IN THE HIGH COURT AT CALCUTTA

CIVIL APPELLATE JURISDICTION
[CIRCUIT BENCH AT PORT BLAIR]

PRESENT: THE HON'BLE JUSTICE MADHURESH PRASAD

AND

THE HON'BLE JUSTICE PRASENJIT BISWAS

FMAT(ARBAWARD)/2/2026
IA NO. CAN/2/2025

UNION OF INDIA ... APPELLANT

VS.

M/S K.P. TRADING AND COMPANY ... RESPONDENT

For the appellant : Mr. Rakesh Kumar

For the respondent : Mr. Tapan Kumar Das

Heard on : October 05, 2026

Judgment on : October 05, 2026

MADHURESH PRASAD, J.

1. The present appeal has been filed under Section 37 of the Arbitration and Conciliation Act, 1996 (hereinafter referred as to the 1996 Act). It is the case of the appellant/Union of India that a tender was awarded on 22.11.2010 to the respondent. The scope of the work was part of Tsunami Rehabilitation Scheme to reclaim cultivable agricultural land. The work consisted of reconstruction of Sea Dyke in lieu of the Sea Dyke damaged during the 2004 Tsunami.

2. After award of the work, the respondent/claimant (hereinafter referred to as the Company for clarity and convenience) before the

learned Arbitrator did not commence the work on the stipulated date (01.12.2010) of commencement. In fact the work was not started even till the stipulated date (31.08.2011) of completion, under the agreement. On 23.03.2015, the appellant invoked Clause 3A of the General Conditions of Contract (hereinafter referred as the GCC) to foreclose the contract.

3. The Company thereafter invoked Clause 25 of the GCC containing the arbitration clause and requested the Chief Engineer, APWD for adjudication of his disputes and claim raised by the Company.

4. The appellant took no steps for appointment of Arbitrator. The Company thus, invoked Section 11 of the 1996 Act by moving the High Court for appointment of an Arbitrator. The Sole Arbitrator was thus appointed vide order dated 05.04.2016 by the High Court for adjudication of the Company's disputes. Due to inability of the Arbitrator appointed by the High Court to take up the case, another Arbitrator was appointed vide order dated 14.06.2016 by the High Court, who proceeded to consider the Company's claim.

5. Before the learned Arbitrator, the Company claimed that it had deposited the Earnest Money Deposit (EMD) of Rs. 5,79,682/- (Rupees five lakhs seventy nine thousand six hundred eighty two only) and the Performance Guarantee (PG) being an amount of Rs. 20,17,227/- (Rupees twenty lakhs seventeen thousand two

hundred twenty seven only). The EMD was deposited on 13.09.2010 whereas the PG was deposited on 18.11.2010.

6. Despite the deposits made by the Company, the work could not commence as the site in question was allegedly not made available to the Company. Such claim of the Company was considered by the learned Arbitrator with reference to the conditions contained in the NIT; and contract bearing Agreement No.16/Accts/EE/CD-III/2010-11 along with the General Conditions of Contracts which formed part of the agreement.

7. Condition No. 4 of the NIT contemplated that "*the site for the work is available*". The second option in Clause No. 4 stipulating that the site for the work shall be made available, was struck off. The NIT unambiguously held out an assurance that the site for the work was available. Thus, Clauses 8 and 9 of the NIT allowed the tenderers to inspect the drawing and documents pertaining to the work and also to inspect and examine the site and its surrounding for satisfying themselves as to nature of the ground and soil etc.

8. The learned Arbitrator also considered the stipulation in the letter of acceptance dated 16.11.2010 that on receipt of the Performance Guarantee Bond amount, the letter to commence the work shall be issued and site of work shall be handed over. However, the learned Arbitrator found that there was no document whatsoever to show that the site was handed over to the Company. It was the

specific claim of the Company in their Statement of Claim that they were repeatedly contacting the departmental official for handing over of the site. Learned Arbitrator considered the letter dated 14.11.2011 to this effect.

