**IN THE HIGH COURT AT CALCUTTA**
**CIVIL APPELLATE JURISDICTION**
**COMMERCIAL APPELLATE DIVISION**

Before:

**The Hon'ble Justice Debangsu Basak**
And
**The Hon'ble Justice Aryak Dutt**

**AO-COM NO. 40 of 2026**
**Friends Engineering Co-operative Society Limited**
**Vs.**
**Digha Shankarpur Development Authority**

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|---|---|
| For the Appellants : | Mr. Debashis Kundu, Sr. Adv.<br>Mr. Indranil Nandi<br>Mr. D.P. Samanta<br>Mr. Sayak Konar |
| For the Respondents : | Mr. Surojit Nath Mitra, Ld. A. G.<br>Mr. N.C. Bihani, Sr. Adv.<br>Mr. Soumya Mukherjee<br>Mr. Dibashis Basu, Ld. A.G.P.<br>Ms. Sneha Dutta<br>Mr. Purnendu Das |
| Hearing Concluded On : | 23.09.2026 |
| Judgment Delivered On : | 06.10.2026 |

**Aryak Dutt, J.:**

**1.** This is an appeal under Section 37(1)(c) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act") read with Section 13(1A) of the Commercial Courts Act, 2015 (hereinafter referred to as the "the Act of 2015"), directed against the judgment and order dated 12th March, 2019, passed by the learned District Judge, Purba Medinipur in J. Misc. Case No. 23 of 2014. By that judgment, the learned District Judge allowed the respondent's application under Section 34 of the Act and set aside the award dated 14th February, 2014, made by the learned Sole Arbitrator, the Hon'ble Justice Samaresh Banerjea (Retd.).

**2.** The appellant, the claimant in the reference, seeks restoration of the award. The respondent, Digha Shankarpur Development Authority (hereinafter referred to as "DSDA"), on the contrary supports the judgment.

**3.** The appeal was presented and registered in the Non-Commercial Appellate Division. The disputes arise out of a Memorandum of Understanding for construction work, entered

into pursuant to a tender process. The parties agreed before this Court that the disputes between them fall within the meaning of Section 2(1)(c)(vi) of the Act of 2015. By an order dated 13th August, 2026, in exercise of power under Section 15 of the Act of 2015, this Court directed the appeal to be transferred in the Commercial Appellate Division. The appeal has accordingly been transferred and numbered as AO-COM/40/2026 and has been heard as a commercial appeal.

**4.** The appeal lies to this Division under Section 13(1A) of the Act of 2015, the proviso to which preserves appeals against orders specifically enumerated in Section 37 of the Act. An order setting aside an Arbitral Award under Section 34 of the Act is one such order. Registration of the appeal in the Commercial Appellate Division does not enlarge or alter its scope. It remains an appeal under Section 37(1)(c) of the Act and is to be decided on the principles set out below.

**5.** DSDA is a statutory authority of the Government of West Bengal. It proposed a two-storied market complex of about 690 stalls on some 7.50 acres of land at Sector B-7, New Digha Township. The appellant, a co-operative society, submitted an

Expression of Interest on 24th September, 2004, which DSDA accepted on 26th October, 2004.

**6.** A Memorandum of Understanding was executed on 25th November, 2004 (hereinafter referred to as "the MOU"). Under it the appellant, as "Builder", was to erect the complex "at its own cost, expenses and charges" at an estimated cost of Rs. 5,26,90,708/-, within 24 months, under DSDA's technical supervision. Clause 5 obliged the Builder to comply with the building regulations of the concerned authorities and to indemnify DSDA against breach of them. Clause 6 entitled the Builder to levy the construction expenditure for each stall from prospective lessees or buyers and the Builder will never claim the construction cost for more than estimated cost. The per-stall rates stipulated under Clause 6 were left blank. Clause 19 provided for an arbitration in the event of any dispute arising between the parties.

**7.** A work order was issued on 29th November, 2004 and possession of the site was made over. The appellant commenced the foundation work on 12th January, 2005.

