Delhi Jal Board vs Delhi Integrated Multi Model Transit ... on 26 March, 2025

Author: Subramonium Prasad

Bench: Subramonium Prasad

IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of decision:

IN THE MATTER OF:

\+ O.M.P. (COMM) 420/2023

DELHI JAL BOARD

Through: Ms. Nandita Rao, with Mr. Amit Pes Verma, Advocates Srivastava (EE) a Gupta(AE), Delhi

versus

DELHI INTEGRATED MULTI MODEL TRANSIT SYSTEM LTD. (DIMTS) .....Responde

Through: Mr. Sumit Bansal, Senior Advoca with Mr. Udaibir Singh Kochar, Utsav Garg, Advocates Mr. Harsh Gurbani, Mr. Sajeve Deora, Advocates for Intervenor

\+ OMP (ENF.) (COMM.) 247/2024

DELHI INTEGRATED MULTI-MODAL TRANSIT SYSTEM LTD. (DIMTS) .....D

Through: Mr. Sumit Bansal, with Mr. Udaibir Utsav Garg, Advoc

versus

DELHI JAL BOARD .....J

Through: Ms. Nandita Rao, with Mr. Amit Pes Verma, Advocates Srivastava (EE) a Gupta(AE), Delhi

CORAM:

HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

JUDGMENT

O.M.P. (COMM) 420/2023 & I.A. 41495/2024, I.A. 45952/2024

1. The present petition has been filed under Section 34 of the Arbitration and Conciliation Act, 1996 challenging the Award dated 12.06.2023 passed by the Ld. Sole Arbitrator.

2. Shorn of unnecessary details, facts leading to the filing of the petition reads as under:

> a. The Petitioner is entrusted with the work of supply of water and arrangement of sewage in the NCT of Delhi. b. The Respondent/Claimant is a joint venture company of Govt, of NCT of Delhi and IDFC Foundation, each having 50% shareholding. It is stated that Govt, of NCT of Delhi set up the claimant (namely Delhi Integrated Multi Modal Transit System Ltd.), as a fully owned Special Purpose Vehicle (SPV) on 19.04.2006 to implement integrated multi-modal transit network in Delhi. The claimant is managed by a board and it has four directors from Govt. of NCT of Delhi and four directors from IDFC. The Chief Secretary, Govt. of NCT of Delhi is ex-officio Chairman of the Claimant. The Claimant is involved in planning, design, operations, management and maintenance services in the transportation sector and is active in the following sub-sectors:
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> (i) Transport Planning
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> (ii)Transport Technology and IT Solutions
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> (iii) Intelligent Transport System
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> (iv) Policy and Transaction Advisory Services
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> (v) Transport Engineering
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> (vi) Operations and Management
>
> (vii) Railway Engineering
>
> (viii) Comprehensive Management of Bus Transit.

c. That the Petitioner invited a proposal from the Respondent/Claimant for Design, Development, Implementation, Operation And Maintenance of the Water Tanker Distribution Management System (hereinafter referred to as 'WTDMS') involving the development of software, Supply and Installation of System Software, Hardware, establishment of WTDMS service centres and Operation, and Maintenance of WTDMS solution to provide convenient and speedy service to customers through its own network and other partners. The Petitioner wished to install an electronic monitoring system in the water tankers which would indicate their locations in GPS,

driver efficiency cards, water level sensors to catch leakage, chlorine meters and equipment to check efficiency of hydrants.

d. The Respondent/Claimant submitted its final proposal. On 21.04.2011, a letter of intent was issued by the Respondent/Claimant under which the work of the Respondent/Claimant was to implement a multi model transit network in Delhi. On 19.05.2011, the Respondent/Claimant submitted a Bank Guarantee of Rs.87,79,000/-. On 06.06.2011, a work order was issued to the Respondent/Claimant. e. On 10.06.2011, a contract for the total sum of Rs.61,45,00,000/- was entered into between the parties for the period of 07 years @ 7,626 per tanker per month with an annual escalation of 6% per annum. Under the contract a total of 800 tankers were to be supplied at 42 different sites (filing point locations). It is further stated that there were three phases under the contract i.e., Pilot Project, Readiness to Go-live and Go-live. Additionally, the Respondent/Claimant was eligible for payment of minimum of 700 vehicles after Go-live and it was entitled to receive payments on a monthly basis from the date of Readiness to Go-live at the awarded base rate.