9. The learned Arbitrator further considered the correspondences to the effect that the appellant itself was asking the Agricultural Department to hand over the site to PWD. This communication is dated 31.10.2010. Learned Arbitrator also considered the other documents such as communication dated 10.01.2011 and letter dated 15.03.2011 from the Executive Engineer, PWD to the Agricultural Department wherefrom it emerged that demarcation of land at this location was not done. It also emerges that the land was not physically handed over to the PWD. This state of affair is apparent from successive communication being the Executive Engineer's letter date 20.07.2011; and communication dated 01.08.2011 from the Agriculture Department asking the Forest Department for NOC.

10. Under these circumstances, the appellant itself granted a provisional extension on 24.07.2012, extending the time for completion of the work upto 31.08.2012. The learned Arbitrator found that the appellant issued the letter dated 23.03.2015, 2 ½ years thereafter, in purported exercise of discretion under Clause 3A of the GCC which reads:

> "*CLAUSE 3A*
> *In case, the work cannot be started due to reasons not within the control of the contractor within 1/8th of the stipulated time for completion of work, either party may close the contract in such eventuality, the Earnest Money Deposit and the Performance Guarantee contract shall be refunded, but no payment on account of interest, loss of profit or damage etc shall be payable at all."*

11. Considering these facts and circumstances emanating from the record the learned Arbitrator found the work could not be started due to the reason not within the control of the Company. As a matter of fact the learned Arbitrator found a clear statement in this regard in the letter dated 23.03.2015 invoking Clause 3A of the GCC, foreclosing the agreement. The factual finding regarding the site not having made available to the Company therefore was based on materials considered by the learned Arbitrator in the form of correspondence placed either by the Company or by the appellant in the arbitral proceeding.

12. The learned Arbitrator also considered that the Clause 3A of the GCC extracted above provided an option to either parties to foreclose the agreement by invoking this clause in the event the work could not be started by the contractor within 1/8 of the stipulated time for the completion of the work, due to reason not within the control of the contractor.

13. The learned Arbitrator thus concluded that Clause 3A provided an option of an early exit within a reasonable time from the date of commencement of the work. The appellant was conscious from the

date of the execution of the agreement that the site was not available with them. The learned Arbitrator also found that despite their pursuing the matter before the authorities namely Agriculture Department and Forest Department, the site could not be handed over. Under the circumstances, learned Arbitrator held that the appellant was under an obligation to foreclose the contract under Clause 3A of GCC, without any further delay. The learned Arbitrator thus held that the Company could not be in any manner held liable for such lapses of not handing over the site to the Company, so as to disentitle the Company from the claim raised by it.

14. The appellant's denial of interest on loss of profit or damages as contemplated under Clause 3A could be sustained only if they had invoked the Clause 3A in terms of the letter and spirit of the Clause 3A i..e within 1/8 of the stipulated period of contract, which the appellant did not do. In fact the appellant granted one extension on 24.07.2012, for completion of work till the extended date, i.e. 31.08.2012. The site was still not handed over to the Company for executing the work. However, the appellant did not foreclose the agreement till about 2 ½ years thereafter. The liability of the appellant was therefore clearly established by the learned Arbitrator with reference to the terms and conditions in the NIT, agreement and GCC and also correspondence adduced before the learned Arbitrator.

15. The findings therefore did not merit any interference by the Court exercising jurisdiction under Section 34 of the Act. We find no infirmity in such consideration by the learned Arbitrator or by the Court exercising jurisdiction under Section 34 of the Act.

16. We therefore proceeded to consider the case of the appellant that the extent of claim allowed and quantification of loss was not sustainable.

17. We find that after submission of the statement of claim and counter statement of facts, the submission of the parties and after giving them opportunity of leading their evidences in support of their respective claims, the arbitrator proceeded to decide the following 8 claims made by the claimant:-

(i) Claim No. 1 — Interest on Earnest Money Deposit of Rs. 5,79,682.00 (Rupees five lakhs seventy nine thousand six hundred eighty two) which remained blocked from 13.09.2010 to 23.03.2015 @14% per annum.

Rs. 3,65,120.00

(ii) Claim No. 2 — Losses incurred due to blockage of margin money deposited with bank for obtaining Performance Guarantee @ 14% per annum on Rs. 5,04,307.00 (Rupees five lakhs four thousand three hundred seven only) from 18.11.2011 to 23.03.2015.