**8.** By a letter dated 24th March, 2005, DSDA directed suspension of the work until further orders. It cited discrepancies in the selection of the builder and the absence of permissions from the Ministry of Environment, Government of India and the West Bengal Pollution Control Board. By a letter dated 21st April, 2005, DSDA again directed the work to be stopped. On 20th April, 2005, DSDA resolved that MOUs with private contractors be cancelled and construction be stopped "till fresh orders are issued through completion of appropriate formalities and taking due care of CRZ norms". By a letter dated 2nd May, 2005, the MOU was cancelled with effect from 21st April, 2005. By a Memo dated 11th May, 2005, the work order was declared null and void.

**9.** On or about 26th May, 2005, DSDA published a fresh notice inviting Expressions of Interest at the same site. That notice was later withdrawn.

**10.** Joint measurements were taken in the presence of the appellant's representative. The value of the unfinished work was assessed at Rs. 16,99,671/- on 22nd August, 2006.

**11.** The appellant raised a formal claim on 9th April, 2008 and invoked arbitration on 28th April, 2008. On an application

under Section 11 of the Act, this Court by an order dated 5th February, 2010, appointed the Hon'ble Justice Samaresh Banerjea (Retd.) as the Sole Arbitrator. The learned Arbitrator entered upon reference on 11th March, 2010.

**12.** On the consent of the parties, and without prejudice to the appellant's contentions, an interim award of Rs. 15,00,000/- towards the cost of the unfinished construction was made. DSDA had duly paid that sum.

**13.** On the joint prayer of the parties, the learned Arbitrator appointed Sri Debal Roy, IFS, Member Secretary, West Bengal State Coastal Zone Management Authority, as an expert. The expert was to report whether the structure fell within the prohibited zone under the CRZ Notification, 1991. The expert inspected the site on 4th and 5th September, 2010 using GPS readings. He reported that the “disputed structure” lay outside the 500-metre CRZ boundary. DSDA filed an objection to the report through its Assistant Engineer, Sri Maicap, who was examined and cross-examined.

**14.** By the award dated 14th February, 2014, the learned Arbitrator held that the termination was illegal and arbitrary and

that DSDA was in breach. He reasoned that the letters of suspension and cancellation gave vague reasons. DSDA produced no resolution recording that the site fell within the CRZ prohibited zone. DSDA itself invited fresh offers for the same site. The expert's report placed the structure outside the 500-metre line. He rejected the plea of supervening impossibility and held that it was DSDA's duty to obtain the requisite clearances.

**15.** The award on the several claims is summarised below.

| ***Claim*** | ***Head*** | ***Claimed (Rs.)*** | ***Awarded (Rs.)*** |
|---|---|---|---|
| ***1*** | *Value of work executed* | *32,50,000* | *15,00,000 (interim) + 2,00,000 + 2,44,757* |
| ***2*** | *Establishment — on-site / off-site* | *5,28,000 / 1,22,000* | *4,00,000 (on-site); off-site of 1,00,000 held payable in the body but omitted in the operative part* |
| ***3*** | *Depreciation of tools and plant* | *1,32,000* | *Nil* |
| ***4*** | *Loss of expected profit on the unexecuted portion* | *74,16,000* | *51,85,243 in the body; 51,08,000 in the operative part* |
| ***5 & 6*** | *Mobilisation/materials at site* | *5,20,000/ 1,42,000* | *92,500* |
| ***7*** | *Idle labour* | *1,43,500* | *1,43,500* |

| | | | |
|---|---|---|---|
| ***8*** | *Advances to labour gangs* | *2,20,000* | *1,50,000* |
| ***9*** | *Advances to suppliers* | *16,50,000* | *10,00,000* |
| ***10*** | *Interest on blocked capital* | *4,06,000* | *Nil* |
| ***11*** | *Loss of goodwill* | *10,00,000* | *Nil* |
| ***12*** | *Interest* | *18% p.a.* | *10% p.a. from 9th April, 2008 to the award; 18% p.a. if unpaid within 2 months* |
| ***13*** | *Costs* | *As found due* | *2,00,000 + 10,000* |

**16.** The figure under Claim No. 4 was reached by taking 15% of the unexecuted value of the contract amounting to Rs. 74,16,000/- and deducting Rs. 22,30,757/-, being the aggregate of the sums allowed under Claims 1, 2, 5, 7, 8 and 9.

