2025 INSC 1171

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL No. OF 2025
(ARISING OUT OF SLP (C) NO. 2706 OF 2024)

SEPCO ELECTRIC POWER CONSTRUCTION CORPORATION ... APPELLANT

VERSUS

GMR KAMALANGA ENERGY LTD. ...RESPONDENT

J U D G M E N T

AUGUSTINE GEORGE MASIH, J.

1. Leave granted.
2. The instant Civil Appeal, arising from Special Leave Petition (Civil) No. 2706 of 2024, assails the Judgment dated 27.09.2023 in ARBA (ICA) No. 1 of 2023 (hereinafter, "Impugned Judgment") by Division Bench of the High Court of Orissa (hereinafter, "High Court"), moved under Section 37 of the Arbitration and Conciliation Act, 1996 (hereinafter, "1996 Act") read with Section 13 of the Commercial Courts

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Reason:

Act, 2015 by the sole Respondent herein, being, GMR Kamalanga Energy Limited (hereinafter, "GMRKE Limited").

3. Vide the Impugned Judgment, the appeal was allowed to the effect that Judgment dated 17.06.2022 in ARBP (ICA) No. 1 of 2021 as passed by the Single Judge of the High Court under Section 34 of the 1996 Act (hereinafter, "Section 34 Judgment") was set aside along with the Award dated 07.09.2020 (as corrected on 17.11.2020) (hereinafter, "Arbitral Award"), both of which were rendered in favour of the sole Petitioner herein being SEPCO Electric Power Construction Corporation (hereinafter, "SEPCO"). This was done through framing of the following issues by the Division Bench of the High Court:

> *"A. Whether the Tribunal interpreted the contractual provisions correctly in assessing that issuance of contractual notices is a condition precedent? If so, then can the condition of issuance of notice be waived and whether a party can claim estoppel consequent thereto?*
>
> *xxx xxx xxx*
>
> *B. Whether the Tribunal based its analysis and findings on mistaken facts?*

xxx xxx xxx

C. Whether the Tribunal's interpretation of the contractual provisions shocks the conscience of the Court?

xxx xxx xxx

D. Whether the Ld. Single Judge was correct in dismissing the Section 34 petition at the stage of admission without considering all the arguments made by the parties?

xxx xxx xxx

E. In light of the above whether the orders of the Ld. Single Judge and the Ld. Arbitral Tribunal have 'shocked the conscience of this Court', or 'are contrary to the basic notions of justice', or 'are in express violation of Section 28(3) of the A&C Act', which necessitates interference by this Court under Section 37 of the A&C Act?"

4. The factual matrix, as presented before us by SEPCO is that it was an Engineering, Procurement, and Construction (hereinafter, "EPC") Contractor which entered into numerous agreements with GMRKE Limited with the objective of construction of three 350 Mega Watt coal-fired thermal power plants at the village of Kamalanga in District Dhenkanal of state of Odisha (hereinafter collectively, "Project" and individually, "Unit 1", "Unit 2" and "Unit 3") on behalf of the latter and its operations thereof.

The details of the aforesaid agreements are as follows:

a. Agreement for Civil Works and Engineering, Erection, Testing and Commissioning dated 28.08.2008, bearing Contract No. GMR-SEPCO-03 (hereinafter, "CWEETC Agreement")
b. Guarantee and Co-ordination Agreement dated 28.08.2008 (hereinafter, "GCA")
c. Onshore Supply Agreement dated 28.08.2008, bearing Contract No. GMR-SEPCO-02 (hereinafter, "Onshore Supply Agreement")
d. Offshore Supply Agreement dated 28.08.2008, bearing Contract No. GMR-SEPCO-01 (hereinafter, "Offshore Supply Agreement")

(hereinafter collectively, "EPC Agreements")

5. A fourth 350 Mega Watt equivalent plant (hereinafter "Unit 4") was proposed and also included as part of the aforesaid agreements through amendment(s) dated 31.05.2010, amending the Milestone Dates and the prices of

the contract in the EPC Agreements. However, the work in relation to the said Unit 4 was suspended by GMRKE Limited in August 2011.

6. Subsequently, owing to delays in the Project, parties met at Jinan City, People's Republic of China. This led them to agree and execute the Minutes of Meeting dated 07.11.2012 (hereinafter, "Jinan Agreement").

7. As numerous disputes are said to have arisen between the parties, SEPCO went on to demobilize from the sites of construction of the concerned Project midway, around January 2015. Following all the apparent disagreements, SEPCO is said to have issued a Notice of Dispute dated 30.03.2015 against GMRKE Limited. This was followed by Notice of Arbitration dated 08.06.2015 by SEPCO leading to constitution of an arbitral tribunal comprising three members (hereinafter, "Arbitral Tribunal").

8. The status of the aforesaid agreements, at the time of beginning of the arbitration between the parties was as follows:

    a. CWEETC Agreement as amended by Amendment No. 1 to the CWEETC

Agreement dated 26.05.2009, Amendment No. 2 to the CWEETC Agreement dated 31.05.2010, Amendment No. 3 to the CWEETC Agreement dated 15.02.2011, and Amendment No. 4 to the CWEETC Agreement dated 04.04.2013 (hereinafter, "Amended CWEETC Agreement")

b. GCA as amended by Amendment No. 1 to the GCA dated 31.05.2010 (hereinafter, "Amended GCA")

c. Onshore Supply Agreement as amended by Amendment No. 1 to the Onshore Supply Agreement dated 26.05.2009, Amendment No. 2 to the Onshore Supply Agreement dated 31.05.2010, and Amendment No. 3 to the Onshore Supply Agreement dated 15.02.2011 (hereinafter, "Amended Onshore Supply Agreement")

d. Offshore Supply Agreement as amended by Amendment No. 1 to the Offshore Supply Agreement dated 18.05.2009, Amendment No. 2 to the Offshore Supply Agreement dated 26.05.2009, and Amendment No. 3 to the Offshore Supply

Agreement dated 31.05.2010 (hereinafter, "Amended Offshore Supply Agreement")

(hereinafter collectively, "Amended EPC Agreements")

9. During the period between 27.04.2016 and 07.09.2020, pleadings and submissions were pressed by the parties before the Arbitral Tribunal leading to framing of 27 issues. SEPCO presented before the Arbitral Tribunal that it had achieved its Milestone Dates for Unit 1 on 09.05.2013, for Unit 2 on 18.11.2013, and for Unit 3 on 03.06.2014 through completion of Reliability Run Test, and GMRKE Limited took control of the Units 1 and 2 on 23.11.2013, which was contested by the latter.

10. One of the key contentions, as raised by SEPCO before the Arbitral Tribunal, and which is also germane to the dispute before us, was that there was no condition precedent for contractual notices to be sent by SEPCO to GMRKE Limited under the Amended CWEETC Agreement for want of explicit wording to said effect in the concerned sections for procedural mandates,

namely Sections 4.2.5 and 7.3.2. Despite acknowledging no adducing of evidence by SEPCO on compliance of notices, the Arbitral Tribunal focused on the entitlement of waiver or estoppel. It placed reference to the email dated 18.03.2012 inviting cooperation by GMRKE Limited through Mr Rao for waiver of condition of notices and the acceptance thereof by SEPCO on 29.03.2012. Despite the contention of GMRKE Limited on such an impossibility owing to the "No Oral Modification" clause, equitable estoppel was deemed to have arisen in March 2012.

11. Subsequently, the Arbitral Tribunal, vide its Arbitral Award, determined the claims, as raised by the parties, in an all-embracing manner, being germane to delays, contractual obligations, defects, and the resulting financial entitlements under the Amended EPC Agreements. As to their Jinan Agreement, while SEPCO was held to have been granted extension of time, there was no substitution of the original dates of the milestones. Therein, with saving of the financial entitlements of the parties, claims

pre-dating the said agreement were observed to have been settled. As to the considerations for possession of land, its access and security thereof, breaches were ascribed to GMRKE Limited, including their failure to erect a boundary wall within a reasonable timeframe, as stipulated, and denial on their part to SEPCO for non-exclusive access to the Project site. While these lapses on the part of GMRKE Limited were observed not to invariably postpone the overall progress of the project, the Arbitral Tribunal observed that disturbances caused by the villagers in the area and deficiencies vis-à-vis handing over the project site caused delays which ought to be compensated.

12. Referencing the technical obligations, GMRKE Limited was held liable for their further failure to provide SEPCO with coal and fuel oil, which was compliant and in the requisite quantity. This was observed to have caused quantifiable delays in the Project. However, on the other hand, the claim for additional sums, allegedly owing to modifications made to the 400 kilovolt

switchyard was rejected in favour of SEPCO, remarking that there was no lodging of the alleged claim of variation by SEPCO. While a need for determination on claims arising from "Change in Law" was rejected, the net effect of determining all the claims in juxtaposition with customs clearance by the Arbitral Tribunal was that the obstruction(s) caused by GMRKE Limited gave rise to a recovery in favour of SEPCO. Even the suspension of Unit 4 for the Project by GMRKE Limited, being beyond the threshold of six months' limit, was not legal as per the Amended EPC Agreements, for which, SEPCO was entitled to reimbursement.

13. On consideration of the counterclaims, the Arbitral Tribunal went on to hold that SEPCO was liable for delayed payment of liquidated damages and defects caused on their end, namely, attemperation flow, HFO system, fly ash removal, and ash handling. Damages were accordingly determined. Moreover, the bank guarantees, as invoked by GMRKE Limited were upheld, same being subject to restitution of amounts which were observed to be retained

improperly on their part.

14. Therefore, the determination of the Arbitral Award gave a net effect that GMRKE Limited was liable to pay approximately INR 995 Crores to SEPCO.

15. The relevant portion of the Arbitral Award, summarizing the final award, is reproduced below:

> "***XXXIV. AWARD***
>
> *2338. For the reasons set forth above, the Tribunal decides and awards as follows:*
>
> *(1) Awards and orders* ***GKEL to pay SEPCO*** *forthwith the amounts of –*
>
> *a.* ***USD 480,000, CNY 730,527,024*** *and* ***INR 29,477,436****; and*
>
> *b.* ***USD 94,361,218.24*** *being the sum drawn down under the bank guarantees.*
>
> *(2) Awards and orders* ***SEPCO to pay GKEL*** *forthwith the amounts of* ***CNY 262,707,471*** *and* ***INR 2,339,989,308.***
>
> *(3) Declare that GKEL is entitled to set off all sums due and owing to it against any sum that may be found otherwise due and owing to SEPCO.*"

16. Assailing the Arbitral Award, GMRKE Limited moved the Single Judge of the High Court under

Section 34 of the 1996 Act raising the contentions that the unfair treatment of the parties and adjudicating the case *dehors* the pleadings showcased procedural as well as legal errors on behalf of the Arbitral Tribunal.

17. Elaborating, it contended that the CWEETC Agreement stood modified by the Arbitral Tribunal to the effect that the parties had waived the need to issue contractual notices, despite an express provision, being Section 25.5.3 of the Amended CWEETC Agreement, establishing otherwise. Moreover, the Arbitral Tribunal had erred in placing reliance upon GMRKE Limited's email dated 18.03.2012 to observe the aforesaid and estopping them from seeking contractual notices, notwithstanding that the said email was merely to rescind the Notice of Suspension dated 07.03.2012 by SEPCO, that too only when GMRKE Limited had established Letters of Credit of USD 12,660,000 (US Dollars 12 Million Six Hundred and Sixty Thousand only) and USD 11,450,000 (US Dollars 11 Million Four Hundred and Fifty Thousand only).

18. The preceding contentions are referred to further contend that it is therefore that the Arbitral Tribunal barred GMRKE Limited from raising the defence vis-à-vis lack of contractual notices on behalf of SEPCO in connection with their claims, namely, Grid Synchronisation, Fuel Oil, Coal, and Unit Characteristics Test-Performance Guarantee Test. This led SEPCO being awarded prolongation costs of roughly INR 70 Crores to INR 80 Crores, therewith reducing the liquidated damages, which would have been owed towards GMRKE Limited by SEPCO, to the tune of approximately INR 100 Crores.

19. Referring to the discriminating and unfair treatment, GMRKE Limited pressed into service the denial of their counterclaims to the tune of at least INR 150 Crores by the Arbitral Tribunal, observing want of notice on their part. Cumulatively, it is asserted that the amount of prejudice caused towards GMRKE Limited is in the neighbourhood of INR 300 Crores.