f. The Contract was entered into between the Petitioner and the Respondent for supply of 800 tankers to be supplied at 42 different sites. The vehicle were to be provided by the Delhi Jal Board. The total cost was Rs.61,45,00,000/-. The amount was to be disbursed in 07 years @ 7626 per tanker per month. The Respondent was also entitled to annual escalation of 6% per annum. The terms of the payment were detailed in the payment Schedule which is Schedule IX. Material on record indicates that the Petitioner was not in a position to provide the requisite tankers for the installation of GPS device.

g. It is the case of the Respondent that in view of the inability of the Petitioner to provide the tankers, the Respondent had to slow down its activities for implementation of the Project. That even after one year, the tankers were not provided and that the Respondent, vide letter dated 13.07.2012, informed the Respondent that the order of 385 water tankers (130 tankers of 3KL and 255 tankers of 9KL) for each zones have been placed.

h. It is the case of the Respondent that delay was purely attributable to the incapacity of the Petitioner in providing the water tankers. At this juncture, it is pertinent to mention that there are three phases under the Contract i.e., Pilot Project, Readiness to Go-live and Go-live. The payment under the Contract was to be made only after a minimum of 700 vehicles were made ready by the Respondent after Go-live. The entire payment schedule went haywire in view of the inability of the Petitioner to provide the tankers. The purpose of installation of the GPS device was to track the location of the tankers. Vide letter dated 03.10.2012, the Respondent informed the Petitioner about the implementation of the Pilot Project as per the Pilot Project Schedule. It is the case of the Respondent that apart from the fact that the tankers had not been supplied, even the sites and the control rooms were not provided by the Petitioner and by 27.11.2012, only 55 tankers could be made ready which were fitted with the GPS devices but these tankers were only fitted with the GPS devices as an interim solution.

i. By 28.10.2013, a total of 397 tankers were GPS enabled with 213 of them equipped with water level censor. A total of 22 sites out of 34 sites were commissioned and pressed into service for the

purposes of the project.

j. On 07.11.2013, a total of 414 tankers were made ready and were pressed into service. Automation and equipment installation at total 33 sites were completed by the Respondent/Claimant. Thereafter, the Petitioner issued a certificate of "Readiness to Go-Live" in favour of the Respondent/Claimant w.e.f 11.11.2013. The said certificate had a condition i.e., "Till the satisfactory third-party report comes, 20% of payment for the tankers considered between "Readiness to Go-Live"

> and "Go-Live" will be withhold and the same will be released after satisfactory report of Third Party for monitoring in totality through WTDMS. This will be additional to PBG submitted by M/s DIMTS".

k. On 09.04.2014, a meeting was held where all the concerned officers were present and they expressed their satisfaction regarding the performance of water tankers.

l. A meeting was held on 07.05.2014, whereby the Petitioner submitted that the Service Level Matrix (SLM)/SLA Matrix which is akin to a performance report to know about the efficiency of all devices has not been made available by the Respondent/Claimant. In response, the Respondent/Claimant submitted that the SLA matrix will be applicable only after Go-Live of the system however in light of the Petitioner's request it will demonstrate SLA matrix. m. On 09.05.2014, the Respondent/Claimant informed about the completion of deployment of all necessary hardware and software in accordance with the agreement at locations made available by the Petitioner.

n. On 26.06.2015, upon the failure of the Petitioner to provide the tankers, a meeting was held to re-negotiate the contract. Upon which a re-negotiation committee was set up to re-negotiate the contract. Meanwhile the sub-vendor of the Respondent/Claimant with whom the Respondent/Claimant had back-to-back contracts withdrew manpower from the sites due to failure of the Petitioner to clear the outstanding dues.

o. It is stated that the re-negotiation committee met on several occasions and on 06.10.2016, the recommendations of re-negotiation committee were forwarded to the technical committee for further deliberations. The Respondent/Claimant vide its communication dated 23.02.2017 confirmed the acceptance of negotiated revised rates and Schedule-III was amended with respect to two phases i.e. 'before Go-Live' and 'after Go-Live' subject to stated conditions.

p. It is stated that on 09.05.2017, the technical committee recommended release of 70% payment to the Respondent/Claimant but no payment was released. It is further stated that on 19.06.2017, the Respondent/Claimant submitted a revised service level matrix from May, 2017 to April, 2017 and clarified that since manpower services were withdrawn due to non-payment, the metrics are dependent upon the deployed manpower.