**17.** DSDA challenged the award under Section 34 in J. Misc. Case No. 23 of 2014. Among its grounds were that the award conflicted with the public policy of India. The MOU was at best a quasi-contract and the award ignored the evidence. The grant of damages, costs and interest was bad and illegal.

**18.** By the impugned judgment, the learned District Judge held that the expert's report bore no plot number, measurement,

photograph, high tide line or geo-referenced map and does not reflect the actual state of affairs. He then relied on two memos of the Urban Development Department dated 17th December, 2004 and 20th December, 2004, a letter of the Ministry of Environment and Forests (No. J-17011/24/92-IA-II), and a CRZ map. He held that the learned Arbitrator had failed to appreciate those documents and that the award was "contrary to the law and justice" and therefore is in conflict with the public policy of India, and had set it aside.

**19.** Learned counsel appearing for the appellant submitted that the court below acted as a Court of Appeal and re-appreciated the expert's evidence. The expert was appointed at DSDA's own suggestion. DSDA's objection was tested by the examination of its witness. The findings that the report showed no measurement or high tide line are contrary to the map annexed to the report, which marks the CRZ boundary, the HTL, the LTL and measurements sourced from Survey of India toposheet No. 73 O/10.

**20.** It was urged that the two Urban Development Department memos and the Ministry's letter were never placed

before the learned Arbitrator, were not pleaded in the Section 34 application, and were handed up as photocopies at the hearing. The Court below could not set aside the award for failing to appreciate documents that were never before the Tribunal.

**21.** It was contended that the impugned judgment gives no reason as to why the award offends public policy. "Contrary to law and justice" is not a ground under Section 34. The Court below never addressed the core issues. The legality of the termination and the several heads of claim.

**22.** On merits, it was argued that the burden of obtaining permissions lay on DSDA as owner. A want of prior permission is at most a curable irregularity. DSDA's fresh invitation for the same site belied its plea of impossibility and that DSDA's new case in its written notes before the Tribunal was rightly shut out.

**23.** On loss of profit, reliance was placed on the case of ***A.T. Brij Paul Singh v. State of Gujarat,*** reported in ***(1984) 4 SCC 59***, and on the decision of a Co-ordinate Bench of this Court in ***B.B.M. Enterprise v. State of West Bengal*** being ***FMA 1409 of 2022 with FMA 1419 of 2022***, for the proposition that 15%

of the value of the unexecuted work is a reasonable measure of lost profit in a works contract.

**24.** Learned counsel appearing for DSDA submitted that the Digha–Shankarpur belt is governed by the CRZ regime and that no construction is permitted within 500 metres of the High Tide Line. Sector B-7 was, by the Ministry's letter, incorporated in the Coastal Zone Management Plan of West Bengal and categorised as CRZ-II. The Urban Development Department had directed DSDA to stop construction under MOUs at eight locations including Sector B-7, and DSDA was bound to comply.

**25.** It was submitted that the MOU was not a complete document, since the price of the stalls was never settled. It was inoperative, or at best voidable and in the nature of a quasi-contract. DSDA could therefore be liable at most for the value of the work done, and not for loss of profit or other compensation.

**26.** It was contended that the appellant participated in the joint measurement without protest and thereby accepted the stoppage and the avoidance of the MOU.

**27.** It was argued that the award rested on an incomplete inspection report and overlooked vital documents, including a CRZ map that was on the arbitral record. Though re-appreciation of evidence is not permitted under Section 34, an award that is contrary to substantive law, unreasoned, or ignores vital material is perverse and in conflict with public policy.

**28.** Reliance in this regard was placed on ***Associate Builders v. Delhi Development Authority,*** reported *in* ***(2015) 3 SCC 49***; ***Ssangyong Engineering & Construction Co. Ltd. v. National Highways Authority of India,*** reported in ***(2019) 15 SCC 131*** and ***Delhi Airport Metro Express (P) Ltd. v. Delhi Metro Rail Corporation Ltd.,*** reported in ***(2022) 1 SCC 131***.