Rs. 8,22,020.00

(iii) Claim No. 3 Damages/Lossess on account of Head Office expenses due to prolongation of contract plus interest @ 14% per annum from the date of foreclosure.

Rs. 72,62,017.00

(iv) Claim No. 4 Losses of profit due to non-execution of contract plus interest @ 14% per annum thereupon.

Rs. 90,84,784.00

(v) Claim No. 5 Damages/Losses due to idling of Machinery and T&P and site overhead expenses for four months plus interest thereupon @ 14% for 48 months.

Rs. 20,97,916.00

(vi) Claim No. 6 Cost of boulders procured and transported but could not be used due to foreclosure plus interest @ 14% per annum for two years.

Rs. 1,28,57,600.00

(vii) Claim No. 7 Interest @ 14% per annum on all the claims from date of foreclosure till actual date of payment.

(viii) Claim No. 8 Cost of arbitration

Rs. 3,00,000.00

18. The Arbitrator considered the claims in the following terms:

(i) Claim No. 1 Interest on the amount of Rs. 5,79,682.00 (Rupees five lakhs seventy nine thousand six hundred eighty two only) @ 8.5% per annum (being average rate of bank interest prevalent during period in question) as reasonable

amount for the period from 13.09.2010 to 23.03.2015 quantified at Rs. 2,22,876.00 (Rupees two lakhs twenty two thousand eight hundred seventy six only).

(ii) Claim No. 2 was allowed to the extent of Rs. 1,22,006.00 (Rupees one lakh twenty two thousand and six only) in favour of the claimant against this claim.

(iii) Claim No. 3 was allowed to the extent of Rs. 5,00,000.00 (Rupees five lakhs only) to the claimant against this claim.

(iv) Claim No. 4 was allowed to the extent of Rs 12,85,982.00 (Rupees twelve lakhs eighty five thousand nine hundred eighty two only) to the claimant against this claim

(v) Claim No. 5 was disallowed by the learned Arbitrator.

(vi) Claim No. 6 was also disallowed by the learned Arbitrator.

(vii) Claim No. 7 was considered in the following terms – the claimant was found entitled to simple interest @ 8% per annum on the awarded amounts under the claims no.1,2,3 & 4 from 18.11.2015, i.e. the date of on which the dispute was arose, till the date of the award. Learned Arbitrator further held that no further interest will be payable if the awarded amount including interest and costs is paid to the claimant within 60 days of issue date of award. Thereafter it will carry interest @ 9% PA from date of award till date of payment.

(viii) Claim No. 8 being the cost of the arbitration was allowed to the extent of Rs. 3,00,000.00 (Rupees three lakhs only) in favour of the claimant.

19. Insofar as the two counter claims raised by the petitioner/ appellant, the same was rejected in the following terms:

> *" My decision on counter claims no. 1 and 2;*
>
> 1. *The counter claims have never been raised earlier nor been referred to arbitration by competent authority under the agreement/court.*
> 2. *It has been established that respondent was in breach of contract. Therefore he is not entitled to claim any losses/damages from the claimant contractor.*
> 3. *The losses claimed are not even remotely substantiated. It is not the case that respondent was granted money on interest bearing loan. Also government deposits do not earn interest normally. No details of actual losses are given. As far as staff is concerned, he has failed to establish that any staff was employed exclusively for this project."*

20. It is thus obvious that against a total claim of Rs. 3,27,89,457/- (Rupees three crores twenty seven lakhs eight nine thousand four hundred fifty seven only), the learned Arbitrator awarded the claim to the tune of Rs. 24,30,834/- (Rupees twenty four lakhs thirty thousand eight hundred thirty four only).

21. Aggrieved by the award, the present appellant assailed the same under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as '1996 Act') in Other Suit No. 02 of 2018. The same was considered by the Court of Additional District Judge, South Andaman District who found no reason to interfere with the award in exercise of jurisdiction of Section 34 of 1996 Act. The Suit was thus dismissed on contest but without there being any order as

to costs. The award dated 15.09.2017 of the learned Arbitrator was affirmed.