q. It is stated that on 13.09.2017, the Petitioner proposed that payments will be reduced on account of non-availability of manpower and deficiency in SLMs. This was rejected by the

Respondent/Claimant on 18.09.2017.

r. It is stated that on 06.11.2017, the Respondent/Claimant issued a show cause notice for termination of contract for gross non- performance of the contract. The notice stated that no tool/mechanism has been provided by the Respondent/Claimant to assess the performance of services provided to monitor the water tanker till 19.06.2017 and the performance has not improved even after the lapse of more than 03 years.

s. It is stated that on 16.11.2017, the Respondent/Claimant reiterated its stand that it was the Petitioner who delayed the project and had been in breach of the terms of the contract and called upon the Petitioner to pay the outstanding payment of Rs.17,62,02,549/- payable from November, 2013 till 31.10.2017 together with interest on delayed payment.

t. It is stated that on 15.01.2018, the contract was subsequently terminated on the ground of poor performance of the Respondent/Claimant leading to disputes arose between the parties under the contract.

u. It is stated that on 03.12.2018, the CEO of the Petitioner was appointed Dr. R. C. Meena as the Sole Arbitrator who entered reference on 10.04.2019 but he was ineligible to act as an Arbitrator and therefore, an application under Section 12 & 13 of the Arbitration and Conciliation Act 1996 seeking recusal of the Arbitrator was filed. Subsequently, a petition under Section 14(2) of the Arbitration and Conciliation Act 1996 was filed on 12.11.2021 and the same was allowed by this Court whereby Justice Jayant Nath, Former Judge of this Court, was appointed as an Arbitrator to adjudicate upon the disputes between the parties.

v. In the first hearing before the Sole Arbitrator on 01.12.2021, the parties pointed out that the pleadings in the case were completed before the previous Arbitrator. It is further stated that the matter was pending at the stage of cross-examination of the Respondent/Claimant's witnesses. The proceedings were completed thereon and the Sole Arbitrator passed the Impugned Award dated 12.06.2023 in favour of the Respondent/Claimant.

3. Based on the above facts, the Respondent/Claimant sought the following reliefs before the Tribunal:

> "(i) Claim No.1 - declaration that the termination made by the Respondent vide its communication dated 18.01.2018 is illegal and contrary to the terms of the contract.
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> (ii) Claim No.2-the Claimant claims a sum ofRs.33,58,25,549/- for the invoices raised by the Claimant for the work done under the contract.
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> (iii) Claim No.3 - interest on the balance payment@18% per annum is also sought.
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> (iv) Claim No.4- Claimant also seeks a sum of Rs.23,03,13,409/- for breach of contractual obligations by the Respondent and wrongful termination of the contract

which caused damages to .the Claimant.

(v) Claim Nos.5 & 6- the Claimant also seeks interest pendente-lite @18% per annum towards cost of arbitration and legal fees."

4. The arbitration clause is given under Article IX of the contract dated 10.06.2011 whereby it is stated that the Arbitrator shall be nominated by the Petitioner and the place of arbitration will be in Delhi.

5. On 16.01.2020, the following issues were framed by the previous Arbitrator:

"1. Whether the termination of the Contract dated 10.06.2011 is justified/unjustified?

2. Whether the Respondent/Claimant was in breach of its obligation under the contract dated 10.06.2011?

3. Whether the Respondent failed to provide the desired number of tankers as was obligatory upon the Respondent in terms of the contract?

4. Whether the Claimant is entitled to receive any payment for those services, under the contract, which were not accepted by the Respondent before Go-Live as per contract?

5. Whether the Claimant is entitled to the claims?

6. Whether the Respondent is entitled to the counter claims?

7. Whether the payment can be made to the "Claimant for the service provided by the Claimant without assessment of service by the Respondent?

8. Whether the Claimant failed to provide service timely as per contract?

9. Whether the Respondent failed to make payment timely?"

6. The Arbitrator held that the main issue revolves around the claim of the Claimant to receive the full dues in terms of the contract dated 10.06.2011 and connected to the issue is the fact as to whether the Claimant or the Petitioner or both were negligent in performance of the terms of the contract and have breached the terms of the contract.

7. The Arbitrator after considering the material on record held that the entire schedule for implementation of the project which completely had fallen apart and only after almost one year 40 tankers were made available for the Pilot Project to start immediately. The Arbitrator, is therefore of the opinion that the Claimant had spent a lot on its resources which had remained idle as the project got delayed and on the request of the Claimant the Petitioner herein had agreed to absolve the losses

as suffered.