**29.** The application under Section 34 was filed in 2014, before 23rd October, 2015. The challenge must therefore be tested under Section 34 as it then stood, read with ***Oil and Natural Gas Corporation Ltd. v. Saw Pipes Ltd.,*** reported in ***(2003) 5 SCC 705***, ***Oil and Natural Gas Corporation Ltd. v. Western Geco International Ltd.,***reported in ***(2014) 9 SCC 263*** and ***Associate Builders v. Delhi Development Authority***, reported in ***(2015) 3 SCC 49***.

**30.** Under that regime, an award conflicts with the public policy of India if it contravenes the fundamental policy of Indian law, the interest of India, justice or morality, or if it is patently illegal. Patent illegality includes contravention of the substantive law of India, of the Act itself, and of Section 28(3), which then required the tribunal to decide in accordance with the terms of the contract. A finding based on no evidence, one that ignores vital evidence, or one that takes irrelevant matter into account, is perverse as held in the case of ***Associate Builders (supra)***. An award must also state reasons that are proper, intelligible and adequate as held in the case **of *Dyna Technologies (P) Ltd. v. Crompton Greaves Ltd.,*** reported in ***(2019) 20 SCC 1***.

**31.** The Court under Section 34 does not sit in appeal. The arbitrator is the master of the quantity and quality of evidence, and a possible view on facts is not to be disturbed. The Appellate Court under Section 37 is confined to the same grounds, reliance in this regard is placed on ***MMTC Ltd. v. Vedanta Ltd.,*** reported in ***(2019) 4 SCC 163***.

**32.** The judgment rests on two findings. The expert's report does not reflect the actual state of affairs. The learned

Arbitrator failed to appreciate the Urban Development Department memos, the Ministry's letter and the CRZ map.

**33.** The weight to be attached to the expert's report was a matter for the Tribunal. The expert was appointed under Section 26 of the Act, on the joint prayer of the parties and at DSDA's suggestion. He inspected the site in the presence of both parties. DSDA's objection was considered, and its only witness was examined and cross-examined. The Tribunal found that the witness had no expertise to dispute the method used, that he raised no objection at the site, and that the map he relied on was admittedly not prepared by the Geological Survey of India. That was a possible view. The Court below substituted its own assessment of the report. That is re-appreciation of evidence, which Section 34 does not permit.

**34.** The Court below also faulted the Tribunal for not appreciating documents that, on the appellant's unrebutted submission, were never part of the arbitral record and were not pleaded in the Section 34 application. DSDA's written notes assert only that the CRZ map was produced before the Tribunal.

An application under Section 34 is ordinarily decided on the record before the arbitrator.

**35.** Having so held, the Court below concluded that the award was "contrary to the law and justice" and therefore is opposed to public policy. The judgment does not identify which head of public policy was offended, which provision of law was contravened, or which term of the contract was disregarded. "Contrary to law and justice" is not a ground under Section 34. Nor did the Court below examine the grounds directed at the grant of damages, interest and costs.

**36.** We therefore hold that the judgment dated 12th March, 2019 cannot be sustained.

**37.** The dispute dates from 2005, the award from 2014 and this appeal from 2019. The grounds under Section 34 are on record. A respondent in appeal may support the result on a ground urged below that the lower court did not decide. An Appeal Court under Section 37 can therefore examine the grounds on the arbitral record.

**38.** We do not disturb the Tribunal's finding of fact on evidence being a plausible view. Our examination is confined to grounds that go to the legal basis of liability and to the quantification of the claims.

**39.** DSDA's case, taken in its defence was that the MOU was incomplete and at best a quasi-contract. The MOU required the Builder to build "at its own cost" and to recover its expenditure from prospective lessees of stalls at rates specified in Clause 6. Those rates were left blank.

**40.** The award does not examine this at all. It treats the MOU throughout as a conventional works contract with a price of Rs. 5,26,90,708/- payable by DSDA, and awards compensation on that footing.

