IN THE HIGH COURT OF ORISSA AT CUTTACK

ARBA No.28 of 2019

In the matter of an Appeal under Section 37(1)(a) of the Arbitration and Conciliation Act, 1996 assailing the judgment dated 10th April, 2019 passed by the learned District Judge, Mayurbhanj at Baripada in Arbitration Case No.15 of 2015.

Principal Secretary to the Govt. of Odisha & Others .... ***Appellants***

-versus-

M/s.Jagannath Choudhury .... ***Respondent***

Appeared in this case by Hybrid Arrangement (Virtual/Physical Mode):

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For Appellants - Mr. S.N. Das, (Additional Standing Counsel)

For Respondent - Mr. Pratik Parija, Advocate

CORAM:
MR. JUSTICE D.DASH

Date of Hearing : 11.03.2024 : Date of Judgment: 20.05.2024

D.Dash, J. The Appellants by filing this Appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (for short 'the A&C Act' 1996), have assailed the judgment dated 10th April, 2019 passed by the learned District Judge, Mayurbhanj at Baripada in ARB Case No.15 of 2015 the matter of an application under section 34 of the Act, refusing thereby to set aside the award passed by the learned Arbitrator in ARBP No.13 of 2008.

2. FACTUAL MATRIX OF THE CASE:-

(i) The Respondent-Claimant a Superclass Contractor was awarded to execute the work of construction of Jambhira Earth Dam Reach-IV(B) from RB 4715(M) to 4950(M) under Subarnarekha Irrigation Project (SIP), Odisha. The Respondent-Claimant entered into an agreement with the Appellant vide Agreement No.9 LCB of 1995-96 at a contract price of Rs.2,50,68,948.00 with date of commencement and completion being 29.11.1995 and 28.11.1997 respectively. The contract contained execution of 11 items of work as per the schedule of quantity given in Chapter-VII of the agreement.

When the work was in progress, it is stated that the Chief Engineer influenced upon all the Contractors including the Respondent-Claimant to complete the work by end of March, 1997 although the stipulated date of completion was 28.11.1997. Some necessities also arose for deviation of work under Item Nos.1,3,7 and 10 as described om Chapter-VII of the agreement. The Respondent-Claimant completed all the items of work (eleven numbers) including the extra items by the end of March, 1997 before the schedule date of completion. However, the final bill was not settled and the Respondent-Claimant was paid only part of his dues for the work executed in respect of the eleven numbers of items taken

in the agreement and five numbers of extra items. The Respondent-Claimant has, therefore, claimed as under:-

(i) Rs.2,12,59,430.07 towards entitlement under work bill

(ii) Rs.25,11,166.95 towards price escalation (price adjustment), having received Rs.27,17,781.00 as against Rs.52,28,947.95.

(iii) Rs.5,15,858.00 towards the idle charge of the machineries and men from 06.02.1996 till 15.03.1996 on account of opposition and resistance from the villagers.

(iv) Rs.5,45,719.00 towards refund of security deposits; as a part out of it to the tune of Rs.21,82,874.00 only had been received.

(v) Interest @ 18% on the amount payable towards execution of work and balance price escalation.

(vi) Cost of Arbitration.

3. The Appellant-State countered the claim of the Respondent-Claimant on the following stands.

A. The dispute is not arbitrable before the present Arbitrator as appointed.

B. The reference is not maintainable in the absence of furnishing security deposit by the Respondent-Claimant as per Clause-5 and the General Conditions of Contract (GCC).

C. The allegation that the Respondent-Contractor was not achieving proportionate progress due to obstructions from the villagers is baseless as it was very much temporary and did not affect the work.

D. The Respondent-Claimant had executed only two extra items of work as per Clause-32 of the GCC for which payment had been made and in respect of other three extra items of work, the Chief Engineer and Executive Engineer in meeting dated 03.06.1996 had requested all the agencies including the Respondent-Claimant to accelerate and complete the work by 31.03.1997 so that the financial assistance of NABARD would be availed of whereas the Respondent-Claimant instead of completing the work within the time frame of NABARD completed the work by 28.11.1997 and did not submit the final bill and final escalation bill after completion of the work. The Contractor had submitted his 18th RA Bill, which was paid on 29.12.1997.

The work executed by 28.11.1997 including extra items of work as per first RA Bill is final. The Respondent-Claimant executed work worth Rs.3,54,39,233.00 in respect of agreement items out of which Rs.3,43,29,233.00 has been paid and only

balance of Rs.11,10,000.00 is payable. So, it is said that the total balance dues payuable towards price escalation is Rs.30,756.00 as shown in the calculation given in Annexure-2 to the written statement.

E. Part of the security deposit has been refunded and balance shall be released after settlement of the claim.

F. Claim of interest is untenable in view of clause contained in Special Conditions of Contracts (SCC).

4. The Respondent-Claimant thus having not received his dues filed an application under section 11 of the A & C Act before the High Court. The High Court by order dated 30.07.2010 appointed Mr. Justice P.K. Mishra, (Retd.) as the sole Arbitrator.

5. On the above rival case projected by the parties, the learned Arbitrator framed the following issues:-

"1. Whether the Claim is barred by limitation?

2. Whether the Claimant is entitled to receive any further amount towards execution of the work beyond the amount paid under 18th Running Account Bill?