8. The Arbitrator held that as the tankers were not provided in time, the payment schedule was not been adhered to and discussions were ongoing between the parties regarding the payment. The Arbitrator relied on Communication dated 21.12.2012 making it clear that the Petitioner herein had agreed to pay Rs.1400/- per tanker per month for the fitting of the GPS device which was an additional arrangement de hors Contract. The said arrangement continued for about an year till 27.12.2012. The Arbitrator thereafter relied on Communication of 07.11.2013 informing the Petitioner about Go-live of Water Tanker Distribution Management System. The Arbitrator places reliance on the said communication by holding that the stage of the Readiness to Go-live commencing from the date of 07.11.2013 Schedule IX was amended and the amended Schedule IX stated that the payment shall be made to the Respondent by the Petitioner on a monthly basis from the Readiness to Go-live at the awarded base rate. The Arbitrator held that the communication dated 07.11.2013 (Ex.RW-1/9) also clearly states that the payment will be made to the Claimant on awarded base rate. It adds that the recovery will be made as per the contract agreement for tankers. Para 3 also states that during the roll-out period, rate of payment per tanker per month shall be according to the base rate defined in the contract agreement. Clause 4 also states that till satisfactory third-party's report comes, 20% payment of the tankers considered between Readiness to Go- live and Go-Live shall be withheld and the same shall be released after satisfactory report of third-party.

9. The Arbitrator was therefore of the opinion that the Respondent/Claimant became entitled to the payment in terms of the Contract by virtue of the communication of 07.11.2013. The Arbitrator also held that till the satisfactory third-party report comes, 20% of the payment shall be withheld and shall be released only after the receipt of the third- party. The Arbitrator further held that the Petitioner herein had withheld the payments on the ground of unsatisfactory performance so the Arbitrator thereafter went on to scrutinize as to whether the performance was unsatisfactory or not.

10. The Arbitrator also held that a reading of Schedule-III of the Contract would show that the Petitioner was to appoint a third party agency for assessment of the performance which had not been done. Furthermore, it was the duty of the Claimant to provide necessary service level matrix post Go-Live. Therefore, the Petitioner has failed to put in place accepted mechanism to assess the functioning of the WTDMS and neither on its own tried to assess the performance as obvious from the evidence of RW-1. Admittedly, no official of the Petitioner has filed any adverse report relating to the physical verification of the performance of the Respondent. Therefore, the Petitioner acted in contrary to the terms of the contract.

11. The Arbitrator held that the water tankers and its drivers were not under the control of the Claimant and it was for the Petitioner to ensure that the drivers of the tankers use driver cards. With respect to the water level sensor, chlorine meter and hydrants, due to the abnormal delay in making the payment by the Petitioner the sub-vendor who only available till December, 2015 and on this account the sub-vender left the project. It is additionally, held that the Petitioner was time and again informed about the water pressure being higher than the agreed level as a result of which the hydrants were being affected.

12. The Arbitrator held that there is nothing to show on record that the recommendations of the technical committee were accepted by both sides and the original terms of the contract, including the rates were modified.

13. Based on the above observations, the Arbitrator held that the principal amount claim in terms of Schedule-IX comes to Rs.20,46,14,203/-, out which a sum of Rs.3,16,17,578/- was received by the Respondent for the period of pre Go-Live w.e.f. 11.11.2013 after termination of contract, leaving a balance of Rs.17,29,96,625/-. Therefore, the Respondent is fully entitled to claim this amount for the period from November 2013 to January, 2018 with simple interest of 7% per annum. Based on the above calculations, the Claimant is entitled to Rs.19,41,64,807.90/- on account of unpaid bills.

14. The Arbitrator awarded a sum of Rs.5 crores towards project capital costs and a refund of Rs.87.79 lakhs which was given by the Claimant as a performance Bank Guarantee.

15. The Arbitrator dismissed the Claim No.4 which was the claim for breach of contractual obligations as there was no material submissions regarding the claim for damages.

16. The Arbitrator awarded simple interest @7% w.e.f. date of filing the statement of claim till the date of award and simple interest of 7% per annum from the date of the award till recovery.