20. Touching upon the decision of Arbitral Tribunal being *dehors* the pleadings, it was emphasized

on behalf of GMRKE Limited that SEPCO had, at the outset, never asserted a waiver or estoppel against GMRKE Limited apropos the events, incidents, and/or communications of March 2012. Rather, equivalent contention raised by SEPCO with respect to those from March 2010 was rejected by the Arbitral Tribunal in paragraph 226 of the Arbitral Award. Assailing the fabrication of its own theory on estoppel, GMRKE Limited insisted that it was not allowed to present any evidence on the aforesaid issue.

21. Concluding, it alleged that such a conduct on part of the Arbitral Tribunal is *ultra vires* the jurisdiction which it was vested with through the contours of the Amended EPC Agreements between the parties, and also Section 18 and Section 34 Sub-Section 2 Clause (a) Sub-Clause (iii) of the 1996 Act, wherefore calling for setting aside of the Arbitral Award. To substantiate the said claims, GMRKE Limited relied upon decisions of this Court in ***Ssangyong Engineering and Construction Company Limited v. National Highways Authority of***

India (NHAI)[1], Associate Builders v. Delhi Development Authority[2], and a 5-Judge Bench decision of Supreme Court of United Kingdom in ***Rock Advertising Limited v. MWB Business Exchange Centres Limited[3]***.

22. Rejecting the claims raised by GMRKE Limited, the Singe Judge of High Court vide its Section 34 Judgment observed that within the scheme of the 1996 Act, Section 12 Sub-Section 3, and Section 13 provide for a mechanism in regard to ability of the parties to challenge the partiality of arbitrators. However, no such mechanism was moved on behalf of GMRKE Limited contemporaneously to the proceedings before the Arbitral Tribunal. Allegations which are raised in relation to Section 18 and Section 34 Sub-section 2 Clause (a) sub-clause (iii) of the 1996 Act are unsupported by any evidence and therefore, mere allegations cannot be allowed to establish bias and discrimination on the part of the Arbitral Tribunal.

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[1] (2019) 15 SCC 131
[2] (2015) 3 SCC 49
[3] [2018] UKSC 24

23. Referring to paragraph 191 of the Arbitral Award, the Single Judge in its Section 34 Judgment highlighted that the Arbitral Tribunal had acknowledged the contention by GMRKE Limited that claims of SEPCO, as raised in the said context, were untenable owing to the absence of contractual notices as per the Amended CWEETC Agreement. It is to settle the said proposition, Single Judge observed, the Arbitral Tribunal went on to determine whether notice was a condition precedent as per the terms therein in paragraphs 199 and 200 of the Arbitral Award, and it was observed that while numerous sections of the Amended CWEETC Agreement, namely, Sections 4.3.5, 4.11.1.1, 4.11.2.1, and 4.11.3.1, explicitly established it to be a condition precedent, different provisions were invoked in the instant case.

24. It further acknowledged that the claim of SEPCO vis-à-vis events, incidents, and/or communications of March 2010 was rejected owing to their failure to produce or deduce evidence to the aforesaid contention. This stands in contrast to apparent equitable

estoppel arising through the email dated 18.03.2012 as sent by GMRKE Limited, whereby the representative on their behalf clarified that further contractual notices would not be required, and the same was also affirmed through the Jinan Agreement.

25. Further referencing Para 294 of the Arbitral Award, it was observed by the Single Judge of the High Court that the Arbitral Tribunal, notwithstanding Section 25.5.3 of the Amended CWEETC Agreement, which forbade oral revisions in the terms without written consent from both the parties, opined its reliance on the equitable estoppel on facts and the submissions raised on behalf of the parties before it. This was despite a reference by GMRKE Limited on ***Rock Advertising Limited (supra)*** to press into service that an estoppel cannot override a clause of "No Oral Modification" except for unequivocal representation and reliance thereof.

26. Sewing up the Section 34 Judgment in favour of SEPCO, it also clarified that the judicial interference is only permitted in cases where

arbitral awards are shocking to the conscience or which go against the most fundamental principles of justice. Determining no violation of Section 18 or Section 34 Sub-section 2 Clause (b) Sub-Clause (ii) of the 1996 Act had been proven as the Arbitral Tribunal had taken into account the contractual clauses and relevant facts before reaching its decision, the Single Judge of the High Court, albeit debatably so, held the Arbitral Award did not merit any interference.

27. Aggrieved by the affirmation and upholding of the Arbitral Award by the Single Judge of the High Court vide its Judgment dated 17.06.2022, GMRKE Limited initially moved this Court in Petition for Special Leave to Appeal (Civil) No. 12194 of 2022, wherein, while the operation of the Section 34 Judgment was stayed vide Order dated 25.07.2022, on 15.05.2023, observing that GMRKE Limited has undertaken to move the Division Bench of the High Court under Section 37 of the 1996 Act, seeking setting aside of the Arbitral Award as

well as the Judgment dated 17.06.2022, this Court disposed of the matter.

28. Thereafter, as GMRKE Limited moved the Division Bench of the High Court vide ARBA (ICA) No. 1 of 2023, the latter, while considering the first issue raised before it, being, whether the tribunal interpreted the contractual provisions correctly in assessing that issuance of contractual notices is a condition precedent? If so, then can the condition of issuance of notice be waived and whether a party can claim estoppel consequent thereto?, determined it through a two-fold path.

29. Firstly, it answered whether the condition of issuance of contractual notices can be waived? On this, reliance was placed on the Indian Contract Act, 1872 (hereinafter, "ICA 1872") for analytical clarity, as it was postulated as per Section 62 thereof that if the contracting parties agree to substitute a new contract or, for that matter, rescind or alter the original one, the original contract no longer needs to be performed. Emphasis has been laid on

"agreement", requiring *consensus ad idem*[4], as well as a clear declaration of willingness to alter. In its juxtaposition, Section 63 of the ICA 1872 codifies the English principle, according to which, it allows the promisee to unilaterally waive or remit performance, extend the term, or accept an alternative satisfaction without regard for consideration. It was also noted by the Division Bench that this dispensation doctrine has been limited through jurisprudence as developed by the courts of India.

30. Elaborating on the aforementioned jurisprudence of Section 63 of the ICA 1872, the Division Bench of the High Court referred to decision of this Court in ***Jagad Bandhu Chatterjee v. Nilima Rani and Others***[5]**,** wherein this Court further referenced ***Waman Shriniwas Kini v. Ratilal Bhagwandas and Co.***[6] to affirm that a waiver under the mandate of Section 63 of the ICA 1872 did not require any consideration or even an agreement as it is

[4] Agreement as to the same thing
[5] (1969) 3 SCC 445
[6] 1959 SCC OnLine SC 120

merely an intentional abandonment of the right(s) of the promisee. Similarly, a waiver was interpreted as consensual through decision of this Court in ***P. Dasa Muni Reddy v. P. Appa Rao***[7] and therefore observed that it required deliberate relinquishment with mutual comprehension and cannot result from a miscommunication or any involuntary behaviour. This was then also reiterated by this Court in ***All India Power Engineer Federation and Others v. Sasan Power Limited and Others***[8] through clarification that a waiver requires deliberate and explicit intention to relinquish a known right.

31. Regarding alteration under Section 62 of the ICA 1872, reference was drawn by the Division Bench on decision of this Court in ***Chrisomar Corporation v. MJR Steels Private Limited and Another***[9] which had upheld the decision of High Court of Calcutta in ***Juggilal Kamlapat v. N.V. Internationale Crediet-En-***

[7] (1974) 2 SCC 725
[8] (2017) 1 SCC 487
[9] (2018) 16 SCC 117

Handels Vereeninging 'Rotterdam' (alias Rotterdam Trading Co. Ltd.)[10], to iterate that an alteration made should go to the root of the concerned contract and must displace its core meaning, and in such an absence of creation of an independent agreement, the original one remains in effect.

32. Answering the question, reliance was placed on ***MMTC Limited v. Vedanta Limited***[11], and ***PSA Sical Terminals Private Limited v. Board of Trustees of V.O. Chidambranar Port Trust Tuticorin and Others***[12] (authored by one of us, being Justice B.R. Gavai, as he then was) to observe that courts are prohibited from rewriting contracts, so it is crucial to identify the true intent of alteration or waiver when interpreting commercial instruments. In these cases, the arbitral mandate is limited to the terms of the agreement.

33. Secondly, the Division Bench dealt with whether the parties can claim estoppel in the given

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[10] 1952 SCC OnLine Cal 250
[11] (2019) 4 SCC 163
[12] (2023) 15 SCC 781

circumstances. Herein, it was observed in the Impugned Judgment that the legal maxim *allegans contraria non est audiendus*[13], being the foundation of the Doctrine of Estoppel, forbids raising of contradicting claims by the parties, especially when such a reliance results in detriment. Taking support from the decision of this Court in ***Pratima Chowdhury v. Kalpana Mukherjee and Another***[14], it clarified that estoppel by conduct necessitates an existing and unambiguous fact as legislated through Section 115 of the erstwhile Indian Evidence Act, 1872, and also fairness, and exclusion of truth. Moreover, the decisions of this Court in ***Provash Chandra Dalui and Another v. Biswanath Banerjee and Another***[15] and ***B.L. Sreedhar and Others v. K.M. Munireddy (Dead) and Others***[16] had explicitly distinguished estoppel from waiver, with the latter being an intentional relinquishment of one's right.

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[13] A person who alleges contradictory facts is not to be heard
[14] (2014) 4 SCC 196
[15] 1989 Supp (1) SCC 487
[16] (2003) 2 SCC 355

34. Therefore, ascertaining from the material on record, it was observed to be established that estoppel was barred by the parties through their adherence and inclusion of “No Waiver” and “No Oral Modification” clauses, making the contrary view of the Arbitral Tribunal an untenable one.

35. Affirming the subsequent issue, being, whether the tribunal based its analysis and findings on mistaken facts, the Division Bench of the High Court elaborated that the SEPCO had claimed a breach of the CWEETC Agreement vis-à-vis quality of coal, and the Arbitral Tribunal had erroneously recorded the amended coal moisture range in paragraph 606 of the Arbitral Award as 9 to 12 percent rather than the correct figures admittedly being 7 to 15 percent. Placing reliance on this erroneous recording, the Arbitral Tribunal, ruling against GMRKE Limited, failed to acknowledge the moisture levels actually being between 13.7 percent and 14.6 percent, as revealed by the analysis of the expert in paragraph 649 of the Arbitral Tribunal. Opining thereof, the Arbitral Tribunal was observed to have distorted the liability and

the computation of the liquidated damages, and it also wrongly attributed the delays owing to mill choking or bunker chuting to GMRKE Limited.

36. Dealing with the third issue, as to whether the tribunal's interpretation of the contractual provisions shocks the conscience of the court, the Division Bench adopted a trinal approach.

37. The foremost contention to be ascertained was that whether SEPCO was entitled to delay related damages for prolongation and or disruption costs, given the express terms of the contract, was determined through reference to Section 16.4 of the Amended CWEETC Agreement, which postulates that termination payments required documentation of subcontractor settlement and actual costs. SEPCO had claimed CNY 248,833,587 (Chinese Yuan Two Hundred Forty Eight Million Eight Hundred Thirty Three and Five Hundred Eighty Seven) for undelivered equipment for Unit 4, which was suspended. This claim, however, was later updated using Billing Break-Up valuations that were not backed by ledgers. Despite the

objection raised by GMRKE Limited, the Arbitral Tribunal only relied upon the audit conducted by an assistant of one Mr Prudhoe, excluding the disclosures. It was observed that despite no evidence of payments to subcontractors and the acclaimed settlement agreements being hearsay, more than INR 200 Crores were awarded. This was, the Division Bench of the High Court observed, clearly a jurisdictional error on part of the Arbitral Tribunal in contravention to the principles laid down in the decisions of this Court in ***Oil & Natural Gas Corporation Ltd. v. Saw Pipes Ltd.***[17], and ***Associated Engineering Co. v. Government of Andhra Pradesh and Another***[18] and decision to this effect by High Court of Delhi in ***Mecamidi S.A. v. Flovel MG Holdings Private Limited and Another***[19].