**41.** The award does not decide the dispute in accordance with the terms of the contract. An award that is silent on such a question is not reasoned within ***Dyna Technologies (supra),*** and is patently illegal for disregarding of Section 28(3) as it then stood.

**42.** The largest component of the award is Rs. 51,85,243/- towards loss of expected profit. The Tribunal applied 15% of the unexecuted value on the strength of ***A.T. Brij Paul Singh (supra).*** It accepted the calculation because DSDA had not challenged the arithmetic.

**43.** In the case of ***A.T. Brij Paul Singh (supra),*** it does not lay down an inflexible rule that 15% of the unexecuted value is payable whenever a works contract is terminated. What is reasonable depends on the facts of each case, as that judgment itself says. Damages under Section 73 of the Contract Act, 1872, compensate loss that naturally arises from the breach and they are not a penalty for it, reference is made through the case of ***Kailash Nath Associates v. Delhi Development Authority,*** reported in ***(2015) 4 SCC 136***. A claim for loss of profit must rest on material showing that profit would in fact have been earned as referred in the case of ***Unibros v. All India Radio,*** reported in ***2023 SCC OnLine SC 1366*** and ***Batliboi Environmental Engineers Ltd. v. Hindustan Petroleum Corporation Ltd.***, reported in ***(2024) 2 SCC 375***.

**44.** Here there was no such material. There was no evidence of the rates, of demand for the stalls, or of the margin the appellant would have earned. The Tribunal did not find that the unexecuted work could lawfully have been carried out. Expectation damages presuppose that performance would have been completed. On this record, the award of loss of profit rests on no evidence.

**45.** ***A.T. Brij Paul Singh (supra)*** and ***B.B.M. Enterprise (supra)*** was concerned with works contracts in which the employer paid the contract price. They do not assist the appellant on an arrangement of this kind.

**46.** The quantification is also self-contradictory. The body of the award arrives at Rs. 51,85,243/-; the operative part awards a sum of Rs. 51,08,000/-. The figure was reached by deducting from notional profit the sums awarded for the value of work done, establishment expenses, mobilisation, idle labour and advances. The deduction has no rational basis.

**47.** Under Claim No. 9, the appellant's witness admitted that he could not show what quantity of materials was received against the alleged advances. The Tribunal nonetheless

"reasonably presumed" that the unrealised advances were "not less than Rs. 10 lacs" and awarded that sum. Under Claim No. 8, no cash book was produced, and Rs. 1,50,000/- was again allowed on presumption. It does not permit a Tribunal to presume the existence of a loss for which there is no evidence.

**48.** The Tribunal held that the appellant itself contributed to the eight-month delay in dismantling its establishment, and that DSDA's share was of 2 (two) months. It then awarded Rs. 4,00,000/- of the Rs. 5,28,000/- claimed, about three-quarters of the claim, when 2 (two) months of 8 (eight) would yield Rs. 1,32,000/-. The body of the award also held Rs. 1,00,000/- payable for off-site expenses, but the operative part omits it. An award whose operative directions do not match its own findings is not intelligible.

**49.** The awards of interest and costs are consequential on the principal sums.

**50.** The award is patently illegal and perverse.

**51.** The award is not separable. Excising any of them would require recomputing the others. A re-quantification of the

award on merits, by this Court cannot be undertaken. The award must therefore be set aside in its entirety.

**52.** The judgment and order dated 12th March, 2019, passed by the learned District Judge, Purba Medinipur in J. Misc. Case No. 23 of 2014 is set aside. The award dated 14th February, 2014 made by the learned Sole Arbitrator is set aside. The interim award for Rs. 15,00,000/-, made on consent of the parties and since paid, was not the subject of the challenge under Section 34 and is not affected by this judgment. The appeal, **AO-COM/40/2026**, is thus **disposed of** accordingly.

**53.** Connected applications, if any, stand disposed of.

**54.** There shall be no order as to costs.

**(ARYAK DUTT, J.)**

**55.** I Agree.

**(DEBANGSU BASAK, J.)**