the decision which it arrives at; or

(*iii*) ignores vital evidence in arriving at its decision, such decision would necessarily be perverse.

However, by way of a note of caution, it was observed that when a court applies these tests it does not act as a court of appeal and, consequently, errors of fact cannot be corrected. Though, 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. It was also observed that 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 that score.

71. In ***Ssangyong Engg. & Construction Co. Ltd.* v. *NHAI*, (2019) 15 SCC 131**, which dealt with the legal position post the 2015 Amendment in Section 34 of the 1996 Act, it was observed that a decision which is perverse, while no longer being a ground for challenge under "public policy of India", would certainly amount to a patent illegality appearing on the face of the award. It was pointed out that an award based on no evidence, or which ignores vital evidence, would be perverse and thus patently illegal. It was

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also observed that a finding based on documents taken behind the back of the parties by the arbitrator would also qualify as a decision based on no evidence inasmuch as such decision is not based on evidence led by the parties, and therefore, would also have to be characterised as perverse [See ***Ssangyong Engg. & Construction Co. Ltd.* v. *NHAI*, (2019) 15 SCC 131**].

72. The tests laid down in ***Associate Builders* v. *DDA*, (2015) 3 SCC 49** to determine perversity were followed in ***Ssangyong Engg. & Construction Co. Ltd.* v. *NHAI*, (2019) 15 SCC 131** and later approved by a three-Judge Bench of this Court in ***Patel Engg. Ltd.* v. *North Eastern Electric Power Corpn. Ltd.*, (2020) 7 SCC 167**.

73. In a recent three-Judge Bench decision of this Court in ***DMRC Ltd.* v. *Delhi Airport Metro Express (P) Ltd.*, (2024) 6 SCC 357**, the ground of patent illegality/perversity was delineated in the following terms: (SCC p. 376, para 39)

> "*39*. In essence, the ground of patent illegality is available for setting aside a domestic award, if the decision of the arbitrator is found to be perverse, or so irrational that no reasonable person would have arrived at it; or the construction of the contract is such that no fair or reasonable person would take; or, that the view of the arbitrator is not even a possible view. A finding based on no evidence at all or an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside under the head of "patent illegality". An award without reasons would suffer from patent illegality. The arbitrator commits a patent illegality by deciding a matter not within its jurisdiction or violating a fundamental principle of natural justice."

Scope of interference with an arbitral award

74. The aforesaid judicial precedents make it clear that while exercising power under Section 34 of the 1996 Act the Court does not sit in appeal over the arbitral award. Interference with an arbitral award is only on limited grounds as set out in Section 34 of the 1996 Act. A possible view by the arbitrator on facts is to be respected as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon. It is only when an arbitral award could be categorised as perverse, that on an error of fact an arbitral award may be set aside. Further, a mere erroneous application of the law or wrong appreciation of evidence by itself is not a ground to set aside an award as is clear from the provisions of sub-section (2-A) of Section 34 of the 1996 Act.

75. In ***Dyna Technologies (P) Ltd.* v. *Crompton Greaves Ltd.*, (2019) 20 SCC 1**, paras 27-43, a three-Judge Bench of this Court held that courts need to be cognizant of the fact that arbitral awards are not to be interfered with in a casual and cavalier manner, unless the court concludes that the perversity of the award goes to the root

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of the matter and there is no possibility of an alternative interpretation that may sustain the arbitral award. It was observed that jurisdiction under Section 34 cannot be equated with the normal appellate jurisdiction. Rather, the approach ought to be to respect the finality of the arbitral award as well as party's autonomy to get their dispute adjudicated by an alternative forum as provided under the law."

49. In the aforesaid backdrop, the challenge raised by ACC in *OMP (COMM) 400/2017* and the limited challenge laid by EPI in *OMP (COMM) 408/2017* are required to be examined.

I. ACC'S CHALLENGE:

50. In ***OMP (COMM) 400/2017***, ACC has confined its challenge to the findings rendered in respect of Claim Nos. 1, 2, 7 and 9, as well as Counter Claim Nos. 2, 3, 5 and 6, as adjudicated in the Impugned Award and the Modified Award.