38. The ensuing contention was to ascertain that the agreements excluded the common law right of termination, such as acceptance of

[17] (2003) 5 SCC 705
[18] (1991) 4 SCC 93
[19] 2019 SCC OnLine Del 9414

repudiatory breaches. Herein, the Division Bench of the High Court elaborated that the termination rights were "comprehensive and exclusive" under Section 4.16 of the Amended CWEETC Agreement. However, by ignoring Section 16.3.1 and thereby revising the agreement, the Arbitral Tribunal erroneously observed in paragraphs 961 to 963 of the Arbitral Award that common law termination remedies survived. This is a direct contravention of the explicit prohibition in the Onshore Supply Agreements and the Amended CWEETC Agreement. Moreover, the Arbitral Tribunal, by recognizing SEPCO's letters from 2014 and demobilization as an acknowledgement of "repudiatory breaches" in paragraphs 965 and 967 of the Arbitral Award, granted a claim which was abandoned post-hearing when SEPCO relied on termination by Letter dated 31.03.2016.

39. Dealing with the tertiary consideration vis-à-vis ascertaining that the SEPCO was liable to receive 5 percent of the contractual price upon completion of the tests, the Division Bench

observed that in accordance with Sections 6.1.5.1, 6.1.7.1(a) of the Amended CWEETC Agreement, the Performance Guarantee Test required the Reliability Run Test and the Unit Characteristics Test. Nevertheless, the Arbitral Tribunal granted INR 255 Crores, recognized the Performance Guarantee Test as "successfully completed", even though it had declared that the Unit Characteristics Test for Unit 1 failed due to excessive attemperator flow, inadequate Induced Draft fans, and loud noise. The Arbitral Tribunal further disregarded inconsistencies in Reliability Run Test protocols demonstrating systematic failures, such as ash management, Heavy Fuel Oil, and High-Pressure feedwater systems, and design flaws discovered in all units, with same being recorded in paragraph 1094 of the Arbitral Award. It was therefore held that the Arbitral Tribunal travelled beyond its authority by revising the milestone conditions and rewriting the contract, being also in contrast to observations in the aforesaid decisions in ***Saw Pipes (supra)*** and ***Associated Engineering***

(supra), calling for setting aside of the Arbitral Award.

40. Moving on to the fourth issue, the Division Bench was to ascertain whether the Single Judge was correct in dismissing the Section 34 petition at the stage of admission without considering all the arguments made by the parties. On this, it articulated that the Single Judge of the High Court, while dealing with the contentions of the parties at the stage of admission, formulated issues on creation of an un-pleaded case by the Arbitral Tribunal, on rewriting of the contracts through waiver of notices, and whether the waiver so inculcated applied bilaterally amongst the parties. Commenting on the decision of the Single Judge, the Division Bench remarked that despite admitting that the decision of the Arbitral Tribunal on waiver was based on scant or no evidence, it was still affirmed by wrongly placing reliance on Mr Rao's email dated 18.03.2012, and further observed that the Arbitral Award did not "shock the conscience" in accordance with ***Associate Builders (supra)***,

thereby refusing to interfere under Section 34 of the 1996 Act. It was therefore alleged by GMRKE Limited that this alleged error of waiver of notice had struck at the root of the issue of prolongation costs arising from suspension of the Unit 4. The Division Bench further observed that Section 12 Sub-Section 3 read with Section 13 of the 1996 Act mandated a prompt challenge on alleged bias by the Arbitral Tribunal within 15 days. Accordingly, citing the decision of House of Lords in ***Porter v. Magill***[20] and of this Court in ***N.K. Bajpai v. Union of India and Another***[21], both the forums rightly ruled that belated claims of bias were unsustainable.

41. Fifthly, the Division Bench of the High Court determined that in light of the above, whether the orders of the Single Judge and the Arbitral Tribunal have "shocked the conscience of this Court", or "are contrary to the basic notions of justice", or "are in express violation of Section 28(3) of the A&C Act", which necessitates

[20] [2002] 2 AC 357 : [2001] UKHL 67
[21] (2012) 4 SCC 653

interference under Section 37 of the 1996 Act. Hereby, the High Court observed that the interpretation by Arbitral Tribunal of the terms of the contract in the instant case, specifically with regard to SEPCO's right to delay related damages for costs associated with prolongation and disruption, and Arbitral Tribunal's conclusion that the said agreements did not include the common law right of termination, constitutes a flagrant breach of the contract(s) between the parties.

42. Observing that the Arbitral Tribunal shocked the conscience of the court by exceeding its jurisdiction and also changing the terms of the contract through a total disregard of the specific terms, it further reiterated that any award that disregards the binding precedents as laid down through numerous decisions of this Court can be set aside on grounds of violating fundamental policy of Indian law. In a similar vein, unequal treatment of the parties by the Arbitral Tribunal amounts to violation of natural justice under Section 18 of the 1996 Act. The Division Bench, on this basis, observed

that the Arbitral Tribunal dismissed the counterclaims of GMRKE Limited for alleged lack of notice, even though it had observed that the parties had waived contractual notifications. Collectively, the Bench further remarked that it goes against the fundamental ideas of justice to reword the clauses of "No Oral Modification" and "No Waiver". Therefore, placing reliance on the decisions of this Court in ***Larsen Air Conditioning and Refrigeration Company v. Union of India and Others***[22] and a 3-Judge Bench decision in ***Project Director, National Highways No.45 E and 220 National Highways Authority of India v. M. Hakeem and Another***[23], (where one of us, Justice B.R. Gavai, as he then was, was a member) the Arbitral Award was set aside.

43. It is, therefore, in this mode that the Division Bench of the High Court allowed the appeal moved by GMRKE Limited through ARBA (ICA) No. 1 of 2023 and consequently set aside the Section 34 Judgment and the Arbitral Award.

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[22] 2023 INSC 708 : (2023) 15 SCC 472
[23] (2021) 9 SCC 1

44. Assailing the Impugned Judgment, SEPCO moved this Court through filing of Petition for Special Leave to Appeal (Civil) No. 2706 of 2024 and raised seven propositions.

45. Learned Senior Advocate on behalf of SEPCO, while contending of the scope for interference under Section 34 of the 1996 Act, placed reliance on decision by a 3-Judge Bench of this Court in ***Renusagar Power Co. Ltd. v. General Electric Co.***[24] to assert that a mistake of fact or law by the arbitrator, for that purpose, does not call for an interference of the courts to set aside such an award and moreover, a mere contravention of law does not attract the bar of public policy. Further supporting the applicability of the ***Renusagar (supra)*** on India seated arbitral awards, reliance was placed on ***Saw Pipes (supra)***.

46. Referencing another 3-Judge Bench decision of this Court in ***Oil and Natural Gas Corporation Limited v. Western Geco International Limited***[25], which was

[24] 1993 Supp 3 SCR 22 : 1994 Supp (1) SCC 644
[25] (2014) 9 SCC 263

pronounced before the 246th Law Commission Report could be given effect to, it was asserted that an award would be adjudicated to be contrary to the "fundamental policy of Indian law" if there's a violation of doctrine of *audi alteram partem*[26], judicial approach has not been followed by the arbitrator, or the award falls outside the scope of doctrine of Wednesbury Reasonableness in terms of its perversity.

47. Equivalent reliance has been placed on decisions of this Court in ***Associate Builders (supra)***, ***HRD Corporation (Marcus Oil and Chemical Division) v. GAIL (India) Limited***[27], ***Ssangyong Engineering (supra)***, and ***Gemini Bay Transcription Private Limited v. Integrated Sales Service Limited and Another***[28] (Justice B.R. Gavai, as he then was, was also a member of the Bench) to argue that the instant Arbitral Award ought not to have

[26] Hear the other side.
[27] (2018) 12 SCC 471
[28] (2022) 1 SCC 753

been interfered with by the Division Bench of the High Court.

48. Bringing the decision of this Court in a recent 3-Judge Bench decision in ***Delhi Metro Rail Corporation Limited v. Delhi Airport Metro Express Private Limited***[29] to our attention, wherein one of us (Justice B.R. Gavai, as he then was) was also a member, it was asserted that interference with an arbitral award cannot frustrate the "commercial wisdom behind opting for alternate dispute resolution", merely because an alternative view exists.

49. Secondly, a two-fold proposition was raised on behalf of SEPCO. At the foremost, substantiating its assertion that the grounds not urged before a lower court cannot be raised before a superior court, for which reliance was placed on a 5-Judge Bench decision of this Court in ***Daman Singh and Others v. State of Punjab and Others***[30]. It further pressed into service that it is not unheard of that a court does not pass findings on every issue raised in the

[29] (2024) 6 SCC 357
[30] (1985) 3 SCR 580 : (1985) 2 SCC 670

petition or concerned written submission(s). An appellate court ought not to concern itself as to why a contention is not dealt as part of the judgment or order. To aid its secondary assertion that at the stage of admission, the matter can be heard at length, including on merits, and the appeal can be dismissed if the court finds it devoid of merit or otherwise not maintainable, reliance was placed on ***Bolin Chetia v. Jogadish Bhuyan and Others***[31], the relevant paragraph of which, being 14, reads as follows:

> *"14. Reference was made by the Bombay High Court to Golcha Investment (P) Ltd. v. Shanti Chandra Barna [(1970) 3 SCC 65 : AIR 1970 SC 1350] wherein while interpreting Chapter XLII of the Bombay High Court Rules (Rules 965, 966, 966-A thereof), this Court has observed that such of the appeals as are not required to be placed for admission are entitled to be admitted as a matter of course. The decision was explained by the Division Bench of the Bombay High Court. We are inclined to extract and reproduce the following passages from the judgment of the Bombay High Court in S.P. Khanna case [1976 Tax LR 1740 (Bom)] : (Tax LR pp. 1741-42, paras 6-7)*
>
> > *'In the constitution of such appeal and its procedure, the stage of admission, like the one of final hearing after issue of notice,*

[31] (2005) 6 SCC 81

appears to us as inherent. Matters are placed for admission with a view to enable the Court to apply its mind to controversy and to find out whether the order questioned calls for reconsideration by the higher court. This is usually done by giving hearing to the party-appellant. It is implicit that at that stage the Court may adjudicate by finding against the petitioning appellant and upholding the order impugned. Such adjudication at the stage of admission of appeal is part of the jurisdiction of the appellate court and we have doubt whether that jurisdiction could be affected if it is explicitly granted by the statute by framing a rule of procedure. Placing the matters for admission before the Court are not mere matters of procedure but also involve exercise of judicial authority by the appellate court. Normally if the authority is conferred by the statute, we would be loath to hold that its effectiveness would stand curtailed by any procedural rule disabling the Court, of its power of hearing the appeal and pronouncing at the stage of admission about the merits of the appeal by finding out whether the same deserves further consideration by the Court.

All this process involved in 'admission' has clear juridical efficacy and recognition. It subserves the dynamics to have a speedy and sure disposal of matters brought before the higher forums in the judicial hierarchy. The Code of Civil Procedure permits expressly the rejection of appeals at admission stage by enacting provision like Order 41 Rule 11 CPC. Even without such a provision, we would think that it would be inbuilt (sic) (inbred) in the appellate jurisdiction enabling the Court to hear the appellant as to the matter brought before it

and reject the appeal which may prima facie have no merit or may suffer from the defects of untenability, limitation as well of incompetency. This stage, which is treated as admission stage of an appeal, appears to protect the litigation from waste of costs as well of public and private time. That can effectively check meritless and vexatious litigations. All these considerations must be kept in view while considering the form of appeal provided by statute. Provisions of Section 483 and the appeal thereunder cannot be treated as an exception and as erasing out all these juridical as well as judicious considerations inherent in the admission stage of an appeal. We can well observe that the stage of admission of appeals in company matters is neither superfluous nor unnecessary. In fact that posits serious exercise of appellate authority full of judicial consequences. Unless there is something expressly dispensing with that stage, it would be neither just nor proper to hold that in the appeals under Section 483 there cannot be a hearing at the admission stage. We have already indicated that what was observed in Golcha case [(1970) 3 SCC 65 : AIR 1970 SC 1350] was with reference to the rule of this Court and nothing more. That observation cannot further be strained or logically extended as laying down that in an appeal under Section 483 of the Act the appellate court is powerless at the stage of admission to find out the merit of the appeal or is disabled from rejecting it though it may be worthless. It is well settled that possible logical extensions from the ratio of a judgment surely are not part of the ratio itself and it is hazardous to apply precedents in that manner.'