22. The appellant is thus before us in the present proceeding under Section 37 of the 1996 Act.

23. The learned advocate for the appellant submitted that since the Claim No. 5 (damages) was rejected, the award of the Arbitrator inasmuch as it allowed the Claim No. 4 under the head loss of profit is unsustainable.

24. It is submitted that the claimant did not adduce any evidence whatsoever in support of Claim No. 4. Merely by relying on Section 73 of the 1872 Act, the claim to loss of profit was allowed. The claim is unsustainable since the learned Arbitrator found no evidence as regards any deployment of resources by the claimant; and rejected the claim No.5, for damages.

25. In absence of any basis for quantification of loss of profit, the Claim No. 4 could not have been allowed. It is argued that Section 73 of the 1872 Act itself contemplates such compensation not to be given for any remote and indirect loss or damage sustained by reason of breach of contract.

26. Insofar as claim of the various deposits made by the claimant, learned counsel for the appellant has not raised any dispute, he has fairly submitted that the deposits were made by the claimant. Since

the appellant invoked Clause 3A of the GCC, the claimants were entitled to refund of the amounts.

27. Disputing the award of the Arbitrator insofar as it allowed the Claim No. 4. It is submitted that the decision of the Arbitrator in this regard is perverse and unsustainable since such conclusion of the Arbitrator cannot be reconciled with the conclusion of the Arbitrator with respect to Claim No. 5 being under the head of damage/losses due to idling of machinery and expenditure incurred over deployment of resources. In support of his submission learned counsel for the appellant has relied upon a decision of the Apex Court in the case of ***Batliboi Environmental Engineers Limited vs. Hindustan Petroleum Corporation limited and another*** reported in ***(2024) 2 SCC 375***. The judgment of the Apex Court is dated 21.09.2023. The learned counsel relied upon paragraph Nos. 23, 29 to 39 of the said judgment to submit that when a claim is made to loss of profit as made by the claimant herein, the claimant has to prove that there was other work available that he could have secured if not for the delay. The same has to be proved with reference to invitations to tender in which the claimant could not participate due to insufficient capacity to undertake other work; or by books of accounts to demonstrate a drop in turnover. If loss of turnover resulting from delay is not established, the contractor would not be entitled to loss of profit.

28. In the instant case, the Arbitrator already awarded the interest on the amounts deposited. In absence of any material to prove that a loss of profit has occasioned, the award of the Arbitrator in respect of Claim No. 4 under the head *loss of profit* is unsustainable.

29. Recognizing the limitation of an Appellate Court in respect of an arbitral award as per Sections 34 and 37 of the 1996 Act, it is submitted by learned counsel for the appellant that in the case of ***Batliboi Environmental Engineers Limited*** *(supra),* the Apex Court has clearly held that in paragraph Nos. 45 to 48, which are as follows:-

> *"45. Referring to the third principle in Western Geco, it was explained that the decision would be irrational and perverse if (a) it is based on no evidence; (b) if the arbitral tribunal takes into account something irrelevant to the decision which it arrives at; or (c) ignores vital evidence in arriving at its decision. The standards prescribed in Excise and Taxation Officer-cum-Assessing Authority v. Gopi Nath & Sons37 and Kuldeep Singh v. Commissioner of Police38 should be applied and relied upon, as good working tests of perversity. In Gopi Nath & Sons it has been held that apart from the cases where a finding of fact is arrived at by ignoring or excluding relevant materials or taking into consideration irrelevant material, the finding is perverse and infirm in law when it outrageously defies logic as to suffer from vice of irrationality. Kuldeep Singh clarifies that a finding is perverse when it is based on no evidence or evidence which is thoroughly unreliable and no reasonable person would act upon it. If there is some evidence which can be acted and can be relied upon, however compendious it may be, the conclusion should not be treated as perverse. This Court in Associate Builders emphasised that the public policy test to an arbitral award does not give jurisdiction to the court to act as a court of appeal and consequently errors of fact cannot be corrected. Arbitral tribunal is the ultimate master of quality and quantity of evidence. An award based on little evidence or no evidence, which does not measure up in quality to a trained legal mind would not be held to be invalid on this score. Every arbitrator need not necessarily be a person trained in law as a Judge. At times, decisions are taken acting on equity and such decisions can be just and fair should not be overturned under Section 34 of the A&C Act on the ground that the*