Binding Contract

51. The principal contention urged by ACC is that no binding contract came into existence between EPI and ACC and that the MoM was merely a preliminary understanding and not a concluded contract. This contention stands rejected by the learned Arbitrator, and this Court finds no infirmity in the said finding. The relevant finding in the Impugned Award is reproduced hereunder:

"**10.0 WHETHER THERE WAS A VALID, LEGAL AND BINDING CONTRACT BETWEEN EPI AND ACC?**

10.1 Before taking up the claims and counter claims, it is necessary to determine if there was a valid, legal and binding contract between both parties. On a thorough perusal of documents submitted and the verbal arguments by both the parties it is noted that the first document submitted by EPI as Exhibit C-1 and by ACC as Enclosure page 1 is the letter dated 03.10.2003 from ACC in which ACC have clearly mentioned about EPI's intention to participate in the tender for the subject work and ACC were keen to associate with EPI in execution of work on back to back basis. ACC agreed to submit EMD and all the securities as per

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NIT and accept the conditions stipulated in the NIT. ACC requested EPI to issue a set of tender documents.

10.2 Further, when the meeting was held on 03.10.2003, ACC agreed that all terms and conditions between EPI and SCCL shall be applicable "mutatis mutandis". These were in addition to the terms and conditions of the tender invited by EPI. ACC agreed to engage sufficient experienced engineers and supervisory staff and construction plant and equipment for execution of the work from their existing stock or leasing/ purchasing of these equipment from market meaning that ACC had some of the machinery required for execution of such projects in their existing stock. ACC agreed to arrange all securities as per NIT and arrange all finance required for execution of project. It is expected that while submitting the tender, ACC would have known the scope of work, working conditions at site and all terms and conditions of work. No bidder shall give an offer for work of this magnitude without knowing the scope of work, site conditions and terms and conditions. It is important to note that even before receiving a letter dated 16.01.2004 from EPI requesting ACC to make arrangements for commencement of work, ACC vide their letter dated 17.12.2003 informed EPI that they had entered into a pretender tie up and to execute the work and started mobilizing their machinery. ACC stated that apart from the existing machinery ACC were planning to procure few new machinery. It is quite evident that ACC agreed to commence work even on the basis of the MOM.

10.3 In a letter dated 27.02.2004 to EPI, ACC stated that they had made all arrangement for the finances for procurement of 45 vehicles and other connected machinery except excavators and proposed to procure 4 excavators at an estimated cost of Rs. 4 cr. ACC requested EPI to enter into a lease agreement with the financer directly for a maximum exposer of Rs.3.5 cr. ACC mentioned that necessary agreement in the required format of EPI shall be signed by them or a clause to this effect may be included in the contract agreement.

10.4 The Work Order was placed later by EPI on 14.05.2004 when the site work was in progress and this was accepted by ACC. During hearing held on 02.09.2016, ACC stated that they had started the work at site and subsequently EPI issued amendment to the order with the consent of ACC. In response to a quarry from me, ACC confirmed that the reasons given by the Claimant for issuing amendment were considered by ACC and then ACC gave their unconditional consent to EPI and ACC continued their work till termination. ACC mentioned that the problems started after termination of the contract.

10.5 It may be noted from the above that if MOM or the letter from EPI asking for commencement of work were not valid, legal or binding, ACC were within their rights not to commence the work.

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In fact, even before EPI's letter dated 16.01.2004, ACC had intimated EPI about commencement of work and mentioned that they had started mobilizing their machinery. ACC have submitted a letter dated 20.12.2003 in which they informed EPI about the existing equipment and their plans to obtain on lease/procure new equipment for project implementation. This is in contradiction to the background information furnished by ACC where they stated that ACC did not have earth moving equipment, tippers and other infrastructure to take up the work and. EPI promised to help by financing the procurement of machinery etc.

10.6 I find that even after placement of Work Order on 14.05.2005, ACC did not write to EPI or insist for any agreement or any other document. In letter dated 17.06.2004, ACC mentioned about equipment deployment, progress of work at site, financing of new equipment, proposal for withdrawal of 50% scope of work, secured advance etc. ACC informed that they had booked six TATA tippers available with M/s. Jasper Industries, Vijayawada. I have not been able to find any letter on record from ACC questioning the legality and validity of the MOM and the work order until termination of work of ACC.

10.7 I have examined the records submitted by the parties and their oral arguments, The contents of the Writ Petition filed by EPI have also been examined. The relevant findings of the Hon'ble High Court are reproduced hereunder

Quote

……….At the outset, it is to be noted that the Work Order deals with the scope and nature of the work, quantities and value of the work, work completion schedule, payment terms, rates of payment, penalty for delay in works apart from other conditions with regard to security deposits, forfeiture of deposits. It also provides for termination of work in case the progress of work is not satisfactory or if it is found essential to expedite the works. Thus, it is clear that all the rights and liabilities of the parties are regulated by the terms and conditions specified in the Work Order itself.