17. The counter claims of the Petitioner amounting to Rs.39,13,94,165/- was rejected by the Arbitrator.

18. It is this Award dated 12.06.2023 which is under challenge in the present petition.

19. Learned Senior Counsel for the Petitioner submits that Respondent/Claimant vide its own assessment dated 19.06.2017 admitted that except GPS services it failed to perform on all other aspects. It is stated that, therefore, there is no requirement for further evidence to prove that the Respondent/Claimant has provided unsatisfactory services. It is further submitted that although the Petitioner instructed the Respondent/Claimant to slow down its activities in October, 2011, the project started in a phased manner from January, 2013, however, the Respondent/Claimant's software and hardware were not fully functional and the Respondent/Claimant failed to provide details of expenses incurred on manpower. Therefore, the Petitioner started paying for GPS which was part of the project from January 01, 2013 and paid approximately Rs.77, 000 by 17.01.2013 so the Respondent/Claimant claim of losses due to the Petitioner's fault was not justified.

20. It is stated by the learned Senior Counsel for the Petitioner that the Respondent/Claimant's system lacked the capability to effectively manage the available MS tankers, as highlighted in the re-negotiation committee report which conclusively established that both Petitioner and the Respondent/Claimant share the responsibility for the tanker unavailability. It is further submitted that allegations against the Petitioner of failure to provide the tankers and causing the delay are unfounded.

21. It is further stated by the learned Senior Counsel for the Petitioner that agreement vide its payment schedule (Schedule IX) stipulated that payment would only be made after performance checks. Respondent/Claimant was tasked with developing software to track individual equipment performance, including six components i.e., (1) GPS: Successfully tracked tanker movement and distance travelled, with 100% performance, (2) Water Level Sensor :Monitored water levels in tankers, (3) Driver Card: Ensured authorized water dispensing, (4) Chlorine Sensor: Ensured potable water supply, (5) Hydrants: Managed water usage and prevented theft, and (6) Software: Operated and Monitored equipment performance. It is stated that Despite requests, Respondent/Claimant failed to provide performance reports, making it impossible for Delhi Jal Board to make payments as per Schedule IX. However, considering the re-negotiated rate, service efficiency and divided rate, the Petitioner made full payment to the Respondent/Claimant

22. It is further stated by the learned Senior Counsel for the Petitioner that Readiness to Go-Live was only declared for 42 tankers and no other tankers was considered for payment in want of the performance report. Go-Live was not declared which means that the project was not commenced. Therefore, the Respondent was liable to take payment for capital expenditure costs but the Arbitrator passed an Award in favour of the Respondent/Claimant for Rs.25,29,93,808/-. Under this, the Respondent/Claimant was awarded 19,41,64,807.90/- on account of unpaid bills plus simple interest @7% per annum till filing of the claim petition plus Rs.5 crores for project capital costs without any clarity regarding the expenditure towards hardware and software components. Additionally, purchase/procurement/voucher details of the components installed by the Respondent were neither given by the Respondent nor mentioned in the Award by the Arbitrator.

23. It is further stated by the learned Senior Counsel for the Petitioner that as per Respondent/Claimant 's own service level matrix i.e., performance report dated 19.06.2017 whereby it is admitted that only the GPS function had 100% efficiency and other services such as driver car, water level sensor, chlorine meter, hydrants, showed a efficiency level of 10%, 54%, 24% and 37% respectively from May 2014 to January 2017 and thereafter water level sensor efficiency fell to 28% from January 2017 to 15.01.2018 and the others fell to zero.

24. It is further stated by the learned Senior Counsel for the Petitioner that the Arbitrator wrongly interpreted the condition at Sl. No.3, Schedule-III of the contract providing for third party auditing as the said clause does not condone the obligation of the Respondent to provide a metric of evaluating the efficiency and further the said clause applies after the Go-Live phase, therefore there was no requirement for the Petitioner to appoint a third party assessor as the Petitioner accepted the performance report dated 19.06.2017 provided by the Respondent.

25. Per contra, learned Senior Counsel for the Respondent contends that during the course of the arbitration proceedings, the Petitioner is its statement of defence came out with its self generated analysis of the performance of the services rendered by the Claimant and claimed the said analysis to be based on the data submitted by the Claimant, however, no such data has been placed before the Arbitrator by the Petitioner.

26. It is further stated by the learned Counsel for the Respondent that the manpower support was withdrawn by the sub-vendor - M/s Wintech from January, 2016 due to non-payment on the part of the Petitioner. It is further contended that the drivers of the tankers who were under the control of the Petitioner were not using smart cards and it was on the Petitioner to ensure the same.