arbitrator's approach was arbitrary or capricious. Referring to the third ground of public policy, justice or morality, it is observed that these are two different concepts. An award is against justice when it shocks the conscience of the court, as in an example where the claimant has restricted his claim but the arbitral tribunal has awarded a higher amount without any reasonable ground of justification. Morality would necessarily cover agreements that are illegal and also those which cannot be enforced given the prevailing mores of the day. Here again interference would be only if something shocks the court's conscience. Further, 'patent illegality' refers to three sub-heads: (a) contravention of substantive law of India, which must be restricted and limited such that the illegality must go to the root of the matter and should not be of a trivial nature. Reference in this regard was made to clause (a) to Section 28(1) of the A&C Act, which states that the dispute submitted to arbitration under Part I shall be in accordance with the substantive law for the time being in force. The second sub-head would be when the arbitrator gives no reasons in the award in contravention with Section 31(3) of the A&C Act. The third sub-head deals with contravention of Section 28(3) of the A&C Act which states that the arbitral tribunal shall decide all cases in accordance with the terms of the contract and shall take into account the usage of the trade applicable to the transaction. This last sub-head should be understood with a caveat that the arbitrator has the right to construe and interpret the terms of the contract in a reasonable manner. Such interpretation should not be a ground to set aside the award, as the construction of the terms of the contract is finally for the arbitrator to decide. The award can be only set aside under this sub-head if the arbitrator construes the award in a way that no fair-minded or reasonable person would do.

46. As observed previously, we need not examine the amendment made to the A&C Act vide Act No. 3 of 2016 with retrospective effect from 23.10.2015 and the judgments that deal with the amended Section 34 of the A&C Act. Pertinently, the amendment to Section 34 of the A&C Act was effected, pursuant to the observations of the Supplementary Report to Report No. 246 on Amendments to Arbitration and Conciliation Act, 1996 by the Law Commission of India, titled 'Public Policy – Developments post-Report No. 246' published in February 2015. This Supplementary Report observed that the power to review an arbitral award on merits under Section 34 of the A&C Act, as elucidated in the case of Western Geco, subsequently followed in Associate Builders, is contrary to the object of the A&C Act and international practice on minimization of judicial intervention. A reference can also be conveniently made to MMTC Ltd. v. Vedanta Ltd.,39 and Ssangyong Engg. & Construction Co. Ltd. v. National Highways Authority of India which examine the scope of intervention of courts under Section 34 of the A&C Act as amended by Act No. 3 of 2016. MMTC Ltd. and Ssangyong Engg., and other judgments which deal with the amended Section 34 of the A&C Act that are not applicable in the present case.

47. We have extensively analysed the award, its patent flaws and illegalities which emanate from it, like the manifest lack of reasoning in

arriving at the conclusions and the calculation of amounts awarded, which, in fact, amount to double or part-double payments, besides being contradictory etc. In view of our aforesaid reasoning, the award has been rightly held to be unsustainable and set aside by the division bench of the High Court exercising power and jurisdiction under Section 37 read with Section 34 of the A & C Act.

48. In view of the aforesaid discussion, the appeal is dismissed without any order as to costs."

30. It is submitted that considering the earlier judgments delivered by the Apex Court holding the field till date, the Apex Court in the judgment of ***Batliboi Environmental Engineers Limited*** *(supra),* has held that patent flaws and illegalities which emanate from an award, like the manifest lack of reasoning in support of the conclusions and the amounts awarded as in the instant case, would suffice to set aside an arbitral award by exercising of jurisdiction under Sections 34 and 37 of the 1996 Act.

31. Learned counsel for the Company has relied upon three decisions, which are as follows:-

(i) ***Mohd. Salamatullah and other vs. Government of Andhra Pradesh*** reported in ***AIR 1977 SC 1481***.

(ii) ***A.T. Brij Paul Singh and other vs. State of Gujarat*** reported in ***AIR 1984 SC 1703***.