………..

The Writ Petition was dismissed by the Hon'ble High Court

Unquote

Considering the above, I hold that the MOM between ACC & EPI dated 03.10.2003 and the Work Order No. DLI/CON/466/282 dated 14.05.2004 are valid, legal and binding between the parties."

52. A perusal of the above-stated finding reflects a continuous chain of documents evidencing a concluded contractual relationship. It is undisputed that ACC itself approached EPI *vide* letter dated

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03.10.2003 expressing its willingness to execute the work on a back-to-back basis, and in the meeting held on the same date, agreed to the essential terms governing the arrangement, including incorporation of SCCL terms *mutatis mutandis*.

53. It is also not in dispute that ACC proceeded to act upon the arrangement even prior to execution of the formal work order, as is evident from its communication dated 17.12.2003 regarding mobilisation of machinery. In this regard, the work order dated 14.05.2004 was subsequently accepted by ACC without *demur* and expressly incorporated the MoM, ACC's offer, and the SCCL work order as part of the contractual framework.

54. The learned Arbitrator has also rightly noticed the inconsistency in ACC's stand. While disputing the binding nature of the MoM and the work order, ACC has simultaneously founded its counterclaims on the very same documents. Such a position cannot be sustained, as a party cannot both approbate and reprobate the same transaction. The finding of the learned Arbitrator that a valid and binding contractual framework existed between the parties is thus a finding based on the material on record and does not warrant interference under Section 34 of the A&C Act.

55. ACC's further contention that no binding monthly targets existed, particularly in the absence of any revised schedule, does not merit acceptance. As rightly held by the learned Arbitrator, a binding contractual framework existed between the ACC and EPI. The work order dated 14.05.2004 expressly incorporates the SCCL schedule dated 26.03.2004, and the MoM, which stipulates that SCCL terms

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would apply *mutatis mutandis*. Thus, the performance schedule formed an integral part of the contractual arrangement.

56. This position is further reinforced by the conduct of ACC at the meeting held on 30.06.2004, where it acknowledged the shortfall in achieving the stipulated targets and proposed corrective measures. The subsequent Amendment No.1, providing for the recovery of penalties or liquidated damages imposed by SCCL from ACC, further underscores that the schedule and corresponding obligations were known to and accepted by ACC. The document constitutes an admission to the factual matrix as espoused by the Respondent and which stands accepted by the learned Arbitrator.

57. In this view, the contention that the learned Arbitrator has created obligations *dehors* the contract is misconceived. The learned Arbitrator has merely construed and applied the contractual framework in light of the contemporaneous record and the conduct of the parties. The reliance placed by ACC on ***PSA Sical Terminals Pvt. Ltd.*** *(supra)* is, therefore, misplaced, as the said findings do not travel beyond the contractual framework but are firmly rooted within it.

58. Having held so, the consequences of ACC's failure to adhere to its performance obligations, as determined by the learned Arbitrator, now fall to be considered in the context of the claims under challenge.

Claim No. 1

59. The challenge to Claim No. 1 pertaining to penalty on the unexecuted quantity rests, at its core, on the submission that no binding monthly targets existed, and that the learned Arbitrator has, in effect, created contractual obligations by imposing a schedule that was never agreed upon between EPI and ACC.

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60. The said submission has already been addressed and rejected in the context of the challenge to the binding nature of the contractual framework. Having held that the work order dated 14.05.2004, read with the MoM and the SCCL schedule dated 26.03.2004, constituted a binding contractual arrangement, and that the performance obligations thereunder were known, acknowledged and accepted by ACC, most evidently from its conduct at the meeting of 30.06.2004, the foundational premise of ACC's challenge to Claim No. 1 does not survive.

61. The learned Arbitrator, upon appreciating the material produced before him, has correctly noted that the reduction of ACC's scope to 145 LBCM consequent upon the meeting of 30.06.2004 did not exonerate ACC from its prior defaults.

62. As is apparent, and which aspect is not contested, the said meeting was called precisely because of ACC's persistent underperformance, and ACC's agreement to the reduction constitutes an acknowledgement of its inability to carry out the Contract as originally agreed upon. The same cannot be construed to be in the nature of a release from any liability, but in fact, points in the contrary direction. Accordingly, the learned Arbitrator computed the penalty on the unexecuted quantity under ACC's revised scope of 145 LBCM, arriving at Rs. 1,35,41,073.52 after setting off the penalty of Rs. 23,16,379.60 already recovered from ACC's running bills.