3. Whether the Claimant is entitled to receive any amount for the Extra Items of work?

4. Whether the Claimant is entitled to receive further amount towards Price Adjustment?

5. Whether the Claimant is entitled to any compensation towards Idle Hire Charges of Machineries?

6. Whether the Claimant is entitled to any amount towards refund of Security Deposit?

7. Whether the Claimant is entitled to interest as claimed?

8. Whether the Claim for cost of Arbitration is justified?"

6. Considering the evidence, both oral and documentary, on record in the backdrop of the rival pleadings and all other materials available, the learned Arbitrator proceeded to pass the award on different heads of claim, summary of which is reproduced herein below:-

"**Summary of Award**

	Amount Claimed	**Amount Awarded**.
Claim No.1	2,12,59,430.07p	73,76,378.00
Claim No.2	25,11,166.95p	12,51,932.00
Claim No.3	5,15,858.00p	NIL
Claim No.4	5,45,719.00p	5,45,719.00
Claim No.5	Interest	Interest @ 18% on 91,74,029 from Date of Award Till payment.
Claim No.6	Cost	Consolidated cost of Rs.7,00,000/-"

7. Being aggrieved by the award passed by the learned Arbitrator, the Appellant-State filed an application under section 34 of the A & C Act in the Court of the learned District Judge, Mayurbhanj at Baripada praying therein to set aside the said award passed by the learned Arbitrator. The said application having been rejected by the learned District Judge by judgment dated 10.04.2019, this Appeal under section 37 of the A & C Act has been filed.

8. Mr. S.N. Das, learned Additional Standing Counsel appearing for the Appellant-State submitted that

(A). the learned Arbitrator could not have proceeded with the arbitration without following the mandate of Clause-53(F) of the agreement which stipulates that where the parties invoking arbitration is the Contractor, no reference for Arbitration shall be maintainable unless the Contractor furnishes security of a sum determined in accordance with the payable attached to be said clause, which on termination of the Arbitration Proceeding shall be adjusted against the cost, if any, awarded by the Tribunal against a party.

It was submitted that although the Appellant-State had taken a specific objection regarding maintainability of the claims for noncompliance of Clause-53(F), the learned Arbitrator has not given any finding on the said issue. In support of the same, he relied upon the decision of ***Municipal***

Corporation, Jabalpur & Others Vrs. M/s. Rajesh Construction Company (2007) 5 SCC 344.

(B). He further submitted that the claims raised by the Respondent-Claimant were grossly barred by limitation. It was contended that in view of specific Clause-36 of the GCC, the Respondent-Claimant was to raise the final bill after completion of the work and final bill/18th RA Bill was cleared on 24.12.1997. The Respondent-Claimant for the first time requested for clearance of outstanding dues on 28.10.1997 and another letter with the same request was sent on 03.06.2000 when similar letters were again issued on 19.04.2004 and 25.05.2006. The Respondent-Claimant invoked the Arbitration clause and demanded for settlement of the dispute on 24.11.2007 and the application under section 11(6) of the A & C Act was filed on 19.03.2008. He, therefore, submitted that here both by the time of the notification of the claim and the filing of application for appointment of Arbitrator, the Claims advanced were grossly barred by limitation which the learned Arbitrator has not considered within the specific framework and allowed the claims on merit in gross violation of both statutory as well as contractual provision.

In support of the above submission, he relied upon the decision of the Apex Court in case of ***M/s.T & AG vrs.***

Ministry of Defence; (2023) SCC Online SC 657 with special reference to paragraph-65-72.

(C). He next submitted that the Arbitrator in deciding the dispute has rewritten the terms of the agreement by construing the work covered under the BOQ to be extra items of work. He submitted that the claims towards extra item No.1 was in relation to the cost incurred towards executing BOQ Item No.1, i.e., removal of slushy soil allegedly done manually by the Respondent-Claimant instead of mechanical means when as provided under the agreement whereas Clause-8.3.1 (I) of TS10; it would include both manual and mechanical excavation of the soil and the same thing has been done by the learned Arbitrator in respect of extra Item No.2 and 3. He, therefore, submitted that once the rate has been fixed in contract for a particular work, the Respondent-Claimant was not entitled to claim additional amount merely because he had to spend more for carrying out said work. It was, therefore, stated that the exercise undertaken by the learned Arbitrator in determining the rate for the work was beyond his competence and authority and it was not open to the learned Arbitrator to rewrite the terms of the contract and award in favour of the Respondent-Claimant a higher rate for the work for which rate was already fixed under the contract. So, he contended that the learned Arbitrator having acceded

his authority and power, the same invites interference in this Appeal by the Court.

In support of the said submission, he relied upon the decision in case of ***Satyanarayan Construction Company Vrs. Union of India (2011) 15 SCC 101*** with special reference to paragraph 10 an 11.

(D). He further submitted that there being express bar on payment of interest stipulated in the agreement, the learned Arbitrator could not have awarded interest, over and above, the awarded claims. In support of the same, he invited the attention to Clause – 53(C) and 53(E) of the GCC which specially bar payment of interest. He also relied upon the decision in case of ***Union of India Vrs. Manraj Enterprises, (2022) 2 SCC 3***31. So, it was submitted that the award is vitiated by patent illegality appearing on its face and that is in contravention with the fundamental policy of Indian law.