(iii) Unreported decision of the Division Bench of the Bombay High Court in the case of ***M/s Jeevat Construction vs. Union of India and others in Appeal No. 755 of 2005 decided on 07.02.2017.***

32. By relying upon the decision in the case ***Mohd. Salamatullah and other*** (supra), it is submitted that this Court should not investigate into claims awarded by the Arbitrator *de novo.*

33. Referring to the decision of ***A.T. Brij Paul Singh and other*** (supra), it is submitted that once it is held that the appellant was in breach of contract, the expenditure incurred by the petitioner being corroborated by the various receipts, which we have referred to above, the petitioner would be entitled to a loss of expected profit in the work. He has also relied upon paragraph No. 11 of this judgment to submit that the award towards loss of profit is not only reasonable but a lesser quantification. The Arbitrator has not awarded the 15% claimed by the Company, but awarded 3.75% only. It is thus apparent that the arbitrator has admitted the claim for loss of profit after due consideration and upto a real and reasonable extent.

34. The judgment of the Bombay High Court in the case of ***M/s Jeevat Construction*** (supra) has also been placed by the learned counsel. He has referred to paragraph no. 17 to reiterate the same submission that where there was breach of contract and wrongful termination, the party who is not in default, in the present case being the Company is entitled to recover the damages.

35. This court has to accord consideration to the rival submissions within the limited purview of interference in an arbitral award within the scope of Sections 34 and 37 of the 1996 Act. There are decisions

galore based on the statutory provisions contained in the above two noted sections of the 1996 Act, reiterating the limited scope of appellate jurisdiction. We therefore are required to confine ourselves within the well established limits as an appellate court in respect of an arbitral award.

36. The submission of the appellant that the conclusion in respect of Claim No. 4 cannot be at variance with the conclusion in respect of Claim No.5, in our opinion, does not hold water. The Claim No.5 is with regard to damages and loss due to idling of machineries, Tools and Plants and site over head expenses for the entire period. The claim under this head is also based on alleged procurement of unskilled, semi-skilled, highly skilled workers from the mainland but there is no material and evidence in support of this distinct claim. However, insofar as Claim No.4 is concerned, the claimant has produced income tax returns showing a steady decline in the gross total income starting from the years 2010-2011 to 2015-2016. It is also not in dispute that the tender amount was inclusive of a margin of 15% as percentage on cost of materials and labour to cover all overheads and profits.

37. The court is also required to consider the fact that the appellant has invoked Clause 3A to foreclose the contract much beyond 1/8 of the stipulated time for completion of work. Clause 3A was required to be invoked within a month from the stipulated date of

commencement (1.12.2010). However, we find that the same was invoked on 23.03.2015, more than four years after the stipulated date of commencement.

38. It is apparent that the authorities have resorted to Clause 3A even though the clause was not available to foreclose the contract beyond 1/8th of the stipulated time for completion of the work. The same has obviously been done on extraneous consideration to avoid the obligations arising out of foreclosure of the contract under Clause 13 of the GCC.

39. The breach of contract by the appellant is thus undeniable in view of the facts and circumstances on record. The circumstances, therefore, does give rise to a claim under Section 73 of the 1872 Act in favour of the claimant for loss of profits. The same is distinct from the damages sought to be quantified by the claimant under Claim No. 5. The Arbitrator has held that the work could not be performed on account of breach of contract by the employer. However, the learned Arbitrator did not accept the Company's plea regarding deployment of any material on site, including labour.

40. The Arbitrator as well as the court exercising the jurisdiction under Section 34 of the 1996 Act have rightly excluded such claims while quantifying the amount of loss of profit and limited the amount of loss of profit only to the extent of 3.75% of the net contract amount

(4,03,44,539/- Rupees four crores three lakhs forty four thousand five hundred and thirty nine only) quantified at Rs. 12,85,982/- (Rupees Twelve lakhs eight five thousand nine hundred eighty two only) as a reasonable profit.

41. We are in agreement with the submission of the learned counsel for the Company that the employer has not challenged the award of the arbitrator on any of the grounds, available for challenging an award as contemplated in Sections 34(2) or (2-A) of the 1996 Act. No ground whatsoever has been raised under Section 34 which is obvious from a bare reading of the application filed under Section 34 of the 1996 Act, raising a limited challenge to the award in respect to Claim No. 4.