27. It is further stated by the learned Counsel for the Respondent that the Petitioner failed in its obligation to ensure the operation and maintenance of the civil and electrical infrastructure at locations. At some of the locations, the underground cables were damaged which ought to have been rectified by the Petitioner. The water pressure was very high due to the large capacity of the motor/pump deployed by the Petitioner leading to frequent failure of actuator valve installed by the Claimant.

28. It is further stated by the learned Counsel for the Respondent that the Petitioner was obliged to issue a notice of 30 days vide Article-V for curing the material breach and it was only if the material breach was continued after the notice period, the Respondent had an option to terminate the contract. Admittedly, no time was given to cure the material breach.

29. It is further stated by the learned Counsel for the Respondent that no ground as specified in Section 34 has been raised by the Petitioner and the award is fair, just and reasonable and extensively supported the reasons.

30. Heard learned Senior Counsels for the parties and perused the material on record.

31. The parameters of interference by Courts under Section 34 of the Arbitration & Conciliation Act has been laid down by the Apex Court after analysing a number of judgments in Delhi Metro Rail Corporation Limited v. Delhi Airport Metro Express Private Limited, (2024) 6 SCC 357, wherein the Apex Court has observed as under:-

> "33. Section 34 of the Arbitration Act delineates the grounds for setting aside an arbitral award. The provision, as amended by the Arbitration and Conciliation (Amendment) Act, 2015 reads as follows:
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> "34. Application for setting aside arbitral award.--(1) * * * (2) An arbitral award may be set aside by the Court only if--
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> (a)***
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> (b) the Court finds that--
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> (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or
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> (ii) the arbitral award is in conflict with the public policy of India.

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

> (i) the making of the award was induced or affected by fraud or corruption or was in violation of Section 75 or Section 81; or
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> (ii) it is in contravention with the fundamental policy of Indian law; or
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> (iii) it is in conflict with the most basic notions of morality or justice.

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

(2-A) An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the Court, if the Court finds that the award is vitiated by patent illegality appearing on the face of the award:

> Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by reappreciation of evidence."
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> (emphasis supplied)
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> 34. The contours of the power of the competent court to set aside an award under Section 34 has been explored in several decisions of this Court. In addition to the grounds on which an arbitral award can be assailed laid down in Section 34(2), there is another ground for challenge against domestic awards, such as the award in the present case. Under Section 34(2-A) of the Arbitration Act, a domestic award may be set aside if the Court finds that it is vitiated by "patent illegality"
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> appearing on the face of the award.
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> 35. In Associate Builders v. DDA [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , a two-Judge Bench of this Court held that although the interpretation of a contract is exclusively within the domain of the arbitrator, construction of a contract in a manner that no fair-minded or reasonable person would take, is impermissible. A patent illegality arises where the arbitrator adopts a view which is not a possible view. A view can be regarded as not even a possible view where no reasonable body of persons could possibly have taken it. This Court held with reference to Sections 28(1)(a) and 28(3), that the arbitrator must take into account the terms of the contract and the usages of trade applicable to the transaction. The decision or award should not be perverse or irrational. An award is rendered perverse or irrational where the findings are:
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> (i) based on no evidence;

(ii) based on irrelevant material; or

(iii) ignores vital evidence.

36. Patent illegality may also arise where the award is in breach of the provisions of the arbitration statute, as when for instance the award contains no reasons at all, so as to be described as unreasoned.

37. A fundamental breach of the principles of natural justice will result in a patent illegality, where for instance the arbitrator has let in evidence behind the back of a party. In the above decision, this Court in Associate Builders v. DDA [Associate Builders v.

DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] observed : (SCC pp. 75 & 81, paras 31 & 42) "31. The third juristic principle is 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.

*** 42.1. ... 42.2. (b) A contravention of the Arbitration Act itself would be regarded as a patent illegality -- for example if an arbitrator gives no reasons for an award in contravention of Section 31(3) of the Act, such award will be liable to be set aside."

(emphasis supplied)

38. In Ssangyong Engg. & Construction Co. Ltd. v.

NHAI [Ssangyong Engg. & Construction Co. Ltd. v.