9. Mr. P. Parija, learned counsel for the Respondent-Claimant having submitted that

(A) the Arbitral award is not an ordinary adjudicatory order so as to be lightly interfered with by the Courts under section 34 and 37 of the A & C Act as if dealing with an appeal or revision against a decision of any subordinate court, relying upon the decision in case of ***Reliance Infrastructures Vrs. State of Goa; (2024) 1 SCC 479*** contended that the present

award is not liable to be interfered with on any of the grounds urged by the learned Additional Standing Counsel.

(B) the issue of limitation was very much before the learned Arbitrator and that has been decided in favour of the Respondent-Claimant holding the claim to be not barred by limitation. He submitted that even though it is taken for a moment that the Respondent-Claimant had not raised the final bill after the work but as the matter relating to payment to be made to him on account of the extra items of work executed were pending before the Appellant and under consideration and had continued for a period without being responded to in any positive or negative manner, the learned Arbitrator has rightly held that the cause of action for raising the claim in the facts and circumstances of the case has arisen on the day when the Respondent-Claimant filed the application under section 11(6) of the A & C Act, finding no other option in getting his unpaid dues from the Appellant without further wasting time in a fruitless manner.

(C) It was submitted that the learned Arbitrator as can be seen from the relevant paragraph of the award has gone for detail discussion of the materials before him and considered the same in the backdrop of the rival case projected by the parties including some extra items of work admitted by the Appellant to have been done by the Respondent-Claimant

and when everything being taken into consideration in their proper prospective, the learned Arbitrator has arrived at a finding on each of the heads of the claim and also has gone to disallow certain items of claim lodged by the Respondent-Claimant, it cannot be said to be the findings are based on no evidence so as to be termed as perverse coming within the sweep of patent illegality warranting interference. It was submitted that there being no express denial and as such as against the claim of interest in the contract/agreement, the learned Arbitrator is absolutely right in awarding the interest for the period having all the authority to do so. With the above submissions, he contended that the Appeal is devoid of merit and as such is liable to be dismissed confirming the award as well as the judgment passed on the application under section 34 of the A & C Act filed by the Appellant.

10. **<u>Issues for consideration</u>**: -

Having heard learned counsel for the parties at length and giving my anxious and thoughtful consideration over the same, the following points for determination had been identified for being answered.

(1) What is the scope of this Court's power under section 37 of the A & C Act and whether the arbitral award is in contravention of the fundamental policy of Indian law, as in the given

case contrary to the provision laid down in the Indian Limitation Act, 1963?

(2) Whether the findings of the Arbitrator are based on no evidence and as such the same are perverse and thus the award suffers from the vice of patent illegality?

(3) Whether the learned Arbitrator is right in awarding the interest as afore-stated by travelling beyond the contract, which is impermissible and as such without jurisdiction?

11. ISSUE A: WHAT IS THE SCOPE OF THIS COURTS POWER UNDER SECTION 37 OF THE A&C ACT

1. In the present case, we are only concerned with Section 37(1)(c) which states that an appeal lies under Section 37 from an order setting aside or refusing to set aside an arbitral award under Section 34 of the A& C Act.
2. We may note that the law laid down by the Supreme Court constricts the supervisory role of the courts while testing the validity of an Arbitration Award. In the case of ***Mcdermott International Inc. v. Burn Standard Co. Ltd.*** [1] , the Supreme Court has held as under:—

"The 1996 Act makes provision for the supervisory role of courts, for the review of the arbitral award only to ensure fairness. Intervention of the court is envisaged in few circumstances only, like, in case of fraud or bias by the Ld. Arbitral Tribunals, violation of natural justice, etc. The court cannot correct errors of the Ld. Arbitral Tribunals. It can only quash the award leaving the parties free to begin the arbitration again if it is desired. So, the scheme of the provision aims at keeping the supervisory role of the court at minimum level and this can be justified as parties to the agreement make a conscious decision to exclude the court's jurisdiction by opting for arbitration as they prefer the expediency and finality offered by it."

3. It is now a settled position that while exercising a power under Section 34 of the A&C Act, the arbitral award can only be confirmed or set aside, but not modified. To buttress the said position of law, reliance is placed on the decision of the Supreme Court's recent judgment and order in ***NHAI v. M. Hakeem*** [2], wherein the Supreme Court held that:

> *"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 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.

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31. Thus, there can be no doubt that given the law laid down by this Court, Section 34 of the Arbitration Act, 1996 cannot be held to include within it a power to modify an award. The sheet anchor of the argument of the respondents is the judgment of the learned Single Judge in

Gayatri Balaswamy [Gayatri Balaswamy v. ISG Novasoft Technologies Ltd., 2014 SCC OnLine Mad 6568 : (2015) 1 Mad LJ 5] . This matter arose out of a claim for damages by an employee on account of sexual harassment at the workplace. The learned Single Judge referred to the power to modify or correct an award under Section 15 of the Arbitration Act, 1940 in para 29 of the judgment. Thereafter, a number of judgments of this Court were referred to in which awards were modified by this Court, presumably under the powers of this Court under Article 142 of the Constitution of India. In para 34, the learned Single Judge referred to para 52 in McDermott case [McDermott International Inc. v. Burn Standard Co. Ltd., (2006) 11 SCC 181] and then concluded that since the observations made in the said para were not given in answer to a pointed question as to whether the court had the power under Section 34 to modify or vary an award, this judgment cannot be said to have settled the answer to the question raised finally.