We agree with this statement of law."

50. Thirdly, asserting on the scope of interference under the Section 37 of 1996 Act, it is contended that the scope under this section is narrower than that of Section 34 of the 1996 Act and the court while exercising its power under Section 37 of the 1996 Act, must only ascertain that the court under Section 34 of the 1996 Act did not exceed its jurisdiction, citing decisions of this Court in ***MMTC Limited (supra)***, ***Reliance Infrastructure Limited v. State of Goa***[32], and a 3-Judge Bench decision in ***UHL Power Company Limited v. State of Himachal Pradesh***[33].

51. Furthermore, on its proposition that estoppel is an exception, rather a safeguard, to the "No Oral Modification" clause(s), learned Senior Advocate sought support from the majority opinion of 5-Judge Bench decision of the Supreme Court of United Kingdom in ***Rock Advertising Limited (Supra)***, and a unanimous decision of 5-Judge

[32] (2024) 1 SCC 479
[33] (2022) 4 SCC 116

Bench of Court of Appeal of Singapore in ***Charles Lim Teng Siang & Anr v. Hong Choon Hau & Anr***[34] to press in service that law safeguards a situation wherein the parties seeking to not rely on a no oral modification clause may do so through conduct and also, across the schools of thought vis-à-vis legal effect of the no oral modification clause, all three recognize the doctrine of equitable estoppel as an exception. A reference was also made to decision of the High Court of Bombay in ***John Distilleries Pvt. Limited v. Brihan Maharashtra Sugar Syndicate Limited***[35] wherein an oral alteration to the bottling charges were upheld and it was observed that validity of such clauses, being outside the scope of jurisdiction under Section 34 of the 1996 Act, is immaterial.

52. To assert that rule of hearsay is not applicable on expert witnesses, the learned Senior Advocate cited the decision by a 3-Judge Bench of Court of Appeal (Criminal Division) of

[34] [2021] SGCA 43
[35] 2019 SCC OnLine Bom 67

England and Wales in ***R. v. Abadom***[36] and by Single Judge of the Chancery Division of the High Court of United Kingdom in ***English Exporters Pty. Ltd. v. Eldonwall***[37] to contend that reliance can be placed on work of others who are engaged in the same field. It is further asserted that as per English law, the damages can be awarded based on guesswork, and courts ought to reasonably assess the damages as far as possible whereby precise calculation is impossible. Reference in this regard was made to decision of King's Bench in ***Chaplin v. Hicks***[38] and a decision of Court of Appeal (Civil Division) of England and Wales in ***Soteria Insurance Limited v. IBM United Kingdom Limited***[39]. Decision of this Court in ***Construction and Design Services v. Delhi Development Authority***[40] was also brought to our attention to assert that a court can proceed on guesswork as to the quantum of

[36] [1983] 1 WLR 126
[37] [1973] 1 Ch 415
[38] [1911] 2 KB 786
[39] [2022] EWCA Civ 440
[40] (2015) 14 SCC 263

compensation to be allowed.

53. Lastly, it is contended on behalf of SEPCO that a termination clause would not exclude a party's right under common law to terminate on account of a repudiatory breach through reference to Page 552 of the 30th edition of Anson's Law of Contract, which postulates:

> *"A contract may contain a clause setting out the circumstances and conditions upon which one party shall have the right to terminate by reason of the other party's breach. Such a clause may make clear that a particular term is a condition of the contract so that the rules of termination for breach of condition, discussed above, will then apply.* [*Union Eagle Ltd. vs. Golden Achievement Ltd.; [1997] AC 514] But the clause may be drafted more generally to provide a remedial regime (including the right for the innocent party to terminate the contract) for breach of contract in specified circumstances [Lombard North CEntral ple v. Butterworth; [1987] QB 527], and it may refer to a standard of breach which is different from that which gives rise to the right to terminate at common law—such as where the breach is 'material', which has been held to cover breaches which are less than 'fundamental', but where it is more than trivial or minimal.[Dalkia Utilities Services Plc v Celtech International Ltd; EWHC 63 (Comm)] The party seeking to rely on such a clause must establish strictly that the clause entitles it to terminate in relation to the breach which has occurred [Rice v. Great Yarmouth Borough Council; (2001) 3 L.G.L.R. 4 (CA)], and the Courts will not hold that the common law right*

to terminate for repudiatory breach has been excluded by an express termination clause without clear words showing such an intention. [Dalkia Utilities Services Plc v Celtech International Ltd; EWHC 63 (Comm)] Moreover, the exercise of the right to terminate under an express termination clause will not normally constitute affirmation of the contract so a s to deprive the innocent party of the right to claim its remedies for breach at common law, at least where the clause provides a right to terminate at common law which corresponds to a right under the general law (eg because the breach goes to the root of the contract). [*Stocznia Gdynia SA v Gearbulk Holdings Ltd; [2009] EWCA Civ 75]"*

54. Moreover, it was pressed that a termination clause does not apply in situations where a right to termination is identified in common law, as iterated by decision of Queen's Bench in ***Vinergy International (Pvt.) Ltd. v. Richmond Mercantile Limited FZC***[41] and as also observed by the Arbitral Tribunal in paragraph 962 of the Arbitral Award through reliance on decision of House of Lords in ***Gilbert-Ash (Northern) Limited v. Modern Engineering (Bristol) Limited***[42] it is asserted that one starts with the presumption that neither party intends

[41] [2016] EWHC 525 (Comm)
[42] [1974] AC 689

to abandon any remedies for its breach arising by operation of law, and clear express words must be used in order to rebut such a presumption.

55. On the other hand, opposing the aforesaid contentions, learned Senior Advocate on behalf of GMRKE Limited has extensively reiterated its successful claims before the Division Bench of the High Court and brought to our attention numerous aforementioned case laws and the materials on record to showcase and validate its claims. Therefore, the same are not being reiterated for having been laid down by us while referencing the Section 34 Judgment.

56. We have heard the submissions raised on behalf of the parties at length and also, through their assistance, perused the material on record which has been analytically brought to our attention.

57. Before we delve into the determination of the issues raised before this Court by the parties, it is apposite to refer to the jurisprudence of Section 34 and 37 of the 1996 Act. The verbatim

text of the provisions of Section 34 of the 1996 Act posits the wisdom of the legislature hence:

> ***"34. Application for setting aside arbitral award.***—
>
> *(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).*
>
> *(2) An arbitral award may be set aside by the Court only if—*
>
> *(a) the party making the application furnishes proof that—*
>
> *(i) a party was under some incapacity, or*
>
> *(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or*
>
> *(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or*
>
> *(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration: Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters*

not submitted to arbitration may be set aside; or

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

(b) the Court finds that—

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

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

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

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

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

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

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

(2A) 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.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal:

Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.

(4) On receipt of an application under sub-section (1), the Court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award.

(5) An application under this section shall be filed by a party only after issuing a prior notice to the other party and such application shall be accompanied by an affidavit by the applicant endorsing compliance with the said requirement.

(6) An application under this section shall be disposed of expeditiously, and in any event, within a period of one year from the date on which the notice referred to in sub-section (5) is served upon the other party."

58. Modelled on Article 34 of the UNCITRAL Model Law on International Commercial Arbitration, 1985, Section 34 of the 1996 Act provides for a recourse to a court against an arbitral award and thereby allows for moving of an application for setting aside arbitral awards. Numerous authors have reiterated that the 1996 Act only allows for a limited judicial intervention, only to protect against procedural errors, violations of natural justice abuse of jurisdiction, or to interfere with awards that are in contravention of the public policy of India. Since arbitration aims to avoid additional litigation at the stage of enforcement in order to provide for finality of proceedings, courts, ideally, lack the authority to reevaluate the substantive arguments on the merits of an award.

59. Evidently, the challenge to an arbitral award is embodied in Section 34 and appellate consideration thereof is provided under Section 37 Sub-Section 2 Clause (a) of the 1996 Act thereof. An annulment of award through exercising of jurisdiction under Section 34 renders the said award null and void, making it

unenforceable locally under Section 36 of the 1996 Act, and even internationally under the UNICITRAL Model Law and the New York Convention.

60. Numerous decisions of this Court have crystallized the scope of limited interference. Unquestionably, it is always a conscious decision by the parties entering the expeditious mode of dispute resolution in form of arbitration to oust or to minimize the involvement of courts as also observed by this Court in ***McDermott International Inc. v. Burn Standard Co. Ltd. and Others***[43]. Further, it was in decision of this Court in ***Associate Builders (supra)***, wherein the coordinate Bench, while dealing with ground of an award being in conflict with "public policy" under Section 34 of the 1996 Act, opined that during the said recourse merits of an award are not to be examined or re-visited, and such an inquiry is only permitted to certain specified circumstances. Therein, apropos the perversity of an award, mandating an interference,

[43] (2006) 11 SCC 181

support was sought from decisions of this Court in ***H.B. Gandhi, Excise and Taxation Officer-cum-Assessing Authority, Karnal and Others v. M/s Gopi Nath & Sons and Others***[44] and ***Kuldeep Singh v. Commissioner of Police and Others***[45] to recapitulate the working test of perversity.

61. Extensive reference to the aforesaid decision was made recently by this Court in ***Parsa Kente Collieries Limited v. Rajasthan Rajya Vidyut Utpadan Nigam Limited***[46] to caution against interference with the arbitral awards in a such a manner which maybe deemed as casual or cavalier. Rather, an interference is mandated in a situation wherein any perversity so-identified in the arbitral award goes to the root of the matter and there is no alternative interpretation to allow such an arbitral award to sustain in the eyes of law. While observing to the aforesaid effect, a 3-Judge Bench of this Court in ***Dyna Technologies Private Limited v. Crompton***

[44] 1992 Supp (2) SCC 312
[45] (1999) 2 SCC 10
[46] (2019) 7 SCC 236

Greaves Limited[47] also spelt out that an interference should not be done merely because an alternative view on facts and interpretation of contract exists.

62. In ***M. Hakeem (supra)***, this Court observed that when courts exercise their powers under Section 34 of the 1996 Act, they have a limited ability to set aside an award, as and when any of the grounds laid down by the statute under Section 34 are triggered or fulfilled. It also clarified such a power does not include the power of the courts to modify an arbitral award. The Division Bench therein observed as follows:

> *"**16.** What is important to note is that, far from Section 34 being in the nature of an appellate provision, it provides only for setting aside awards on very limited grounds, such grounds being contained in sub-sections (2) and (3) of Section 34. Secondly, as the marginal note of Section 34 indicates, 'recourse' to a court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-sections (2) and (3). 'Recourse' is defined by P. Ramanatha Aiyar's Advanced Law Lexicon (3rd Edn.) as the enforcement or method of enforcing a right. Where the right is itself truncated, enforcement of such truncated right can also be only limited in nature. What is clear from a reading of the said provisions is*

[47] (2019) 20 SCC 1

that, given the limited grounds of challenge under sub-sections (2) and (3), an application can only be made to set aside an award. This becomes even clearer when we see sub-section (4) under which, on receipt of an application under sub-section (1) of Section 34, the court may adjourn the Section 34 proceedings and give the Arbitral Tribunal an opportunity to resume the arbitral proceedings or take such action as will eliminate the grounds for setting aside the arbitral award. Here again, it is important to note that it is the opinion of the Arbitral Tribunal which counts in order to eliminate the grounds for setting aside the award, which may be indicated by the court hearing the Section 34 application.

xxx xxx xxx

48. *Quite obviously if one were to include the power to modify an award in Section 34, one would be crossing the Lakshman Rekha and doing what, according to the justice of a case, ought to be done. In interpreting a statutory provision, a Judge must put himself in the shoes of Parliament and then ask whether Parliament intended this result. Parliament very clearly intended that no power of modification of an award exists in Section 34 of the Arbitration Act, 1996. It is only for Parliament to amend the aforesaid provision in the light of the experience of the courts in the working of the Arbitration Act, 1996, and bring it in line with other legislations the world over."*

63. It is pertinent to note that this decision in ***M. Hakeem (supra)*** to the effect that courts do not have any power to modify an arbitral award, was

opined to be correct in law, *albeit* by a minority opinion in a recent 5-Judge Bench decision of this Court in ***Gayatri Balasamy v. ISG Novasoft Technologies Limited***[48] with the exception that the courts indeed have the power to carry out corrections in computational, clerical or typographical errors, and any other errors of similar nature, owing to the principle of *actus curiae neminem gravabit*[49]. However, the majority opinion, authored by Chief Justice Sanjiv Khanna (as he then was) on his behalf and three others (including both of us), therein observed that the authority to modify an arbitral award is restricted and should only be used in case of well-defined, precise conditions while establishing standards for the use of a court modifying such an award and clarifying import facets thereof.