42. The said award therefore in respect Claim No. 4 is quantified by the arbitrator acting on the basis of the net contract amount and calculating the percentage on loss of profits as 3.75% component above the net contract amount. It has excluded the remaining margin over and above the net contract amount also implicit within the 15% margin over and above the net contract amount as found in Clause 2(x) of schedule F of the contract, which reads as follows:-

> *" 2 (x) Percentage on cost of materials and*
> *Labour to cover all overheads and profits 15%"*

43. Thus, it cannot be said that the arbitrator has arrived at the quantification in respect of loss of profits arbitrarily or in a whimsical

manner. The approach appears to be bonafide, fair and reasonable without being actuated by any extraneous consideration. In the circumstances the court exercising jurisdiction under Section 34 of 1996 Act, has rightly not substituted its own opinion by interfering with the award in this regard. Insofar as the Claim No. 5 regarding damages, the conclusion of the arbitrator in this regard was rightly based on an assessment of parameters relevant to damages since the damages was claimed due to idling of machinery, tools and plants and site overhead expenses for entire period. This claim also included expenditure over procurement of man power. The arbitrator has thus rightly concluded that since the site had never been handed over and work never commenced, the damages or loss claimed on account of idling of man power, machinery or expenses incurred over them without any materials in support thereof, could not be accepted.

44. We therefore are not inclined to accept the submission of the learned counsel for the appellant that the Claim No. 4 under the heading loss of profit could not have been allowed since the arbitrator had rejected the Claim No. 5 for damages. In view of the above discussion, we find the nature of the two claims to be distinct and based on different parameters, in the present facts and circumstances as emanating from the records.

45. In view of the facts and materials on record, we find that there is no scope for the appellant to rely upon the decision of the Apex

Court in the case of ***Batliboi Environmental Engineers Limited*** (supra) even though the legal proposition in the said judgment is undeniable and is binding upon this court.

46. In the case before the Apex Court, it is apparent that there was no basis for quantification and the judgment was passed in a set of facts and circumstances where there was manifest lack of reasoning in arriving at the conclusion and the calculation of the amount awarded by the arbitrator. In the case of ***Batliboi Environmental Engineers Limited*** (supra), the Apex Court has found the decision to award loss of overheads and loss of profit/profitable, and its quantification to be unsustainable as observed by Apex Court in paragraph 28 of the judgment, which reads as follows:-

> *"28. The Arbitral tribunal in the present case has given complete go by to these principles well in place, overlooked care and caution required and taken a one-sided view grossly and abnormally inflated the damages. The figures quoted in paragraph 11 supra show the overstatement and aggrandizement in awarding Rs. 1,57,37,666/-, towards loss of overheads and loss of profits/profitability, in a contract of Rs. 5,74,35,213/-. Rs.1,21,95,859.68/- was paid for the work done within the term. Rs. 2,92,07,619.13 was paid for the work done post the term. Thus, Rs. 4,14,03,478.81/- was paid for 80% of the work. The balance was Rs.1,14,87,042.00/. The amount awarded towards loss of overheads and profits/profitability is Rs.1,57,37,666/-. No justification for computation of the loss is elucidated or can be expounded. Even if one were to rely upon the chart given by the BEEL, and ignore the contradictions in findings, the amount awarded is highly disproportionate and exorbitant. It is clearly a case of overlapping or at least a part doubling of the loss/damages."*

47. The present case is however different in facts and circumstances. As we have noted hereinabove, the award in respect of loss of profit is after arriving at a conclusion regarding breach of

contract by the employer, which we find to be sustainable. The quantification also is after meticulous examination of the tender amount, the net contract amount, the margin in between the net contract amount and the tender amount and the various components of margin within the 15% margin between the net contract amount and the tender amount. Out of this 15%, the arbitrator has found the award of 1/3rd, i.e, 3.75% to be a reasonable quantification. In our opinion the same requires no interference.