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42. It can therefore be said that this question has now been settled finally by at least 3 decisions [McDermott International Inc. v. Burn Standard Co. Ltd., (2006) 11 SCC 181] , [Kinnari Mullick v. Ghanshyam Das Damani, (2018) 11 SCC 328 : (2018) 5 SCC (Civ) 106] , [Dakshin Haryana Bijli Vitran Nigam Ltd. v. Navigant Technologies (P) Ltd., (2021) 7 SCC 657] of this Court. Even otherwise, to state that the judicial trend appears to favour an interpretation that would read into Section 34 a

power to modify, revise or vary the award would be to ignore the previous law contained in the 1940 Act; as also to ignore the fact that the 1996 Act was enacted based on the Uncitral Model Law on International Commercial Arbitration, 1985 which, as has been pointed out in Redfern and Hunter on International Arbitration, makes it clear that, given the limited judicial interference on extremely limited grounds not dealing with the merits of an award, the "limited remedy" under Section 34 is coterminous with the "limited right", namely, either to set aside an award or remand the matter under the circumstances mentioned in Section 34 of the Arbitration Act, 1996.

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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."

Further, the Supreme Court also re-iterated the above position in National Highway Authority of India vs. Sri P.Nagaraju @ Cheluvaiah & Anr as under:

> *"26. Under the scheme of the Act 1996 it would not be permissible to modify the award passed by the learned Arbitrator to enhance or reduce the compensation based on the material available on record in proceeding emanating from Section 34 of the Act, 1996…"*

12. Adverting to the case in hand, it is found that the learned Arbitrator has rejected the question of maintainability of the arbitral proceeding by order dated 16.03.2021. The Appellant-State had also challenged the order of the High Court appointed the Arbitrator by carrying SLP(C) No.11980 of 2011. That has been dismissed on 19.11.2013. So, the question of maintainability has been finally decided.

The learned Arbitrator had rejected the contention by referring to the affidavit filed by the Appellant-State in ARBP No.13 of 2008 that the plea raised in the present proceeding regarding date of completion of the work is a mere pretext and completely unacceptable. Then referring to the note of submission filed by the Appellant-State in the said arbitration application before the High Court, the learned Arbitrator has rejected the said contention.

13. The position of law is no more res integra that a finding recorded by the learned Arbitrator which is not based on any evidence so as to be substantiated the said finding is perverse

and as such is liable to be set aside being under the sufferance of vice of patent illegality can only be gone into for reappraisal and appropriate finding based on that. It has been held in case of ***Associate Builders (supra)*** as under:-

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31. The third juristic principle that a decision which is perverse or so irrational that no reasonable person would have arrived at the same is important and requires some degree of explanation. It is settled law that where:

(i) a finding is based on no evidence, or

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

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

32. A good working test of perversity is contained in two judgments. In Excise and Taxation Officer-cum-Assessing Authority v. Gopi Nath & Sons, it was held: (SCC p. 317, para 7)

"7. … It is, no doubt, true that if a finding of fact is arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant material or if the finding so outrageously defies logic as to suffer from the vice of

irrationality incurring the blame of being perverse, then, the finding is rendered infirm in law."

In Kuldeep Singh v. Commr. of Police, it was held: (SCC p.14, para 10)

"10. A broad distinction has, therefore, to be maintained between the decision which are perverse and those which are not. If a decision is arrived at on no evidence or evidence, which is thoroughly unreliable and no reasonable person would act upon it, the order would be perverse. But if there is some evidence on record which is acceptable and which could be relied upon, howsoever compendious, it may be, the conclusions would not be treated as perverse and the findings would not be interfered with."

33. It must clearly be understood that when a court is applying the 'Public policy' test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the arbitrator on fact has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. Thus an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score. Once it is found that the arbitrators approach is not arbitrary or capricious, then he is

the last word on facts. In P.R. shah, shares & Stock Brokers (P) Ltd. v. B.H.H. Securities (P) Ltd., this Court held: (SCC pp. 601-02, para 21)

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

34. It is with this very important caveat that the two fundamental principles which from part of the fundamental

policy of Indian law (that the arbitrator must have a judicial approach and that he must not act perversely) are to be understood."

14. In a very recent case of ***Reliance Infrastructure Ltd. (supra)*** reiterating the principles laid down in case of ***SSANGYONG Engineering & Construction CO. LTD. (supra)*** and ***Delhi Airport Metro Express Private Ltd. Vrs. Delhi Metro Rail Corporation Ltd., (2022) 1 SCC 131***, it has been held that -

"patent illegality should be illegality which goes to the root of the matter. In other words, every error of law committed by the Arbitral Tribunal would not fall within the expression "patent illegality". Likewise, erroneous application of law cannot be categorized as patent illegality. In addition, contravention of law not linked to public policy or public interest is beyond the scope of the expression "patent illegality". What is prohibited is for Courts to reappreciation evidence to conclude that the award suffers from patent illegality appearing on the face of the award, as Courts do not sit in appeal against the arbitral award. The permissible grounds for interference with a domestic award under Section 34(2-A) on the ground of patent illegality is when the arbitrator takes a view which is not even a possible one, or interprets a clause in the contract in such a manner which no fair-minded or reasonable person should, or if the arbitrator commits an error of jurisdiction by wandering

outside the contract and dealing with matters not allotted to them. An arbitral award stating no reasons for its findings would make itself susceptible to challenge on this account. The conclusions of the arbitrator which are based on no evidence or have been arrived at by ignoring vital evidence are perverse and can be set aside on the ground of patent illegality. Also, consideration of documents which are not supplied to the other party is a facet of perversity falling within the expression "patent illegality".