64. Firstly, the Court upheld the power of a court as granted by Section 34 Sub-Section 2 Clause (a) Sub-Clause (iv) of the 1996 Act to sever the "invalid" sections of an award from the "valid"

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[48] (2025) 7 SCC 1

[49] An act of the Court shall prejudice no man

ones. The concept of *kompetenz-kompetenz*[50] is consistent with the aforesaid idea as iterated and discussed in Part II of the decision. While discussing the concept of power of a court to sever an award, it clarified that it is not always available, particularly in situations wherein the legitimate and the invalid portions of an award are inextricably intertwined, rendering partial annulment infeasible in such situations.

65. Secondly, holding that a court has power to correct clerical, computational, or typographical errors that appear manifest on the face of the record in Part IV and V of the decision, it elucidated that such authority of a court ought not to be mistaken for a review of the award on merits. Such modifications are permissible within the strict parameters of judicial oversight under Section 34 of the 1996 Act, wherein the court only corrects inadvertent errors as opposed to conducting a substantial re-evaluation of the decision of an arbitrator, thereby reiterating the decisions of this Court in

[50] Power to decide on its own jurisdiction

the likes of ***Grindlays Bank Ltd. v. Central Government Industrial Tribunal and Others***[51] which upheld procedural corrections undertaken by a court to an arbitral award.

66. Thirdly, on the post-award interest aspect, as discussed in Part IX of the decision, it held that in certain circumstances, a court indeed has the authority to modify the interest awarded in an arbitral award. It highlighted that although Section 31 Sub-Section 7 Clause (b) of the 1996 Act establishes a standard rate of post-award interest, situations to the following effect may arise. On that, it illustrates, a court may raise the interest to achieve justice if one party is at fault to pay the award on time. In order to prevent more rounds of litigation, it elaborates that such power extends beyond that to simply lowering the interest rate. This guarantees that the award is carried out promptly and fairly and to avoid drawn-out arguments over interest rates.

67. Finally, iterating on the power of the Court

[51] 1980 Supp SCC 420

under Article 142 of the Constitution of India under Part XII, it affirmed that as per the fundamental tenets of the 1996 Act, this enormous power must be used carefully and sparingly, as observed recently by a 5-Judge Bench of this Court in ***Shilpa Sailesh v. Varun Sreenivasan***[52] while discussing the said jurisprudence. This Court, while exercising power under Article 142, ought to ensure a dispute is settled amicably, especially in situations where stringent procedural norms could lead to an unfair outcome, but does not empower for re-evaluation of an award on merits.

68. Furthermore, in the process of discussing the jurisdiction and powers of courts under Section 34 and 37 of the 1996 Act, a 3-Judge Bench of this Court, in ***UHL Power Company Limited (supra)*** while holding that the learned Single Judge of the concerned High Court had exceeded his jurisdiction through interference with the arbitral award, explicated the reasons of such narrow scope of powers of a court under

[52] (2023) 14 SCC 231

Section 34 of the 1996 Act. Referencing extensively on other decisions of this Court, namely, ***MMTC Limited (supra)***, ***K. Sugumar and Another v. Hindustan Petroleum Corporation Limited and Another***[53], ***Dyna Technologies (supra)***, and ***Parsa Kente Collieries (supra)***, it laid down that the courts do not sit in appeal over arbitral awards, therefore, the jurisdiction of the concerned courts is confined to specific grounds as laid down under Section 34 of the 1996 Act, for instance, violation of public policy, patent illegality, or misconduct. Furthermore, it is based on the principle of party autonomy and the need to uphold the finality of an arbitral award. Concluding, it iterated that when the parties have, through conscious decision-making, opted for arbitration as an alternative means of dispute mechanism, the courts ought to refrain from reappreciation of evidence or substitution of interpretation(s), unless the award is perverse, unreasonable, or contrary to

[53] (2020) 12 SCC 539

the mandate of the statute or decisions of court.

The relevant paragraphs are as follows:

> "***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. [(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 KB*

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. [(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. [(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. [(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. [(2006) 11 SCC 181] and Rashtriya Ispat Nigam Ltd. v. Dewan Chand Ram Saran [(2012) 5 SCC 306] , 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 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. [(2015) 14 SCC 21 : (2016) 2 SCC (Civ) 716], SCC para 25 and SAIL v. Gupta Brother Steel Tubes Ltd. [(2009) 10 SCC 63 : (2009) 4 SCC (Civ) 16], SCC para 29.'*
>
> *(emphasis supplied)*"

69. Now, it is opportune to refer to the provision of Section 37 of the 1996 Act with that of the scope of Section 34 to reiterate and postulate the jurisprudence of interference, which reads thus:

> ***"37. Appealable orders**.—(1) Notwithstanding anything contained in any other law for the time being in force, an appeal shall lie from the following orders (and from no others) to the Court authorised by law to hear appeals from original decrees of the Court passing the order, namely:—*
>
> *(a) refusing to refer the parties to arbitration under section 8;*
>
> *(b) granting or refusing to grant any measure under section 9;*
>
> *(c) setting aside or refusing to set aside an arbitral award under section 34.*
>
> *(2) An appeal shall also lie to a Court from an order of the arbitral tribunal.—*
>
> *(a) accepting the plea referred to in sub-section (2) or sub-section (3) of section 16; or*
>
> *(b) granting or refusing to grant an interim measure under section 17.*
>
> *(3) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to the Supreme Court."*

70. A perusal of the aforesaid elaborates that an appeal lies against an order of either setting aside of an arbitral award or refusal thereof under Section 34 of the 1996 Act under Section 37 Sub-Section 1 Clause (c) of the 1996 Act. The provision, as also interpreted by decisions of courts in India, demonstrates that the scope under Section 37 is inherently limited or rather, narrower, and is governed by the mandate or

parameters or grounds under Section 34 Sub-Section 2 of the 1996 Act.

71. The decision in ***MMTC Limited (supra)***, as referenced recently by a coordinate Bench of this Court in ***Reliance Infrastructure Limited (supra),*** unfolds in an involute manner that a court under Section 37 of the 1996 Act can only determine as to whether the concerned court under Section 34 has not travelled beyond the parameters of the scope therein. No independent evaluation is permitted on the merits of the award. An observation to a similar corollary was also determined by a 3-Judge Bench of this Court in ***Konkan Railway Corporation Limited v. Chenab Bridge Project Undertaking***[54]***,*** while assailing the reinterpretation of the contractual terms in the following manner:

> ***"25.*** *The principle of interpretation of contracts adopted by the Division Bench of the High Court that when two constructions are possible, then courts must prefer the one which gives effect and voice to all clauses, does not have absolute application. The said interpretation is subject to the jurisdiction which a court is called upon to exercise. While*

[54] (2023) 9 SCC 85

exercising jurisdiction under Section 37 of the Act, the Court is concerned about the jurisdiction that the Section 34 Court exercised while considering the challenge to the arbitral award. The jurisdiction under Section 34 of the Act is exercised only to see if the Arbitral Tribunal's view is perverse or manifestly arbitrary. Accordingly, the question of reinterpreting the contract on an alternative view does not arise. If this is the principle applicable to exercise of jurisdiction under Section 34 of the Act, a Division Bench exercising jurisdiction under Section 37 of the Act cannot reverse an award, much less the decision of a Single Judge, on the ground that they have not given effect and voice to all clauses of the contract. This is where the Division Bench of the High Court committed an error, in re-interpreting a contractual clause while exercising jurisdiction under Section 37 of the Act. In any event, the decision in Radha Sundar Dutta v. Mohd. Jahadur Rahim [AIR 1959 SC 24] , relied on by the High Court was decided in 1959, and it pertains to proceedings arising under the Village Chaukidari Act, 1870 and Bengal Patni Taluks Regulation of 1819. Reliance on this judgment particularly for interfering with the concurrent interpretations of the contractual clause by the Arbitral Tribunal and Single Judge under Section 34 of the Act is not justified."

72. A juxtaposition of this provision with the jurisprudence of the Code of Civil Procedure, 1908 instantiates it to function akin to a second appeal under the latter. While the initial probe is initiated during a recourse under Section 34

of the 1996 Act, and if it further affirms the award, a court exercising the mandate of Section 37 ought to employ caution and reluctance to alter with the concurrent findings.

73. Before we commence with the analysis of the dispute(s) raised before us, it is apposite to also refer to the arbitration agreement as adopted by the parties in Section 21.4 of the Amended CWEETC Agreement (hereinafter "Arbitration Agreement"), which reads thus:

> ***"21.4 Arbitration***
>
> *21.4.1 Any Dispute which has not been resolved by negotiation and mediation pursuant to* ***Section 21.3*** *shall, following notice by either Party, be exclusively and finally decided by arbitration in Singapore in accordance with the provisions of the (Indian) Arbitration and Conciliation Act, 1996 or any re-enactment or modification thereof. Save as specified in this* ***Section 21.4.1,*** *no arbitration provisions contained in any other law, shall apply to arbitration of any Dispute.*
>
> *21.4.2 Pursuant to* ***Section 21.4.1,*** *either Party may notify the other Party by a written notice clearly stating all the Disputes to be decided by the arbitral tribunal, appointing its own arbitrator and calling upon the other Party to appoint its arbitrator within*

thirty (30) days from the date of receipt of such notice.

(i) Both the arbitrators appointed by the Parties shall then appoint the third arbitrator, who shall act as chairman of the tribunal, and if the chairman is not appointed within thirty (30) days of the date of appointment of the later of the two (2) arbitrators appointed by the Parties. or if a Party does not appoint an arbitrator within thirty (30) days of the date of the receipt of the notice of the other Party, the chairman and/or the arbitrator to be appointed by a Party (such Party having failed to appoint the arbitrator) shall be appointed in accordance with the provisions of the (Indian) Arbitration and Conciliation Act, 1996.

(ii) Each arbitrator shall be and remain independent and impartial, and no arbitrator shall be of the same nationality as any Party.

21.4.3 The arbitrators shall draw up, and submit to the Parties for signature, the terms of reference within fifteen (15) days of the appointment of the third arbitrator. The terms of reference shall include a list of issues to be determined.

21.4.4 Neither Party shall be required to give general disclosure of documents, but may be required to produce documents which are relevant to the Dispute.

21.4.5 The arbitral proceedings shall be conducted in the English language.

xxx xxx xxx

21.4.7 The arbitral award shall be final and binding upon the Parties and enforceable by any court having jurisdiction for this purpose. The arbitral award may be enforced against the Parties to the arbitration proceeding or their assets wherever they may be found and a judgment upon the arbitral award may be entered in any court having jurisdiction."

74. It is also apposite to refer to Section 25.2 of the Amended CWEETC Agreement, which stipulates as follows:

"25.2 Choice of Law

25.2.1 Governing law

This Agreement shall be governed by and construed in accordance with the laws of England. The United Nations Convention on Contracts for the International Sale of Goods shall not apply to this Agreement.

25.2.2 Contracts (Rights of Third Parties) Act 1999

Save as expressly provided for in terms hereof, this Agreement does not create any

right under the Contracts (Rights of Third Parties) Act 1999 which is enforceable by any person."

75. An examination of the Arbitration Agreement indicates that with the express exclusion of the United Nations Convention on Contracts for the International Sale of Goods (hereinafter, "CISG"), the substantive law and interpretation of the contractual terms shall be governed by the laws of England, thereby it being the *lex contractus*[55]. The parties have further determined Singapore and the 1996 Act to be the venue and seat respectively.

76. As described in the provision of Section 20 of the 1996 Act, the place of arbitration is a reference to the seat of arbitration, and reads:

> *"**20. Place of arbitration.**—*
> *(1) The parties are free to agree on the place of arbitration.*
> *(2) Failing any agreement referred to in sub-section (1), the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.*
> *(3) Notwithstanding sub-section (1) or sub-section (2), the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation*

[55] Law governing the contract

among its members, for hearing witnesses, experts or the parties, or for inspection of documents, goods or other property."