NHAI, (2019) 15 SCC 131 : (2020) 2 SCC (Civ) 213] , a two-Judge Bench of this Court endorsed the position in Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , on the scope for interference with domestic awards, even after the 2015 Amendment : (Ssangyong Engg. & Construction Co. case [Ssangyong Engg. & Construction Co. Ltd. v. NHAI, (2019) 15 SCC 131 :

(2020) 2 SCC (Civ) 213] , SCC p. 171, paras 40-41) "40. The change made in Section 28(3) by the Amendment Act really follows what is stated in paras 42.3 to 45 in

> Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , namely, that the construction of the terms of a contract is primarily for an arbitrator to decide, unless the arbitrator construes the contract in a manner that no fair-minded or reasonable person would; in short, that the arbitrator's view is not even a possible view to take. Also, if the arbitrator wanders outside the contract and deals with matters not allotted to him, he commits an error of jurisdiction. This ground of challenge will now fall within the new ground added under Section 34(2-A).
>
> 41. ... Thus, a finding based on no evidence at all or an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside on the ground of patent illegality. Additionally, a finding based on documents taken behind the back of the parties by the arbitrator would also qualify as a decision based on no evidence inasmuch as such decision is not based on evidence led by the parties, and therefore, would also have to be characterised as perverse."

(emphasis supplied)

39. In essence, the ground of patent illegality is available for setting aside a domestic award, if the decision of the arbitrator is found to be perverse, or so irrational that no reasonable person would have arrived at it; or the construction of the contract is such that no fair or reasonable person would take; or, that the view of the arbitrator is not even a possible view. [Patel Engg. Ltd. v. North Eastern Electric Power Corpn. Ltd., (2020) 7 SCC 167 : (2020) 4 SCC (Civ) 149.] A "finding" based on no evidence at all or an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside under the head of "patent illegality". An award without reasons would suffer from patent illegality. The arbitrator commits a patent illegality by deciding a matter not within his jurisdiction or violating a fundamental principle of natural justice."

(emphasis supplied)

32. A perusal of the abovesaid judgment indicates the interpretation of the terms of Contract which is before the Arbitrator is within the domain of the Arbitrator and only if it is found that the contract has been construed in a manner that no fair minded or reasonable person would take, then only patent illegality arises. It has to be demonstrated that the view taken by the Arbitrator is not a plausible view at all. A view cannot be regarded as a plausible view where the Court is of the opinion that no reasonable body of persons could plausibly have taken it. Further, to set aside an order, it has to be shown that the findings of the Arbitrator are based on no evidence, based on irrelevant material or it ignores vital evidence.

33. Applying the said law in the facts of this case, this Court is of the opinion that the arguments of the Petitioner does not bring the challenge within the four corners of the contours of Section 34 of the Arbitration & Conciliation Act.

34. This Court is of the opinion that there is no answer to the finding of the Arbitrator that it was the obligation of the Petitioner herein to appoint a third party agency for verification of the functioning of the WTDMS. The Arbitrator has relied on communication dated 07.11.2013 which states that the performance would be assessed on the basis of the satisfactory report of a third party auditor. The Petitioner has failed to appoint a third party auditor. The Petitioner also failed to put in place the accepted mechanism to assess the functioning of WTDMS. The Arbitrator has also come to a conclusion that the Petitioner on its own also has not tried to assess the performance. No officer of the Petitioner has filed any adverse report relating to the physical verification of the performance of the Respondent. A conclusion has been arrived at by the Arbitrator that the plea of the Petitioner that the functioning of the WTDMS System till 2015 was faulty as per the given facts cannot be accepted. Nothing has been demonstrated before this Court to come to a conclusion that the finding is based on nil evidence or irrelevant material or it ignores vital evidence.

35. Material on record discloses that the payment was to be made to the Respondent from the date of Readiness to Go-Live at the awarded base rate. The base number of vehicles was to be 800 and the minimum payment was to be made for 700 vehicles after Go-Live. Payment of the invoice was to be made within 14 working days provided the Petitioner did not dispute the invoice in terms of the performance. The performance standards have been spelt out in the contract. The Arbitrator on the basis of the material on record came to the conclusion that the payment which was to be made by the Petitioner to the Respondent on a monthly basis from the Readiness to Go- Live at the awarded base rate and the payments have been wrongly withheld on the ground of unsatisfactory performance. The Arbitrator has not accepted the case of the Petitioner that out of five services, i.e., efficiency of GPS, efficiency of driver card, efficiency of water level sensor, efficiency of chlorine meter and efficiency of hydrants, four were unsatisfactory.