63. ACC's further submission that the learned Arbitrator proceeded on an imaginary schedule despite recording the absence of a revised schedule is also misconceived. Contrary to the said submission, it is noted that the learned Arbitrator proceeded on the SCCL schedule as

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incorporated by the contractual framework, which was the only schedule in existence. The absence of a separately negotiated revised schedule as between EPI and ACC does not create a vacuum; it simply means that the incorporated SCCL schedule continued to govern. The amendment no.1 itself expressly stated that the revised schedule would be mutually agreed upon, which never happened, as the contractual arrangement was terminated before any such agreement could be reached.

64. Giving effect to the aforesaid circumstances and in the absence of a revised schedule, the learned Arbitrator correctly applied the original targets as adjusted proportionately for the reduced scope, which is precisely the approach ACC had itself proposed at the 30.06.2004 meeting when it undertook to achieve 6 LBCM per month.

65. The contention that the imposition of a penalty is without a contractual basis is equally unsustainable. Clause 8 of Annexure-A to the SCCL work order dated 19.01.2004, incorporated *mutatis mutandis* into the EPI-ACC framework, which expressly provides that where the contractor fails to complete the total work, a penalty @ 15% will be levied on the value of work left unexecuted. It is noted that SCCL had already imposed penalties on EPI under this clause and adjusted the same from EPI's bills. Therefore, the recovery of a proportionate share of those penalties from ACC, as the party whose underperformance caused the termination, is a straightforward application of the contractual framework and of the back-to-back principle that governed the parties throughout.

66. This Court finds no merit in the contention that the learned Arbitrator has created any obligation *dehors* the contract. The

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obligation in question is traceable to the contractual framework, and its existence as well as quantum stand supported by the material placed before the learned Arbitrator.

67. Therefore, the present challenge, in substance, seeks a reappreciation of factual findings and does not warrant interference under Section 34 of the A&C Act.

Claim No. 2

68. As regards the challenge to Claim No. 2, which pertains to the differential cost arising from SCCL entrusting the unexecuted work to a third party at a higher rate, the learned Arbitrator, by holistically applying and considering the contractual scheme, has rightly held that the ACC is obliged to bear the said cost imposed upon EPI on a conditional basis. The recovery from ACC has been made contingent upon EPI having actually incurred, or being held liable to incur, such differential cost towards SCCL.

69. The afore-said approach espoused by the learned Arbitrator is consistent with the back-to-back arrangement governing the parties, whereby ACC's liability is co-extensive with that of EPI. By recognising the claim while deferring its enforceability to the crystallisation of liability, the learned Arbitrator has adopted a course that is both contractually consistent and equitable. The challenge to this finding, therefore, does not merit acceptance.

Claim No. 7

70. Moving to the challenge pertaining to Claim No. 7, ACC contends that in the absence of any concluded contractual arrangement, the learned Arbitrator has nonetheless granted the said claim in favour of EPI, thereby warranting interference under Section

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34 of the A&C Act. The said premise having already been rejected, the challenge to this claim is rendered largely academic.

71. Insofar as the security deposit of 1% of the value of work executed is concerned, it is relevant to note that the learned Arbitrator, in the Modified Award, has clarified that the amount of Rs. 3,20,059.67 representing the said security deposit was already adjusted and dealt with under Claim No. 3, and the separate endorsement of that amount under Claim No. 7 was redundant and has accordingly been deleted. However, the said correction was not contested, and ACC itself agreed that there was confusion regarding the same and that the correction was warranted. Therefore, the net position under Claim No. 7 as it stands, in the Modified Award, is confined to the EMD of Rs. 50,00,000/-.

72. As regards the EMD of Rs. 50 lakhs, the learned Arbitrator has directed that the mode of recovery shall abide by the verdict of the competent court before which the matter is pending. This Court finds no infirmity in that approach. The subject matter underlying the EMD claim is *sub judice* before a competent court, and this Court expresses no opinion thereon. The said direction to abide by the court's verdict avoids the risk of conflicting determinations and is a sound and judicious course. Consequently, the challenge to Claim No. 7 does not merit acceptance.

Claim No. 9

73. To the extent Claim No. 9 is concerned, which pertains to arbitration costs, the learned Arbitrator, in the Impugned Award, directed that each party shall bear its own costs. However, the learned Arbitrator had, by order sheets forming part of the record, directed

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that EPI, having paid the outstanding Arbitrator's fee on behalf of ACC, would be entitled to recover the same.