77. Undoubtedly, in the absence of the express or implied choice of law, it is the law that has the closest as well as the most real connection with the arbitration agreement, that is applicable. This position was recently iterated by a 3-Judge Bench of this Court while dealing with an application under Section 11 Sub-Section 6 of the 1996 Act, in ***Disortho S.A.S. v. Meril Life Sciences Private Limited***[56].

78. Herein, the 1996 Act is laid down as the law governing the Arbitration Agreement, and therefore it is apposite to reiterate that the *lex arbitri*[57], in the absence of determination otherwise, is determined by the seat of the arbitration as also iterated through extensive deliberation by 3-Judge Bench of this Court in ***Government of India v. Vedanta Limited and Others***[58]. Therein, the court further explicated that a challenge to an award is to be undertaken

[56] 2025 SCC OnLine SC 570
[57] Law of the arbitration
[58] (2020) 10 SCC 1

against the cornerstone of domestic public policy of the seat of the arbitration. This position is also impliedly conceded and admitted on behalf of SEPCO through their conduct, especially when relying significantly on decisions of Indian courts to assert their grounds for challenge and the law in India thereof. Significant reliance was placed by SEPCO on the decision of this Court in ***Ssangyong Engineering (supra)***, as also relied upon by the Impugned Judgment.

79. Clarifying on the distinction between the seat of arbitration and venue of arbitration proceedings, observations of this Court in ***Enercon (India) Limited and Others v. Enercon Gmbh and Another***[59] reiterates that when a seat of arbitration is India, it would only be the courts of India that would have exclusive jurisdiction to determine any disputes pertaining to the process of arbitration thereof.

80. While being betwixt and between the determination of the applicable law, it is

[59] (2014) 5 SCC 1

prudent to refer to Section 28 Sub-Section 1 Clause (b) Sub-Clause (i) of the 1996 Act, which is reproduced below:

> ***"28. Rules applicable to substance of dispute.***—
>
> *xxx xxx xxx*
>
> *(b) in international commercial arbitration,—*
> *(i) the arbitral tribunal shall decide the dispute in accordance with the rules of law designated by the parties as applicable to the substance of the dispute;"*

81. Through a holistic appreciation of the Section 28 Sub-Section (1) Clause (b), along with Sub-Clause (i), it is *prima facie* comprehensible that International Commercial Arbitrations, wherein seat has been adopted to be India or the 1996 Act, are always subject to Section 28 Sub-Section (1) Clause (b) of the 1996 Act, which, in turn, emphasizes that fundamental principle of party autonomy. The parties to a dispute are always at liberty to choose the substantive law, procedural law, and the law of the arbitration agreement so applicable. Party autonomy is widely acknowledged as the foundation of the contemporary arbitration and is protected by

the arbitral legislations, numerous institutional guidelines and international treaties.

82. Having observed as aforesaid, the principle of party autonomy does not vest absolutely. Although the parties have a great deal of discretion in choosing the governing law, their choices cannot conflict with the mandatory provisions in the jurisdiction of the seat of the concerned arbitration. Beyond a doubt, the laws governing the arbitration agreement, the substantive contract, and the procedural conduct of the arbitration may differ, as in the instant case. To reiterate, the parties have, as per the settled law and the gestation of party autonomy, adopted for the English law to be applicable to the substantive interpretation of the contractual terms, while the procedural aspect, as it appears from the aforesaid reflection of the jurisprudence, shall be governed by the laws of the land of this nation, being India, for its law of arbitration, the 1996 Act, being the seat.

83. Let us first proceed to analyse whether the Arbitral Award was correct in determining oral

waiver and/or equity estoppel as against the terms of the contract.

84. The concerned Sections under the Amended CWEETC Agreement read as follows:

> *"**25.5 No Waiver or Variation***
>
> *25.5.1 No failure or neglect on the part of either Party to exercise its rights or remedies under this Agreement and no single or partial exercise thereof shall preclude any further or other exercise of such rights and remedies.*
>
> *25.5.2 Any delay, waiver or omission by either Party to exercise any right or power arising from any breach or default by the other Party in any of the terms or provisions of this Agreement shall not be construed to be a waiver of such breach or default or subsequent breach or default of the same or other terms, provisions or covenants.*
>
> *25.5.3 Without prejudice to **Section 4.2** and the issue of any Variation Order, no variation, amendment, supplement, modification or waiver of this Agreement shall be effective unless in writing and signed by or on behalf of each Party."*

85. Moving on to the issue of notice between the parties vis-à-vis the apparent waiver and/or application of estoppel, it is pellucid from the perusal of the paragraph 226 of the Arbitral

Award that the Arbitral Tribunal had rejected the contention raised on behalf of SEPCO that the condition precedent for allegedly mandatory contractual notices stood waived by the parties in March 2010. Despite this, and without it being raised on behalf of SEPCO, the Arbitral Tribunal placed reliance on the Jinan Agreement and the concerned emails from March 2012 that the condition for contractual notices was waived. GMRKE Limited was never given an opportunity to exhibit evidence to this effect. This observation on behalf of the Arbitral Tribunal amounted to modification of the terms of the contract.

86. We are in agreement with the submissions made by GMRKE Limited to the said effect through their aspect of reliance to assert that the safeguards and prerequisites laid down in ***Rock Advertising (supra)*** squarely cover the field with respect to the instant case. No material was adduced to establish satisfaction of the conditions laid down in the aforesaid decision, being, unequivocal words or conducts to present that such a deviation was valid, and

something travelling over and above an informal promise between the parties.

87. SEPCO is therefore mistaken to contend that while notices may be dispensed for claims for prolongation costs and delay but not for defects within the Defect Liability Period. It strikes at the root of Section 18 of the 1996 Act, which is dealt with in detail below by us. Even further, Section 7.3.2 of the Amended CWEETC Agreement explicitly mandates the notice, and reads:

> *"Unless otherwise specified in this Agreement, within seventy-two (72) hours or such other period as may be agreed by the Owner of learning of any cause of delay or disruption to the progress of the Works, the Civil Contractor shall submit a notice providing full details relevant to such cause, except to the extent the Civil Contractor cannot submit all relevant details within such period because the cause of delay or disruption continued for a period exceeding seven (7) days. The Civil Contractor shall submit interim details at intervals of not more than seven (7) days (from the first day of such delay or disruption) and full and final supporting details together with full supporting documentation in support of its application within fourteen (14) days of the date of cessation of such delay or disruption.*
>
> *Further in all cases where events described in* ***Section 7.3.1*** *have occurred, the Civil Contractor shall advise the Owner of:*

(a) the extent of the actual and contemplated delay and its anticipated effect upon the relevant Milestone Date and or Guaranteed Date of Completion:

(b) the Civil Contractor's plans to take steps to overcome or minimise the actual or anticipated delay and the increased costs, if any, associated therewith: and

(c) the Civil Contractor's plans to adopt any methods suggested by the Owner to overcome or minimise the delay and the increased costs, if any, associated therewith, and the Civil Contractor shall use all reasonable endeavours to take such steps and or adopt such methods."

88. Both the Arbitral Tribunal as well as the Single Judge of the High Court were mistaken to grant relief to SEPCO, upholding the assumed waiver of the mandate of notice despite explicit provisions of the Amended CWEETC Agreement to the otherwise effect.

89. Moreover, the issue of waiver also juxtaposes itself to the mandate of Section 28 Sub-Section 3 of the 1996 Act, which ought to be additionally scrutinized.

90. The 1996 Act, through the mandate of Section 28 Sub-Section 3, casts an explicit duty on a tribunal to resolve disputes in accordance with

the terms of the contract and accepted business practices. For context, the bare provision reads as follows:

> *"**28. Rules applicable to substance of dispute.**—*
>
> *xxx xxx xxx*
>
> *(3) While deciding and making an award, the arbitral tribunal shall, in all cases, take into account the terms of the contract and trade usages applicable to the transaction."*

91. Numerous precedents laid down by this Court have often emphasised that an arbitrator lacks the power to deviate from or to reinterpret the terms of the contract while making an award. The awards must be within the parameters of the agreement entered between the parties.

92. This Court in ***Saw Pipes (supra)*** has reiterated that any deviation from the mandate of Section 28 Sub-Section 3 of the 1996 Act is a valid ground for lambasting an arbitral award. Commenting on the duty of the arbitrators, this Court observed as follows:

> *"**73.** It is to be reiterated that it is the primary duty of the arbitrators to enforce a promise which the parties have made and to uphold the sanctity of the contract which forms the*

basis of the civilized society and also the jurisdiction of the arbitrators. Hence, this part of the award passed by the Arbitral Tribunal granting interest on the amount deducted by the appellant from the bills payable to the respondent is against the terms of the contract and is, therefore, violative of Section 28(3) of the Act."

93. To substantiate that the contract is paramount to the working, scope, and interpretation for the purpose of an award by the arbitrator, a reference may be made to another 3-Judge Bench decision in ***South East Asia Marine Engineering and Constructions Limited v. Oil India Limited***[60]. Therein, while rejecting the challenge to setting aside of the arbitral award, this Court made the following observations:

> ***"28.*** *In this context, the interpretation of Clause 23 of the contract by the Arbitral Tribunal, to provide a wide interpretation cannot be accepted, as the thumb rule of interpretation is that the document forming a written contract should be read as a whole and so far as possible as mutually explanatory. In the case at hand, this basic rule was ignored by the Tribunal while interpreting the clause.*
>
> ***29.*** *The contract was entered into between the parties in furtherance of a tender issued by the respondent herein. After considering the*

[60] (2020) 5 SCC 164

tender bids, the appellant issued a letter of intent. In furtherance of the letter of intent, the contract (Contract No. CCO/FC/0040/95) was for drilling oil wells and auxiliary operations. It is important to note that the contract price was payable to the "contractor" for full and proper performance of its contractual obligations. Further, Clauses 14.7 and 14.11 of the contract state that the rates, terms and conditions were to be in force until the completion or abandonment of the last well being drilled.

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

31. *The interpretation of the Arbitral Tribunal to expand the meaning of Clause 23 to include change in rate of HSD is not a possible interpretation of this contract, as the appellant did not introduce any evidence which proves the same."*

94. Further clarification of this proposition is brought about through observations of this Court in a further decision by 3-Judge Bench in

Union of India and Others v. Bharat Enterprise[61] wherein it was underlined that the existence and powers of an arbitrator are a creature of the agreement between the parties, and it is the terms of the contract which serves as a fundamental basis for the procedure to be adopted by the arbitral tribunal. Therefore, the concerned arbitrator is restricted to the terms of the contract thereof and cannot go outside its scope or what is, *per se*, specified. In words of the Bench, "*A disregard of the specific provisions of the contract would incur wrath of the Award being imperiled. This position cannot be in the region of dispute.*"

95. In order to achieve an enhanced understanding apropos the scope of the powers and jurisdiction of an arbitrator, a reference may also be made to a decision of this Court in ***Associated Engineering (supra),*** which was determined vis-à-vis Section 30 of the Arbitration Act, 1940 wherein, it was observed that:

> "***24.*** *The arbitrator cannot act arbitrarily, irrationally, capriciously or independently of the contract. His sole function is to arbitrate in*

[61] 2023 SCC OnLine SC 369

terms of the contract. He has no power apart from what the parties have given him under the contract. If he has travelled outside the bounds of the contract, he has acted without jurisdiction. But if he has remained inside the parameters of the contract and has construed the provisions of the contract, his award cannot be interfered with unless he has given reasons for the award disclosing an error apparent on the face of it.