15. In the light of the of the parameters as laid down above vis-à-vis the scope of judicial intervention that the present Appeal in view of the judgment passed by the learned District Judge in Arbitration Case No. 15 of 2015 arising out of the arbitration award dated 29.08.2015 passed by the learned Arbitrator has to be addressed.

(A) <u>Limitation</u>

The issue as to the limitation has been decided by the learned Arbitrator as that had been raised from the very beginning. This Court addressing the rival submission advanced, feels that at first, it would be profitable to take note of the law laid down by the Hon'ble Apex Court in case of ***B and T AG (supra)***. The Court was dealing with a petition under section 11(6) of the A & C Act. It was vehemently opposed on twin points of limitation; (1) that the petition under section 11(6) of the A & C Act is time barred and (2)

that the claims raised by the Petitioner were hopelessly barred by limitation. The Court, therefore, was called upon to rule whether time barred claim or claims which are barred by limitation can be said to be live claim so as to be referred to the Arbitrator. Having said that no time limit has been prescribed for filing the application under section 11(6) of the A & C Act for appointment of the Arbitrator, the Court, however, referring to section 43 of the A & C Act and the decision in case of ***Consolidated Engineering Enterprises Vrs. Principal Secretary, Irrigation Department, (2008) 7 SCC 169***, which had addressed the contention that section 43 of the A & C Act makes the provision of Limitation Act, 1963 applicable only to arbitration and not to any proceeding relating to arbitration in a court had negated the same in saying that the provisions of Limitation Act, 1963 shall apply to all proceedings under the A & C Act, both in court and in arbitration, except to the extent expressly excluded by the provisions of A & C Act. It was then, however, observed that there is a fine distinction between the plea that the claims raised are barred by limitation and the pleas that the application for appointment of an Arbitrator is barred by limitation. Referring to the celebrated decision of the High Court of Calcutta in case of ***Dwijendra Narayan Roy Vrs.***

Jogesh Chandra Dey & Another, AIR 1924 (Cal) 600, deciding the cause of action the followings have been said:-

> Cause of action becomes important for the purposes of calculating the limitation period for bringing an action. It is imperative that a party realises when a cause of action arises. If a party simply delays sending a notice seeking reference under the Act 1996 because they are unclear of when the cause of action arose, the claim can become time-barred even before the party realises the same.
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> "**Russell on Arbitration by Anthony Walton (19th Edn.)** at pp. 4-5 states that the period of limitation for commencing an arbitration runs from the date on which the "cause of arbitration" accrued, that is to say, from the date when the claimant first acquired either a right of action or a right to require that an arbitration take place upon the dispute concerned. The period of limitation for the commencement of an arbitration runs from the date on which, had there been no arbitration clause, the cause of action would have accrued:
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> "Just as in the case of actions the claim is not to be brought after the expiration of a specified number of years from the date on which the cause of action accrued, so in the case of arbitrations, the claim is not to be put forward after the expiration of the specified number of years from the date when the claim accrued."
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> In Law of Arbitration by Justice Bachawat at p. 549, commenting on Section 37, it is stated that subject to the Act 1963, every arbitration must be commenced within the prescribed period. Just as in the case of actions the claim is not to be brought after the expiration of a specified number of years

from the date when the cause of action accrues, so in the case of arbitrations the claim is not to be put forward after the expiration of a specified number of years from the date when the claim accrues. For the purpose of Section 37(1) "action" and "cause of arbitration" should be construed as arbitration and cause of arbitration. The cause of arbitration arises when the claimant becomes entitled to raise the question, that is, when the claimant acquires the right to require arbitration. An application under Section 11 of the Act 1996 is governed by Article 137 of the Schedule to the Act 1963 and must be made within 3 years from the date when the right to apply first accrues. There is no right to apply until there is a clear and unequivocal denial of that right by the respondent. It must, therefore, be clear that the claim for arbitration must be raised as soon as the cause for arbitration arises as in the case of cause of action arisen in a civil action.

Whether any particular facts constitute a cause of action has to be determined with reference to the facts of each case and with reference to, the substance, rather than the form of the action. If an infringement of a right happens at a particular time, the whole cause of action will be said to have arisen then and there. In such a case, it is not open to a party to sit tight and not to file an application for settlement of dispute of his right, which had been infringed, within the time provided by the Limitation Act, and, allow his right to be extinguished by lapse of time, and thereafter, to wait for another cause of action and then file an application under Section 11 of the Act 1996 for establishment of his right which was not then alive, and, which had been long extinguished because, in such a case, such an application would mean an

application for revival of a right, which had long been extinguished under the Act 1963 and is, therefore, dead for all purposes. Such proceedings would not be maintainable and would obviously be met by the plea of limitation under Article 137 of the Act 1963.

Negotiations may continue even for a period of ten years or twenty years after the cause of action had arisen. Mere negotiations will not postpone the "cause of action" for the purpose of limitation. The Legislature has prescribed a limit of three years for the enforcement of a claim and this statutory time period cannot be defeated on the ground that the parties were negotiating.