74. In the Modified Award, the learned Arbitrator quantified the said amount at Rs. 3,73,650/- along with interest. The contention of ACC that the learned Arbitrator could not have revisited the claim under Section 33 of the A&C Act does not merit acceptance. The said direction regarding recovery of the arbitrator's fee is distinct from the general claim for costs. The same emanates from a specific direction recorded during the arbitral proceedings and forms part of the award.

75. The said modification does not amount to a fresh adjudication of Claim No. 9 but is in the nature of giving effect to an already recorded direction by incorporating the quantified amount. Such a correction falls within the scope of Section 33 of the A&C Act.

76. It is also not in dispute that ACC had failed to discharge its share of the Arbitrator's fee despite opportunities and agreed schedules, necessitating payment by EPI to avoid disruption of the proceedings. In these circumstances, the direction permitting recovery of the said amount cannot be faulted.

77. Accordingly, this Court is not inclined to interfere with the findings on Claim No. 9.

<u>Counter-Claim Nos. 2, 3, 5 and 6</u>

78. Turning to the counter-claims assailed by ACC, *namely*, Counter Claim Nos. 2, 3, 5 and 6, pertaining to loss on machinery, loss on workmen, loss on establishment, and loss on profit and goodwill, respectively, this Court finds that each has been rejected by the learned Arbitrator upon a considered appreciation of the evidence on record, and that none of the rejections discloses any perversity or

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patent illegality warranting interference under Section 34 of the A&C Act.

79. Insofar as *Counter Claim No. 2* for loss on machinery is concerned, ACC claimed Rs. 1,99,53,000/- representing compensation allegedly paid to machinery and vehicle owners for three months following termination. Before the learned Arbitrator, ACC tendered cash vouchers in support. The learned Arbitrator subjected these vouchers to scrutiny and found them to be suspicious, as most of the payments were made in cash to unnamed or unidentified individuals, the vouchers were largely unsigned, and several did not even disclose the name of the payee to whom payment was allegedly made.

80. At the same instance, ACC even failed to produce any hire agreements or contemporaneous letters engaging the machinery owners for the full project period, which would have been the foundational document to establish any legal obligation to pay compensation upon premature termination.

81. In the absence of such evidence, the learned Arbitrator rightly declined to act upon the cash vouchers alone. Since the said finding is based on the evidentiary record perused sincerely by the learned Arbitrator and in view of the ruling in ***OPG Power*** *(supra),* this Court deems it appropriate not to interfere with the above finding.

82. As regards *Counter Claim No. 3*, the learned Arbitrator, upon examining the lists of workers submitted by ACC, noticed a pattern of irregularity that goes to the root of the authenticity of the claim. Since identical names appeared in identical sequence across multiple categories of workers, the same individuals were listed as drivers, signalmen, tripper helpers, and water tank drivers simultaneously. The

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total number of workmen also varied between the counter-claim statement and ACC's supporting additional documents, with no explanation for the discrepancy. The promissory notes submitted by ACC purportedly reflecting loans taken to fund compensation payments were for amounts exceeding four times the quantum of the counter-claim itself, a disproportion that the learned Arbitrator found incapable of explanation.

83. In these circumstances, the rejection of Counter Claim No. 3 is not merely a plausible view; it is the only reasonable conclusion available on such material. Therefore, a finding resting on fabricated or unreliable documents cannot be said to be perverse simply because it goes against ACC. Consequently, the challenge to this finding fails.

84. In respect of *Counter Claim No. 5*, the learned Arbitrator has observed that such costs are ordinarily embedded in the quoted rates for execution of the work and cannot be claimed separately in the absence of cogent evidence. The documents relied upon by ACC, being unverified and unsupported, were found insufficient. The said finding is in accord with the contractual framework, and also based upon rigorous scrutiny of the material produced, and therefore does not warrant interference.

85. Insofar as *Counter Claim No. 6* is concerned, the learned Arbitrator has declined the claim in the absence of any material establishing that ACC would have earned the projected profits, particularly in view of its own underperformance.

86. In the present case, no such evidentiary foundation was laid. ACC had consistently failed to meet the stipulated monthly targets and did not demonstrate the capacity to execute the work at the

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required scale. In such circumstances, the claim of 15% profit on the balance work is speculative and unsupported by material on record. On the same footing, the claim for loss of goodwill is also unsupported by any material indicating reputational or commercial harm. In this light, the said approach of the learned Arbitrator is consistent with settled principles governing the award of damages and does not disclose any infirmity.