25. *An arbitrator who acts in manifest disregard of the contract acts without jurisdiction. His authority is derived from the contract and is governed by the Arbitration Act which embodies principles derived from a specialised branch of the law of agency (see Mustill and Boyd's Commercial Arbitration, 2nd edn., p. 641). He commits misconduct if by his award he decides matters excluded by the agreement (see Halsbury's Laws of England, Volume II, 4th edn., para 622). A deliberate departure from contract amounts to not only manifest disregard of his authority or a misconduct on his part, but it may tantamount to a mala fide action. A conscious disregard of the law or the provisions of the contract from which he has derived his authority vitiates the award.*

26. *A dispute as to the jurisdiction of the arbitrator is not a dispute within the award, but one which has to be decided outside the award. An umpire or arbitrator cannot widen his jurisdiction by deciding a question not referred to him by the parties or by deciding a question otherwise than in accordance with the contract. He cannot say that he does not care what the contract says. He is bound by it. It must bear his decision. He cannot travel outside its bounds. If he exceeded his jurisdiction by so doing, his award would be*

liable to be set aside. As stated by Lord Parmoor : [Attorney-General for Manitoba v. Kelly, (1922) 1 AC 268, 276 : 1922 All ER Rep 69] (AC p. 276)

> *'It would be impossible to allow an umpire to arrogate to himself jurisdiction over a question which, on the true construction of the submission, was not referred to him. An umpire cannot widen the area of his jurisdiction by holding, contrary to the fact, that the matter which he affects to decide is within the submission of the parties.'*

Evidence of matters not appearing on the face of the award would be admissible to decide whether the arbitrator travelled outside the bounds of the contract and thus exceeded his jurisdiction. In order to see what the jurisdiction of the arbitrator is, it is open to the court to see what dispute was submitted to him. If that is not clear from the award, it is open to the court to have recourse to outside sources. The court can look at the affidavits and pleadings of parties; the court can look at the agreement itself. Bunge & Co. v. Dewar and Webb [(1921) 8 Ll L Rep 436].

27. *If the arbitrator commits an error in the construction of the contract, that is an error within his jurisdiction. But if he wanders outside the contract and deals with matters not allotted to him, he commits a jurisdictional error. Such error going to his jurisdiction can be established by looking into material outside the award. Extrinsic evidence is admissible in such cases because the dispute is not something which arises under or in relation to the contract or dependent on the construction of the contract or to be determined within the award. The dispute as to jurisdiction is a matter which is outside the award or outside whatever may be said about it in the award.*

The ambiguity of the award can, in such cases, be resolved by admitting extrinsic evidence. The rationale of this rule is that the nature of the dispute is something which has to be determined outside and independent of what appears in the award. Such jurisdictional error needs to be proved by evidence extrinsic to the award. [See Alopi Parshad & Sons, Ltd. v. Union of India [(1960) 2 SCR 793 : AIR 1960 SC 588] ; Bunge & Co. v. Dewar & Webb [(1921) 8 Ll L Rep 436] ; Christopher Brown Ltd. v. Genossenschaft Oesterreichischer [(1954) 1 QB 8 : (1953) 3 WLR 689] ; Rex v. Fulham [(1951) 2 QB 1 : (1951) 1 All ER 482] ; Falkingham v. Victorian Railways Commission [1900 AC 452 : 69 LJ PC 89] ; Rex v. All Saints, Southampton [(1828) 7 B&C 785 : 1 Man & Rey KB 663] ; Laing (James), Son & Co. (M/C) Ltd. v. Eastcheap Dried Fruit Co. [(1961) 1 Ll L Rep 142, 145] ; Dalmia Dairy Industries Ltd. v. National Bank of Pakistan [(1978) 2 Ll L Rep 223] ; Heyman v. Darwins Ltd. [(1942) AC 356 : (1942) 1 All ER 337] ; Union of India v. Kishorilal Gupta & Bros. [AIR 1959 SC 1362 : (1960) 1 SCR 493] ; Renusagar Power Co. Ltd. v. General Electric Company [(1984) 4 SCC 679 : (1985) 1 SCR 432] ; Jivarajbhai v. Chintamanrao [(1964) 5 SCR 480 : AIR 1965 SC 214] ; Gobardhan Das v. Lachhmi Ram [AIR 1954 SC 689, 692] ; Thawardas Pherumal v. Union of India [(1955) 2 SCR 48 : AIR 1955 SC 468] ; Omanhene Kobina Foli v. Chief Obeng Akessee [AIR 1934 PC 185, 188 : 40 MLW 138] ; F.R. Absalom, Ltd. v. Great Western (London) Garden Village Society, Limited [(1933) AC 592 : 1933 All ER Rep 616] and M. Golodetz v. Schrier [(1947) 80 Ll L Rep 647] .]"

96. Examining the principles involved, a reference to decisions under the Arbitration Act, 1940, may also be apprised through the decision of a 3-Judge Bench of this Court in ***Allen Berry and Co. Pvt. Ltd. v. Union of India, New Delhi***[62] wherein this Court considered the proper scope of judicial review of arbitral awards and iterated that a court has the right to review documents that are specifically included in an award while reviewing it. However, as also observed in some cases, the courts, especially in the United Kingdom, have travelled farther and set aside the awards in which the contracts have merely been referred in passing, and apparently were incorrectly incorporated, forming the foundation of a verboten award.

97. Moreover, as referred, the King's Bench invalidated an award in ***Landauer v. Asser***[63] because the arbitrator had misconstrued the provisions of the insurance contract. A similar position was adopted by the House of Lords in ***Absalom (F.R.) Ltd. v. Great Western (London)***

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[62] (1971) 1 SCC 295
[63] [1905] 2 KB 184

Garden Village Society Ltd.[64], where the award specifically included a clause 30 of the contract, calling for judicial scrutiny of the interpretation of the arbitrator. In ***Champsey Bhara and Co. v. Jivraj Balloo Spinning & Weaving Co. Ltd.***[65], the Privy Council dealt with the validity of the decision in ***Landauer (supra)*** and therein it was clarified that only a legal error that is evident on the face of the award or in an incorporated document warrants an interference by the courts, as also iterated in ***Duff Development Co. v. Kelanton***[66]. Even prior to ***Allen Berry (supra),*** this Court supported a similar strategy in ***Babu Ram v. Nanhemal***[67]. Therefore, it appears that even if the arbitrator's legal or factual reasoning is faulty, the courts ought to ideally refrain from interfering with an award until an error of law is evident from the award itself or in a document that forms an integral component thereof.

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[64] [1933] AC 592
[65] (1923) AC 480 (PC)
[66] [1923] AC 395
[67] Judgment dated 05.12.1968 in Civil Appeal No 107 of 1966

98. A perusal therefore crystalises that it is the interpretation of an arbitral award which determines whether a contract or a specific provision thereof is considered part of the award or not. If a clear reliance is placed by the arbitrator on the contract, a presumption arises in favour of the incorporation, while a vague or general reference opposes such a presumption.

99. The act of the Arbitral Tribunal as well as the Single Judge of the High Court failed to stand on the test of deliberate and explicit intention of the parties to relinquish their right as observed in ***Sasan Power Limited (supra)***.

100. Even under the current arbitration regime, judicial intervention is narrowly confined to specific, enumerated grounds. Arbitral decisions must adhere to natural justice, and cannot rest solely on personal beliefs or perceived moral duties. But it appears that the Arbitral Award has extensively relied upon the terms of the contract(s), and it was appropriate and good in law on the part of the Division Bench to peruse the contractual terms between the parties. Moreover, it would not be arrogate

to refer to and rely upon the provisions of the Amended CWEETC Agreement.

101. Firstly, on bias, dealing with the issue of waiver, the Arbitral Tribunal, as observed aforesaid, had incorrectly rewritten the terms of the Amended CWEETC Agreement to falsely empower SEPCO for their claims, despite non-compliance of the contractual provisions. It is to be also noted that the Single Judge of the High Court had rejected the contention of GMRKE Limited to the effect of assumption of arguments raised by SEPCO and the discriminatory treatment of the parties thereof by the Arbitral Tribunal in a cursory manner. Furthermore, while dealing with the contention of waiver of notice vis-à-vis the provisions of the Amended CWEETC Agreement, it despite acknowledging insufficiency of material on record to conclude the right to estoppel under common law or the assumed oral waiver of notice, observed that same cannot still be a ground for interference.

102. Secondly, dealing with claims the extent of claims of SEPCO post its termination, especially to seek 5 percent of the contractual price upon

completion of the tests, it is appropriate to refer to the relevant portions of the conditions laid down in the Amended CWEETC Agreement, which are read as follows:

6.1.5 ***Reliability Run***

6.1.5.1 Reliability Run is to be conducted only after successful completion of the Initial Operation and have to be successfully completed prior to the commencement of the Unit Characteristics Tests.

All necessary adjustments shall be made to the respective Unit while operating over the full range enabling the respective Unit to be made ready for the Reliability Run. The Reliability Run shall only be carried out provided the respective Unit is fully available for full load operation. The duration of the Reliability Run shall be as specified in the Technical Specifications.

6.1.5.2 The Reliability Run shall be considered successful provided that the requirements set forth in the Technical Specifications have been satisfied.

6. l .5.3 For the determination of the period of the Reliability Run the time of actual operation shall be measured. In case the duration of actual continuous operation during the test period as per the Technical Specifications is discontinued for causes

attributable to the Owner, the Civil Contractor would have been deemed to have operated the Unit(s) or the Power Station at the required load during such period of discontinuation. However, in such cases the Owner can, at its option, require the period of the test to be extended appropriately in which case the Civil Contractor would be eligible for an extension of the relevant Milestone Date or Guaranteed Date of Completion by an equivalent period and any additional costs reasonably incurred by the Civil Contractor for such extension shall be reimbursed.

However, should any test that is part of the Reliability Run (as set forth in the Technical Specification) be discontinued due to any default of the Civil Contractor or any Subcontractor, such test shall he conducted again. Should any failure (other than that of an entirely minor nature) due to or arising out of faulty design, materials, or workmanship or omissions, incorrect erection or improper operating instructions occur in any part or all of the respective Unit or the Power Station, as the case may be, in a manner that prevents safe commercial use of the respective Unit or the Power Station, as the case may be, a Reliability Run period of fourteen (14) days shall be conducted after the detect has been remedied. The

onus of proving that any failure is not due to faulty design, materials and workmanship shall lie solely with the Civil Contractor.

6.1.5.4 Reliability Run would be deemed to have been successfully completed only after the Owner has agreed in writing to such test report or the test is deemed to have been successfully completed in accordance with this ***Section 6.1.***

6.1.6 ***Unit Characteristic Tests***

6.1.6.1 The Unit Characteristic Tests are to be carried out to demonstrate compliance of the respective Unit or the Power Station, as the case may be, with the required functional capabilities as per the agreed parameters and will be conducted in accordance with and as particularly described in the Technical Specifications.

6.1.6.2 Unit Characteristic Tests would be deemed to have been successfully completed only after the Owner has agreed in writing to a satisfactory test report or the test is deemed to have been successfully completed in accordance with ***Section 6.1.4.6(iv)*** *and the Technical Specifications.*

6.1.7 Performance Guarantee Test

6.1.7.1 General conditions for Performance Guarantee Test

The Performance Guarantee Test would be conducted to determine the level of achievement of the Performance Guarantees for the purpose of Take Over of the respective Units or the Power Station, as the case may be. The Performance Guarantee Test for the Power Station shall be successfully completed alongwith the Performance Guarantee Test for the last Unit. The Performance Guarantee Test would be conducted over a continuous period of seventy-two (72) hours without any interruption. The Performance Guarantee Test for each Unit and the Power Station shall be successfully completed within a period of two hundred and twenty (220) days from the respective dates of successful completion of the Reliability Run. The Performance Guarantee Tests may be carried out for a maximum number of three (3) tests only. Further, provided that the cumulative aggregate shut-down period for preparing to conduct the three (3) tests shall not exceed a period of nineteen (19) days.

The Power Station or any Unit thereof will not be deemed ready for the Performance Guarantee Test if any of the following conditions exists:

(a) the Reliability Run and the Unit Characteristic Tests have not been successfully completed as

per the provisions of this ***Section 6.1;***

(b) *the Owner has given notice, to the Civil Contractor, specifying the reasons therefor in accordance with this Agreement, that the Works necessary for the safe performance of such tests have not been performed or are incomplete or defective."*

(underlining is ours)

103. A perusal of the contractual provisions clearly highlights that the Division Bench was correct to observe that owing to the well-recorded failure of the Unit Characteristics Test for Unit 1, the Arbitral Tribunal, through any possible means could not have, went on to hold that the Performance Guarantee Test was successful. The verboten attempt to do so, through rewriting of the milestone conditions was rightly set aside by the Division Bench of the High Court through the observations in the Impugned Judgment.