In ***Panchu Gopal Bose v. Board of Trustees for Port of Calcutta reported in (1993) 4 SCC 338***, this Court had held that the provisions of the Act 1963 would apply to arbitrations and notwithstanding any term in the contract to the contrary, cause of arbitration for the purpose of limitation shall be deemed to have accrued to the party, in respect of any such matter at the time when it should have accrued but for the contract. Cause of arbitration shall be deemed to have commenced when one party serves the notice on the other party requiring the appointment of an arbitrator. The question was when the cause of arbitration arises in the absence of issuance of a notice or omission to issue notice for a long time after the contract was executed? Arbitration implies to charter out timeous commencement of arbitration availing of the arbitral agreement, as soon as difference or dispute has arisen. Delay defeats justice and equity aids promptitude and resultant consequences. Defaulting party should bear the hardship and should not transmit the hardship to the other party,

after the claim in the cause of arbitration was allowed to be barred. It was further held that where the arbitration agreement does not really exist or ceased to exist or where the dispute applies outside the scope of arbitration agreement allowing the claim, after a considerable lapse of time, would be a harassment to the opposite party. It was accordingly held in that case that since the petitioner slept over his rights for more than 10 years, by his conduct he allowed the arbitration to be barred by limitation and the Court would be justified in relieving the party from arbitration agreement under Sections 5 and 12(2)(b) of the Act. [See: **State of Orissa v. Damodar Das, (1996) 2 SCC 216**]

The observations made by this Court in ***Panchu Gopal (supra)*** in paras 10, 11, 12, 13, 14 and 15 respectively, are also relevant. The observations read as under:

"10. In ***West Riding of Yorkshire County Council v. Huddersfield Corpn. [(1957) 1 All ER 669***] the Queen's Bench Division, Lord Goddard, C.J. (as he then was) held that the Limitation Act applies to arbitrations as it applies to actions in the High Court and the making, after a claim has become statute-barred, of a submission of it to arbitration, does not prevent the statute of limitation being pleaded. Russel on Arbitration, 19th Edn., reiterates the above proposition. At page 4 it was further stated that the parties to an arbitration agreement may provide therein, if they wish, that an arbitration must be commenced within a shorter period than that allowed by statute; but the court then has power to enlarge the time so agreed. The period of limitation for commencing an arbitration runs from the date on which the cause of arbitration

accrued, that is to say, from the date when the claimant first acquired either a right of action or a right to require that an arbitration takes place upon the dispute concerned.

The observations made by this Court in Panchu Gopal (supra) in paras 10, 11, 12, 13, 14 and 15 respectively, are also relevant. The observations read as under:

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Therefore, the period of limitation for the commencement of an arbitration runs from the date on which, had there been no arbitration clause, the cause of action would have accrued. Just as in the case of actions the claim is not to be brought after the expiration of a specified number of years from

the date on which the cause of action accrued, so in the case of arbitrations, the claim is not to be put forward after the expiration of the specified number of years from the date when the claim accrued

In Russell on Arbitration, at pages 72 and 73 it is stated thus:

"Disputes under a contract may also be removed, in effect, from the jurisdiction of the court, by including an arbitration clause in the contract, providing that any arbitration under it must be commenced within a certain time or not at all, and going on to provide that if an arbitration is not so commenced the claim concerned shall be barred. Such provisions are not necessarily found together. Thus the contract may limit the time for arbitration without barring the claim depriving a party who is out of time of his right to claim arbitration but leaving open a right of action in the courts. Or it may make compliance with a time-limit a condition of any claim without limiting the operation of the arbitration clause, leaving a party who is out of time with the right to claim arbitration but so that it is a defence in the arbitration that the claim is out of time and barred. Nor, since the provisions concerned are essentially separate, is there anything to prevent the party relying on the limitation clause waiving his objection to arbitration whilst still relying on the clause as barring the claim."

At page 80 it is stated thus:

"An extension of time is not automatic and it is only granted if 'undue hardship' would otherwise be caused. Not all hardship, however, is 'undue hardship'; it may be proper that hardship caused to a party by his own default should be borne by him, and not transferred to the other party by allowing a

claim to be reopened after it has become barred. The mere fact that a claim was barred could not be held to be 'undue hardship'."

The Law of Arbitration by Justice Bachawat in Chapter 37 at p. 549 it is stated that just as in the case of actions the claim is not to be brought after the expiration of a specified number of years from the date when the claim accrues, so also in the case of arbitrations, the claim is not to be put forward after the expiration of a specified number of years from the date when the claim accrues. For the purpose of Section 37(1) 'action' and 'cause of action' in the Limitation Act should be construed as arbitration and cause of arbitration. The cause of arbitration, therefore, arises when the claimant becomes entitled to raise the question, i.e. when the claimant acquires the right to require arbitration. The limitation would run from the date when cause of arbitration would have accrued, but for the agreement.

Arbitration implies to charter out timeous commencement of arbitration availing the arbitral agreement, as soon as difference or dispute has arisen. Delay defeats justice and equity aid the promptitude and resultant consequences. Defaulting party should bear the hardship and should not transmit the hardship to the other party, after the claim in the cause of arbitration was allowed to be barred. The question, therefore, as posed earlier is whether the court would be justified to permit a contracting party to rescind the contract or the court can revoke the authority to refer the disputes or differences to arbitration. Justice Bachawat in his Law of Arbitration, at p. 552 stated that "in an appropriate case leave should be given to revoke the authority of the arbitrator". It

was also stated that an ordinary submission without special stipulation limiting or conditioning the functions of the arbitrator carried with it the implication that the arbitrator should give effect to all legal defences such as that of limitation. Accordingly the arbitrator was entitled and bound to apply the law of limitation. Section 3 of the Limitation Act applied by way of analogy to arbitration proceedings, and like interpretation was given to Section 14 of the Limitation Act. The proceedings before the arbitration are like civil proceedings before the court within the meaning of Section 14 of the Limitation Act. By consent the parties have substituted the arbitrator for a court of law to arbiter their disputes or differences. It is, therefore, open to the parties to plead in the proceedings before him of limitation as a defence.