36. The Arbitrator after analysing the material on record came to the conclusion that no services of the Respondent are unsatisfactory and as stated above, no third party auditor had been appointed to test the functioning of the WTDMS. As stated above, even the assessment of the functioning of the WTDMS of the Petitioner's officers was absent and therefore there was no material on that basis also. The Arbitrator was also of the opinion that there was no justification for not appointing the third party auditor as has been agreed upon therefore the Petitioner has acted contrary to the terms of the agreement.

37. The learned Arbitrator by the impugned award held as under:-

> "72. In my opinion, the Claimant has given acceptable explanation for the deterioration in services that took place post 2016 after Wintech terminated the contract due to non-payment of its dues. The Claimant cannot be blamed, as it cannot be expected to continue to pour in money and resources to provide upto date services when the Respondent is withholding the dues of the Claimant. Claimant has claimed a principle dues of Rs.20,46,14,203/- dehors any interest, as outstanding. This figure takes into account Rs.2,97,18,760 received on 30.06.2015 and Rs.88,39,074 received on 30.10.2015. Respondent having withheld large amount of dues, of the Claimant illegally and contrary to the terms of the contract cannot now turn around to urge

that services were unsatisfactory. Respondent is responsible for the state of affairs which took place post 2016 and cannot blame the Claimant. In any case, the above plea of the Respondent is misconceived and contrary to Schedule ill of the Agreement and letter dated 07.11.2013, as already noted above.

73. From the facts and evidence on record, I conclude that the Respondent has failed to provide the mechanism of third party audit to assess the performance of the WTDMS. This was in breach of the agreed terms of the Agreement. Reliance of the Respondent on SLM filed in 2017 is misplaced. There is no cogent evidence to show that the performance of the WTDMS was not proper till around 2015. The Claimant has without prejudice filed its SLM on 19.06.2017 which shows some deficiencies of service of the Claimant post 2015. This deterioration of service of the Claimant is directly connected to the fact that wrongly and illegally the Respondent withheld the dues of the Claimant. The Claimant cannot be expected to continue to pour in resources and finances to maintain performance of the WTDMS. The deterioration of service post 2015 is on account of the negligence of the Respondent. The Respondent 'cannot take advantage of the same. Hence, I hold that the dues of the Claimant have been wrongly withheld by the Respondent."

38. The Arbitrator has held that the Respondent has given acceptable explanation for the deterioration in services that took place post 2016 after M/s Wintech terminated the contract due to non-payment of its dues. The learned Arbitrator held that the Respondent cannot be blamed as it cannot be expected to continue to pour in money and resources to provide upto date services when the Petitioner is withholding the dues of the Respondent.

39. The Respondent claimed principal dues of Rs.20,46,14,203/- dehors any interest outstanding, which takes into account Rs.2,97,18,760/- received on 30.06.2015 and Rs.88,39,074/- received on 30.10.2015. The learned Arbitrator observed that the Petitioner having withheld large amount of dues of the Respondent illegally and contrary to the terms of the contract cannot turn around to urge that services were unsatisfactory and the Petitioner was responsible for the state of affairs which took place post 2016 and cannot blame the Respondent and it was held that the plea of the Petitioner is misconceived and contrary to Schedule III of the agreement and letter dated 07.11.2013.

40. The learned Arbitrator held that the Petitioner failed to provide the mechanism of third party audit to assess the performance of the WTDMS which was in breach of the agreed terms of the agreement and the reliance placed by the Petitioner on SLM filed in 2017 is misplaced. The learned Arbitrator held that there is no cogent evidence to show that the performance of the WTDMS was not proper till 2015 and the Respondent has without prejudice filed its SLM on 19.06.2017 which shows some deficiencies of service of the Respondent post 2015 and the deterioration of service of the Respondent is directly connected to the fact that wrongly and illegally the Petitioner withheld the dues of the Respondent and that the Respondent cannot be expected to continue to pour in resources and finances to maintain performance of the WTDMS. The learned Arbitrator held that the deterioration of service post 2015 is on account of the negligence of the Petitioner and the

Petitioner cannot take advantage of the same and therefore the dues of the Respondent have been wrongly withheld by the Petitioner.

41. The findings of the Arbitrator are based on cogent material and evidence not warranting any interference under Section 34 of the Arbitration & Conciliation Act.

42. With these observations, the petition is dismissed along with pending application(s), if any.

OMP (ENF.) (COMM.) 247/2024 List on 07.07.2025.

SUBRAMONIUM PRASAD, J MARCH 26, 2025 HSK/RJ/MP