104. Hereafter, referencing the discriminatory claim of SEPCO as to the need for waiver of notices between the parties to the Amended EPC

Agreements herein, it is evident that a plain reading of the Section 34 of the 1996 Act elaborates the grounds available to a party to challenge an India-seated International Commercial Arbitration. A reference to Section 34 Sub-Section 2 Clause (a) Sub-Clause (iii) of the 1996 Act and specifically "unable to present his case", as rightly contended on behalf of GMRKE Limited, also includes denial of natural justice. This is also postulated in the 1996 Act through the due process clause, being Section 18, which reads:

> *"**18. Equal treatment of parties.**— The parties shall be treated with equality and each party shall be given a full opportunity to present his case."*

105. When a party is unable to analyse, comment or argue on a contention raised by the other party, it will certainly be deemed as a breach of natural justice and thereby, also a violation of the most fundamental notions of justice. Henceforth, the arbitral award is required to be set aside by the courts under Section 18 and Section 34 Sub-Section 2 Clause (a) Sub-Clause (iii) of the 1996

Act. Such an observation derives its weight from the examination by this Court in ***Ssangyong Engineering (supra)***, especially in its paragraphs 34, 36, 37 and 46. Even the decision in ***Associate Builders (supra)***, while dealing with the head of "fundamental policy of Indian law" recognizes *audi alteram partem* as a fundamental juristic principle recognized under Section 18 and Section 34 Sub-Section 2 Clause (a) Sub-Clause (iii) of the 1996 Act.

106. Furthermore, reproving on the distinguished treatment of the parties by the tribunal therein, this Court in ***Narinder Singh and Sons v. Union of India***[68], observed that to be a violation of the principles of natural justice and opined the treatment to fall within the ambit of "lack of full opportunity" under Section 18 of the 1996 Act. The award therein, preventing a just and equitable decision, was set aside for being juxtaposed to the Section 34 Sub-Section 2 Clause (a) Sub-Clause (ii) and (iii) of the 1996 Act.

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[68] (2022) 18 SCC 690

107. The Arbitral Tribunal had gone on to apply the aforesaid waiver discriminately between the parties. For instance, the claims of GMRKE Limited were rejected for want of contractual notices despite those arising after March 2012, as is evident from paragraphs 1400 to 1410 of the Arbitral Award. This is after having observed that claims by SEPCO, after unilateral termination of the contract, would lie for being a claim under common law, as reflected in paragraph 239 of the Arbitral Award. Moreover, post-termination claims for damages by GMRKE Limited were rejected in paragraph 1348 of the Arbitral Award. It further proceeded to award two claims in favour SEPCO, which were prior to March 2012, despite having opined them to be non-maintainable. Reference may be made to paragraphs 291, 373 to 375, 478 to 479 of the Arbitral Award.

108. Even the Single Judge of the High Court failed to correctly peruse and apply the law provisioned through the 1996 Act, despite *prima facie* nature of the discrimination of the Arbitral Tribunal brought on record and pressed into

service by GMRKE Limited. Moreover, the Single Judge erred in observing that no plea for discrimination was raised by GMRKE Limited before the Arbitral Tribunal. No party could have imagined the verbatim of an award to be passed by a tribunal to raise the contention of discrimination. This is despite the observations in the Section 34 Judgment to the effect that Single Judge reiterated the mandate to set aside an award if it violates the principles of natural justice or the jurisprudence of Section 18 of the 1996 Act.

109. The Division Bench did not, and rightly so, turn a blind eye to such a glaring example of unequal treatment. While reiterating the basic and fundamental principles of the Indian legal system and the provisions of the 1996 Act accurately identified the failures of the Arbitral Tribunal to apply the provisions of the 1996 Act, as mandated through the very terms agreed by the parties while curating their Arbitration Agreement. It clearly fails the test of perversity and is incomprehensible and not compatible with the basic notions of justice in this country.

110. Now, we shall move to opine on whether the issue of suspension and cancellation of Unit 4 was determined correctly by the Arbitral Tribunal?

111. On this, first and foremost, it is to be necessarily iterated that this Arbitral Award is violative of the very principles and notions of natural justice altogether, beginning from the discriminatory treatment of the parties as to non-consideration of arguments by GMRKE Limited or even assumption of specific arguments that were not raised at all before the Arbitral Tribunal. Such a circumstance does not merit of warrant a severance of the said Arbitral Award for any issue that was raised and determined by the Arbitral Tribunal. Therefore, we hold that since the Arbitral Award has failed to stand the test while being placed in juxtaposition to the grounds under Section 34 of the 1996 Act, it is a futile and merely academic exercise to delve into the issue re: suspension and cancellation of Unit 4 or any other specific contention on merits for that matter, as such a determination would,

technically, amount to a modification of the part of the decision of the Arbitral Award, which is not permitted or contemplated as per the statute and the 5-Judge Bench decision in ***Gayatri Balasamy (supra)***. Therefore, we are not inclined to examine the provisions of the law as well as the Amended CWEETC Agreement to opine on the merits of the instant issue.

112. Summarising the principles as aforesaid, it is undoubtful that the interference under jurisprudence laid down under Section 34 and 37 of the 1996 Act is narrow, while aforementioned decisions do acknowledge that, SEPCO has vehemently pushed so in an attempt to persuade us to hold the Division Bench in error. However, the jurisprudence, as also identified in the aforesaid issues, clarifies that the principles of natural justice, and the public policy of India are paramount and cannot be ignored or sidelined in an attempt not to frustrate the patent or latent commercial wisdom of the parties to seek an alternative means of dispute resolution. Such issues attack the root of the Indian legal system and the

courts cannot be made a mere spectator to such gross violations.

113. The scope under Section 37, as rightly argued by SEPCO, is slimmer than that under Section 34, but, in the instant case, the Section 34 Judgment had failed to appreciate the gross violations of the basic principles of adjudication of a dispute. While one may argue some of those may be latent and not a *prima facie* violation, thereby not mandating any interference, direct omission of the mandate of Section 18 and Section 28 Sub-Section 3 of the 1996 Act are clearly patent through a skimming of Arbitral Award. No contentions appear on behalf of SEPCO vis-à-vis waiver through the circumstances arising in March 2012, and despite such a want, the Arbitral Tribunal exceeded the mandate to deem a waiver on the part of GMRKE Limited for contractual notices, without any explicit intent. Thereafter, it patently discriminates against GMRKE Limited to deny their claims for want of contractual notice(s).

114. An attack on the fundamental policy of Indian law allows for reappreciation and thereby, the Impugned Judgment cannot be faulted with on the ground of having exceeded its jurisdiction under Section 37 of the 1996 Act. The Division Bench was correct in this regard, as to open up the necessary floodgates of re-appreciation of the Arbitral Award.

115. Having answered all the above issues, it is apparent that the Arbitral Award is not good in law, and it would be at the cost of reiterating the above-stated examination by us to hold that the Arbitral Award is not liable to be restored in the concerning circumstances.

116. The Division Bench of the High Court, after considering all the material placed on record and particularly the relevant statutory provisions and the law laid down on the issue by this Court, has found the award to be one which shocked the conscience of the court. The Division Bench, after considering various aspects, has held that the Arbitral Award was in violation of the fundamental policy of the Indian law, the principles of natural justice and most

basic notions of justice thereby shocking the conscience of the court. It is to be noted that though it has specifically been assailed by the GMRKE Limited before the Single Judge that the Arbitral Tribunal had awarded certain claims in favour of SEPCO, which were neither pleaded nor argued by it and that the Arbitral Tribunal had modified the contract between the parties by holding in favour of SEPCO that there was a due waiver of notice and though the waiver of notice was held in favour of SEPCO the GMRKE Limited was denied the same treatment and as such, a discriminatory treatment was meted out to it, and the said contention was rejected in a cursory manner.

117. It is to be noted further that insofar as the contention of the GMRKE Limited with regard to the discriminatory treatment meted out to SEPCO in respect of waiver of notice and as such it being in violation of Section 18 of the 1996 Act is concerned, Single Judge held that no such plea was raised before the Arbitral Tribunal. To say the least, the said findings of the Single Judge were perverse. It was only on

passing of the Arbitral Award that the GMRKE Limited would come to know about such a discriminatory treatment being meted out to the parties. The findings, as recorded, would require a party to imagine in anticipation as to the manner in which an arbitrator would pass an award. Though the Single Judge of the High Court recorded that an award is liable to be set aside on the ground of it being in violation of principles of natural justice or violation of Section 18 of the 1996 Act, it, without dealing with the contention of the GMRKE Limited rejected the contention in that regard.

118. Moreover, the Single Judge, while answering the contention on behalf of the GMRKE Limited with regard to estoppel or waiver of notice, being in violation of the Amended CWEETC Agreement, is concerned, it observed that although the material available may not be sufficient to come to the said conclusion but that cannot be a ground to interfere.

119. A perusal of the Arbitral Award, which has also been considered in elaborate detail by the Division Bench would reveal that the Arbitral

Tribunal had meted out a discriminatory treatment to SEPCO and GMRKE Limited. On one hand, while SEPCO's claims have been granted despite its admitted failure to issue contractual notices, the counter claims of GMRKE Limited have been rejected on the ground that it failed to serve equivalent notices. The Division Bench correctly held that it cannot turn a blind eye to such a glaring example of unequal learned Division Bench also held that such discrimination was violative of the equality principle enshrined under Section 18 of the 1996 Act.

120. The Division Bench further found that the issue before the Arbitral Tribunal was whether SEPCO had successfully completed the Performance Guarantee Test for Unit 1. It has been found by the learned Division Bench that the Arbitral Tribunal had come to a finding that the Unit Characteristic Test for Unit 1 had failed. The Division Bench found that the successful completion of Unit Characteristic Test was a pre-requisite for the successful completion of Performance Guarantee Test. As

such, it was found that if the Unit Characteristic Test had failed, there was no question of the Performance Guarantee Test having passed. It was further found that a failure to successfully complete the Reliability Run Test and Unit Characteristic Test would mean that the preconditions to perform the Performance Guarantee Test had, in fact, not been achieved and thus the question of conducting the same would not arise. The Division Bench, therefore, held that the Arbitral Tribunal had modified the express terms of the agreements which was contrary to the public policy of India.

121. It could, thus, be seen that the Division Bench has come to a considerable conclusion that the Arbitral Award passed by the Arbitral Tribunal was in conflict with the public policy of India inasmuch as the Arbitral Award was passed in violation of the principles of natural justice. A discriminatory treatment was meted out by the Arbitral Tribunal to GMRKE Limited as against SEPCO and that the Arbitral Award amounted to modification of the contractual terms. We find that the findings of the Division Bench are

recorded after considering the entire material on record and are in consonance with the law laid down by the decisions of this Court in ***Associate Builders (supra)***, and ***Ssangyong Engineering (supra)***. Therefore, we see no reason to interfere with the well-reasoned findings as recorded by the Division Bench.

122. Furthermore, placing the Arbitral Award in juxtaposition to the scope of doctrine Wednesbury Reasonableness no form of reasonability would allow for such a discrimination between the parties by an Arbitral Tribunal.

123. We summarize the aforesaid findings as, despite the limited scope of interference, the Division Bench was obligated to have interfered with the Arbitral Award owing to fulfilment of conditions mandating a re-appreciation of the merits of the award under Section 34 of the 1996 Act. Non-interference and non-setting aside of the award would have hampered upon the fundamental policy of Indian law as well as the public policy of India. The Arbitral Tribunal, itself being a creature of the EPC Agreements, could not have

travelled beyond its mandate to rewrite the constitution of its own existence through observing the condition of notice having been waived. It further discriminated between the parties, showcasing violation of the provisions of the 1996 Act. As this Arbitral Award could not have been severed owing to the aforesaid reasons, thereby it is apt to set aside the whole Arbitral Award.

124. Resultantly, the Impugned Judgment is upheld and the Arbitral Award along with Section 34 Judgment are observed to have been rightly set aside by the Division Bench of the High Court.

125. Consequently, being devoid of merits, the instant Civil Appeal is dismissed.

126. There shall be no order as to costs.

127. Pending applications, if any, shall be disposed of.

.....CJI.
[B. R. GAVAI]

.....J.
[AUGUSTINE GEORGE MASIH]

NEW DELHI;
SEPTEMBER 26, 2025.