In Mustiu and Boyd's Commercial Arbitration (1982 Edn.) under the heading "Hopeless Claim" in Chapter 31 at page 436 it is stated thus:

"There is undoubtedly no jurisdiction to interfere by way of injunction to prevent the respondent from being harassed by a claim which can never lead to valid award for example in cases where claim is brought in respect of the alleged Arbitration agreement which does not really exist or which has ceased to exist. So also where the dispute lies outside the scope of arbitration agreement.""

(*Emphasis Supplied)*

(B). Adverting the case at hand it is found that the learned Arbitrator has dealt this issue at paragraph 52 of the award which read as follows:-

"The question of payment of dues of the Contractor was never finalized by the Respondents.

The Respondents in para-9 of the Written Statement have taken the plea that the Contractor did not submit the final bill and final escalation bill after completion of the work. It is stated in para-10 of Written Statement that "… As settlement of final claim is not possible than without final bill, the Executive Engineer requested the Petitioner Contractor to submit final bills…"

In para-11 of the Rejoinder, the Claimant has stated "....It is further submitted that the Contractor could not have submitted the Final Bill as also the Final Escalation Bill before final measurements were taken by the Departmental Engineers. As would appear from the letter dated 04/11/2008 issued by the Executive Engineer calling the Claimant Contractor to attend his office on 11/11/2008 to accept the final levels …." The letter dated 04/11/2008 has been filed as Annexure-18. From Order No.45 and 46 and the Level Books and Annexure-18 it is apparent that final measurement has not been entered in the Measurement Books. In the absence of final measurement, the Contractor could not have asked for preparation and payment of final bill. The Respondents had never intimated that 18th Running Account Bill was the final bill and nothing more was due. As a matter of fact in the Written Statement they have admitted that 11,10,000/- was payable towards Agreement No.1 and Rs.30,765/- is to be paid towards escalation and the balance security deposit is to be refunded after settlement of final claims. In the counter filed in High Court in Arbp.13 of 2008, the Respondents had pleaded that the matter was under investigation by the Vigilance and matter of payment could not be finalized.

> Clause-53(g) of the contract provides "if the contractor does not make any demand for arbitration in respect of any claim(s) in writing within ninety days of receiving the intimation from the Government that the bill is ready for payment, the claim of the contractor(s) shall be deemed to have been waived and absolutely barred and Government shall be discharged and released of all liabilities under the contract in respect of such claim"
>
> Admittedly the Government had never issued any such intimation. As a matter of fact no final measurement was recorded at any time.
>
> In view of the above consideration it cannot e held that the claim is barred by limitation. As a matter of fact to be fair enough to the Respondents, they have not raised the bar of limitation. The issue is accordingly answered in favour of the Claimant."

16. The Appellant has clearly stated in the written statement that the settlement of the final claim was not possible without final bill and, therefore, the Respondent-Claimant was asked to submit the final bill and the response of the Respondent-Claimant was that he could not have submitted the final bill as also the final escalation bill before final measurement were taken by the Departmental Engineer.

The materials on record being perused, it has been found by the the learned Arbitrator that final measurement had not been entered in the Measurement Book and that the Respondent-Claimant had never intimated that the 18th

Running Account Bill was the final bill and nothing more was due. Moreover, in the very written statement filed by the Appellant, there stands the admission that Rs.11,10,000/- was payable towards Agreement No.1 and Rs.30,765/- towards escalation and the balance of security deposit was to be refunded after settlement of the final claim. In fact, in the counter filed before the High Court in ARBP No.13 of 2018, the Appellant's claim was that the matter of payment had not been finalized on account of pendency of Vigilance investigation. Therefore, in such factual settings the learned Arbitrator having taken the view that when as per the Clause-34 of the GCC, the final measurement had not been done and the Respondent-Claimant was not informed that he had no claim in the matter, the claim by the date of issuance of notice was not barred by limitation cannot be found fault with.

17. The position of law is no more res integra that a finding recorded by the learned Arbitrator which is not based on any evidence so as to be substantiated the said finding is perverse and as such is liable to be set aside being under the sufferance of vice of patent illegality can only be gone into for reappraisal and appropriate finding based on that. It has been held in case of ***Associate Builders (supra)*** as under:-

xxx xxx xxx xxx

31. The third juristic principle that a decision which is perverse or so irrational that no reasonable person would have arrived at the same is important and requires some degree of explanation. It is settled law that where:

(i) a finding is based on no evidence, or

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

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

32. A good working test of perversity is contained in two judgments. In Excise and Taxation Officer-cum-Assessing Authority v. Gopi Nath & Sons, it was held: (SCC p. 317, para 7)

"7. … It is, no doubt, true that if a finding of fact is arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant material or if the finding so outrageously defies logic as to suffer from the vice of irrationality incurring the blame of being perverse, then, the finding is rendered infirm in law."