87. In view of the settled principles laid down in ***OPG Power*** *(supra),* the rejection of the aforesaid claims and counter-claims does not suffer from perversity or patent illegality, nor does it disclose any infirmity on the touchstone of Section 28(3) or 31(3) of the A&C Act, and consequently does not warrant interference under Section 34 of the A&C Act thereof.

II. EPI'S CHALLENGE:

88. In ***OMP (COMM) 408/2017***, EPI has confined its challenge to two aspects of the award as modified on 19.08.2017, the first relating to Counter Claim No. 4 and the second relating to the conditional nature of the award under Claim Nos. 1 and 8.

Counter-Claim No. 4

89. In respect of counter claim no.4, it was fairly conceded on behalf of ACC during the course of arguments that in the Impugned Award, the learned Arbitrator had consciously declined to adjudicate the said counter claim on the ground that the said issue stood *sub judice* before a competent court.

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90. This Court notes that the learned Arbitrator, in the Impugned Award, restrained himself and consciously refrained from rendering any finding on the subject matter of Counter Claim No. 4.

91. However, by way of the Modified Award, passed on an application under Section 33 of the A&C Act, the learned Arbitrator proceeded to award a sum of Rs. 10,08,949/- in favour of ACC under the said counter-claim. The scope of Section 33 thereof, however, is limited to correction of clerical, computational or similar errors, or to dealing with claims which were omitted from the award and does not extend to a case where the learned Arbitrator has consciously declined to adjudicate a claim, as such a decision cannot be treated as an omission within the meaning of said provision.

92. In the present case, the non-adjudication of Counter Claim No. 4 by the learned Arbitrator in the Impugned Award was deliberate and supported by reasons and was lawfully valid. The subsequent Modified Award of the said claim, under the guise of modification, amounts to a re-adjudication on merits, which falls outside the scope of Section 33 of the A&C Act.

93. Considering the foregoing findings, as well as the statement made by learned counsel for ACC during the course of oral submissions fairly conceding the error in such adjudication by the learned Arbitrator, this Court is of the considered view that the modification dated 19.08.2017, to that extent, cannot be sustained in law. Accordingly, the challenge laid by EPI on this ground is upheld.

<u>Claim Nos. 1 and 8</u>

94. The second limb of challenge pertains to the conditional nature of the award under Claim Nos. 1 and 8, whereby the learned

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Arbitrator directed that any recovery would be subject to the outcome of EPI's proceedings with SCCL, coupled with a direction to furnish an undertaking to ACC.

95. This challenge does not merit acceptance. The conditionality flows from the back-to-back arrangement governing the parties, as reflected in the MoM and the work order. The rights and liabilities of ACC were structured to be co-extensive with those of EPI *vis-à-vis* SCCL. In such a framework, any variation in the liability of EPI towards SCCL would necessarily impact the corresponding liability of ACC.

96. The direction requiring EPI to furnish an undertaking ensuring proportionate adjustment is, therefore, consistent with the contractual arrangement and avoids unjust enrichment. The approach adopted by the learned Arbitrator is both equitable and in consonance with the contractual framework; therefore, no ground for interference is made out.

CONCLUSION:

97. In view of the foregoing discussions and analyses, ***OMP (COMM) 400/2017*** filed by ACC is dismissed. The findings of the learned Arbitrator on the existence of a binding contractual framework, the applicability of performance obligations thereunder, and the claims and counter-claims assailed by ACC are either findings of fact, based on appreciation of evidence or plausible constructions of the contractual terms, and do not warrant interference under Section 34 of the A&C Act.

98. Insofar as ***OMP(COMM) 408/2017*** filed by EPI is concerned, the same is partly allowed. The modification dated 19.08.2017, to the

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extent it awards a sum of Rs. 10,08,949/- together with interest of Rs. 12,61,186/- in favour of ACC under Counter Claim No. 4, is set aside, being beyond the scope of Section 33 of the A&C Act. Save to the aforesaid extent, the said Petition is dismissed.

99. In view of the aforesaid terms, both Petitions, being *OMP (COMM) 400/2017* and *OMP (COMM) 408/2017*, along with pending applications, if any, stand disposed of.

100. No order as to costs.

HARISH VAIDYANATHAN SHANKAR, J.

APRIL 27, 2026/jk

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