48. From decision of the Apex Court in the case of ***Batliboi Environmental Engineers Limited*** (supra), we find that the extent of a "second look by the courts under Section 34" of the 1996 Act has been considered in paragraphs 31 and 32:-

> *"31. The scope and ambit of the court's power to review the awards under Section 34 of the A&C Act has been contentious viz., on the interpretation to the expression 'in conflict with the public policy of India'. There have been legislative interventions as well as judicial pronouncements. In the context of the present case, we are required to interpret the provisions as they existed on the date on which the objections to the award were filed i.e., on 21.06.1999. Accordingly, the amendment introduced to Section 34 of the A&C Act vide Act No. 3 of 2016 with retrospective effect from 23.10.2015 and the judgments of this Court examining the amended Section 34 of the A&C Act need not be examined.*
>
> *32. Post award interference and the extent of the second look by the courts under Section 34 of the A&C Act has been a subject matter of perennial parley. The foundation of arbitration is party autonomy. Parties have the freedom to enter into an agreement to settle their disputes/claims by an arbitral tribunal, whose decision is binding on the parties. It is argued that the purpose of arbitration is fast and quick one-stop adjudication as an alternative to court adjudication, and therefore, post award interference by the courts is unwarranted, and an anathema that undermines the fundamental edifice of arbitration, which is consensual and voluntary departure from*

> *the right of a party to have its claim or dispute adjudicated by the judiciary. The process is informal, and need not be legalistic. Per contra, it is argued that party autonomy should not be treated as an absolute defence, as a party despite agreeing to refer the disputes/claims to a private tribunal consensually, does not barter away the constitutional and basic human right to have a fair and just resolution of the disputes. The court must exercise its powers when the award is unfair, arbitrary, perverse, or otherwise infirm in law. While arbitration is a private form of dispute resolution, the conduct of arbitral proceedings must meet the juristic requirements of due process and procedural fairness and reasonableness, to achieve a 'judicially' sound and objective outcome. If these requirements, which are equally fundamental to all forms of adjudication including arbitration, are not sufficiently accommodated in the arbitral proceedings and the outcome is marred, then the award should invite intervention by the court."*

49. At this juncture the learned advocate for the Company submitted that several similar tenders were issued for construction of Dykes/humes etc. after 2004 Tsunami. The modus adopted by the petitioner/appellant in the present case for invoking Clause 3A of the GCC to foreclose the contract after failing to hand over the site in question for carrying out the tender works, and the terms and conditions of contract were also identical in the works allotted to the tenderers, including M/s S. Bose. The claim of *M/s S. Bose* was also allowed by the learned Arbitrator.

50. The question which arose for the consideration in the present case before the learned Arbitrator are one and the same, as arose for the consideration in the case of ***Executive Engineer, CD-III, APWD Department, Andaman and Nicobar Administration vs. M/s S. Bose and others in FMAT(ABAWARD)/2/2024*** wherein a Coordinate bench refused to interfere with the award of the sole Arbitrator and

the order passed by the Court considering the appeal under Section 34 of the 1996 Act.

51. The learned advocate for the appellant is not in a position to draw any points of distinction between the present case and the case of ***M/s S. Bose and others*** *(supra).* The present Company therefore, in our opinion is entitled to benefit of the judgment in the case of *M/s S. Bose*, which applied to the facts and circumstances of the present case.

52. We are further informed that the judgment of the Coordinate bench in the case of *M/s S. Bose & others (supra)* in *FMAT(ABAWARD)/2/2024* was assailed by the appellant before the Hon'ble Apex Court in Special Leave Petition (Civil) Diary No. 32663/2025. The SLP was dismissed on 08.09.2025.

53. We do not find the award of the arbitrator to be suffering from any lack of reasoning, absence of any material in support of the claim, or any infirmity in the above noted facts and circumstances, to arrive at a conclusion regarding the amount to be quantified towards loss of profit. We therefore find no reason to interfere with the award of the sole arbitrator or the order passed by the Court considering the appeal under Section 34 of the 1996 Act.

54. The appeal is accordingly dismissed.

55. Any application pending stands disposed of.

56. All parties are directed to act on a server copy of this order duly downloaded from the official website of this Court.

(Madhuresh Prasad, J.)

I agree.

(Prasenjit Biswas, J.)