In Kuldeep Singh v. Commr. of Police, it was held: (SCC p.14, para 10)

"10. A broad distinction has, therefore, to be maintained between the decision which are perverse and those which are

not. If a decision is arrived at on no evidence or evidence, which is thoroughly unreliable and no reasonable person would act upon it, the order would be perverse. But if there is some evidence on record which is acceptable and which could be relied upon, howsoever compendious, it may be, the conclusions would not be treated as perverse and the findings would not be interfered with."

33. It must clearly be understood that when a court is applying the 'Public policy' test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the arbitrator on fact has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. Thus an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score. Once it is found that the arbitrators approach is not arbitrary or capricious, then he is the last word on facts. In P.R. shah, shares & Stock Brokers (P) Ltd. v. B.H.H. Securities (P) Ltd., this Court held: (SCC pp. 601-02, para 21)

"21. A Court does not sit in appeal over the award of an Arbitral Tribunal by reassessing or reappreciation the evidence. An award can be challenged only under the

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

34. It is with this very important caveat that the two fundamental principles which from part of the fundamental policy of Indian law (that the arbitrator must have a judicial approach and that he must not act perversely) are to be understood."

18. In a very recent case of ***Reliance Infrastructure Ltd. (supra)*** reiterating the principles laid down in case of ***SSANGYONG ENGINEERING & CONSTRUCTION CO.***

LTD. (supra) and ***Delhi Airport Metro Express Private Ltd. Vrs. Delhi Metro Rail Corporation Ltd., (2022) 1 SCC 131***, it has been held that -

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

are not supplied to the other party is a facet of perversity falling within the expression "patent illegality".

19. In ***Ssangyong Engineering and Construction Company Ltd. (Supra)*** the position held is that although the decision which is perverse is no long a ground for challenge under public policy of India which certainly amount to a patent illegality appearing on the face of the award. Thus a finding based on no evidence at all and the award which ignores vital evidence in arriving at its decision which is perverse and liable to be set aside on the ground of patent illegality. In case of ***Dyena Technologies Pvt. Ltd. (Supra)*** whether the award was without any reason and the learned Arbitrator had merely restated the contentions of the parties without appropriate consideration of the complicity of the issues involved therein, the award was held to be unintelligible and thus liable to be set aside. In case of ***State of Rajasthan (Supra)*** where the Arbitrator had simply awarded the amount as claimed in the claim statement merely basing upon the same without anything more, it was held to be invalid being wholly illegal and beyond the jurisdiction of the learned Arbitrator.

It is now, therefore, the rival contentions as regards the award under challenge before us would stand for being

addressed in the touchstone of the afore-stated legal principles.

20. (A) On perusal of the award, it is seen that the learned Arbitrator at Paragraph 43 onwards of the award has dealt all those items of claim raised by the Respondent-Claimant, which are covered under respective issues.

The Respondent-Claimant having claimed payment for extra work @ Rs.79/- per CUM, the learned Arbitrator having found that the Project Level Committee (PLV) having recommended as per the rate in the Booklet that has to be accepted. Accordingly, the entitlements of the Respondent-Claimant has been decided. Similarly, the claim of the score of price escalation (price adjustment), the learned Arbitrator has taken note of the revised calculation given by the Appellant. Then taking rival stand as to the extra items of work into account has ascertained the entitlement on that account.

(B) In doing so, the learned Arbitrator has made detail discussion of the obtained materials from every angle and decided the entitlement of the Respondent-Claimant under the Issues. It would be clear that on thorough examination of the materials on record mainly relying upon the documents admitted in the proceeding, the learned Arbitrator has answered the issues framed touching upon each heads of the claim..

(C) The learned Arbitrator, having decided the issues as aforesaid has very rightly denied the claim of the Respondent-Claimant as to the compensation for the man and machinery remaining idle from 05.02.1996 till 15.03.1996 for the local resistance as that has not been duly substantiated with reference to evidence as acceptable.

(D) The learned Arbitrator, as it appears, from the award has gone for detail examination of available evidence in the backdrop of the rival statement and their evaluation. A careful reading being given to the discussion of evidence made by the learned Arbitrator on the heads of the claim, this Court is not at all in a position to say that the same does not stand on the base of evidence. The basis on which those have been rendered by the learned Arbitrator cannot be said to be wholly erroneous. Therefore, when reappreciation of evidence is not permissible, at this stage so as to substitute another view with that of the view of the learned Arbitrator, the views taken by the learned Arbitrator as afore-stated have to be said to be possible views on the factual settings.

21. At this stage, it be stated that the Appellant when had raised the question of maintainability of the Arbitral Proceeding by filing application under section 16 of the A & C Act, that was rejected by order dated 16.03.2011. The Appellant even had challenged the order of appointment of

the learned Arbitrator as made by this Court in ARBP No.13 of 2018 by carrying SLP(Civil) C.C. No.11980 of 2011 before the Supreme Court and that had also been dismissed on contest by order dated 19.11.2013. Therefore, the contentions raised from the side of the Appellant that the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission of the arbitration and that the composition of Arbitral Tribunal was not in accordance with the Agreement of the parties are no more entertainable.

22. Now coming to the rate of interest as has been awarded by the learned Arbitrator, i.e., 18% per annum; the same appears to be without any reason and in the facts and circumstances as disproportionate which thus is pegged at 9% per annum being reasonable.

23. Accordingly, the Appeal stands disposed of with the modification of the rate of interest on the awarded amount from the date of award till payment to the extent as indicated above.

(D. Dash),
Judge.

Himansu