Supreme Court of India
Reliance Infrastructure Ltd. vs State Of Goa on 10 May, 2023
Author: Dinesh Maheshwari
Bench: Dinesh Maheshwari, Sanjay Kumar

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 3615 OF 2023
(ARISING OUT OF SLP(C) NO. 8493 OF 2021)

RELIANCE INFRASTRUCTURE LTD.

VERSUS

STATE OF GOA

WITH
CIVIL APPEAL NO._____ OF 2023
(ARISING OUT OF SLP(C) NO. 16778 OF 2021)

JUDGMENT

DINESH MAHESHWARI, J.

2. These two appeals, preferred against the judgment and order dated 08.03.2021, as passed by the High Court of Judicature at Bombay, Goa Bench in Commercial Appeal No. 12 of 2019, one by Reliance Infrastructure Limited1, being the appeal arising out of SLP (Civil) No.8493 of 2021; and another by the State of Goa2, being the appeal arising out of SLP (Civil) No.16778 of 2021, have been considered together and are taken up for disposal by this common judgment.

3. By way of the impugned judgment and order dated 08.03.2021, while dealing with an appeal under Section 37 of the Arbitration and Conciliation Act, 19963 read with Section 13 of the Commercial Courts, Commercial Division and Commercial Appellate Divisions of High Courts Act, 2015, the High Court has proceeded to upset the order dated 12.09.2019, as passed by the Principal District & Sessions Judge, North Goa, Panjim4 in dismissing the application filed under Section 34 of the Act; and has partially set aside the award dated 16.02.2018, as made by the Arbitral Tribunal comprising of the Sole Arbitrator, a former Judge of this Court.

1 Hereinafter also referred to as 'the claimant'.

2 Hereinafter also referred to as 'the State' or 'the Government of Goa'. 3 Hereinafter also referred to as 'the Act of 1996' or simply 'the Act'. 4 Hereinafter also referred to as 'the Commercial Court'.
Relevant factual aspects and background

4. Shorn of unnecessary details, the relevant factual aspects could be usefully summarised as follows:

4.1. On 10.01.1997, the claimant entered into a Power Purchase Agreement5 with the Government of Goa to commission and operate a power generation station of 39.8 MW capacity for the period 14.08.1999 to 13.08.2014. The power station was to use 'Naphtha' as fuel to generate electricity along with a provision for using 'Alternate Fuel'. The claimant commenced commercial operation on 14.08.1999.

4.2. Various supplementary agreements were entered into between the parties from September 1997 to November 2001. By the First Supplementary Power Purchase Agreement dated 10.09.1997, it was mutually agreed to convert the generating station from Open Cycle Generating Station into a Combined Cycle Generating Station with a capacity of 48 MW. The Contracted Capacity was increased from 39402 KW to 46560 KW. Furthermore, the claimant was authorized to sell power in excess of 39.8 MW to consumers due to the combined cycle operation. On 20.09.2000, the Second Supplementary Agreement was executed between the parties, which enabled the claimant to conduct certain direct sales of power to consumers with permission. The computation of tariff was based on the 'New Rated Capacity,' which was deemed to be the Contracted Capacity. The agreement also mandated the provision of 5 'PPA', for short.

backup power by the Government of Goa to the claimant for distribution to its consumers in case of scheduled or unscheduled outages, as specified in the agreement. On 05.11.2001, the parties entered into the Third Supplementary Agreement, which specified a reduction in supply of power by the claimant to the extent of 19.8 MW from March 2004 until the end of the PPA term, i.e., 13.08.2014

This 19.8 MW quantum was designated as 'New Rated Capacity'.

4.3. It appears that in view of power being costly, the Government of Goa intended to stop the purchase from the claimant and addressed a letter to that effect on 20.03.2013. However, in view of a provision in the PPA for use of alternate fuel, by its communication dated 21.03.2013, the claimant gave its proposal to the Government of Goa to supply power by using Regassified Liquefied Natural Gas6, which was being brought up to Goa by GAIL by its pipeline. The claimant gave a formula by which the per unit cost of power would be billed by it to the Government of Goa. This particular aspect relating to the claimant's proposal to switch over to the alternate fuel and charges payable in that regard has formed a major part of contentions in this case. Hence, a little elaboration shall be apposite. 4.3.1. On 26.04.2013, the Government of Goa replied to the claimant's letter dated 21.03.2013, inter alia, in the following terms: -

> "In view of your offer under reference, the Government has decided to continue to purchase power @ Rs. 8.58 per unit w.e.f. 01/04/2013 as per your formula proposed in the letter dated 21/03/2013 considering the present rates of fuel and dollar.

6 'RLNG', for short.

The same may be noted for records and incorporated in your power bills. The revised fixed rate shall be applicable from 1st April 2013." 4.3.2. On 30.04.2013, the claimant, however, sought a clarification from the Government regarding the formula-based tariff payable for the supply of electricity, inter alia, in the following words: -

> "1. With regard to the price mentioned in our proposal dated 21.03.2013, the tariff of Rs.8.58/unit is based on the prevailing RLNG price ($17.2/mmbtu) and INR/USD exchange rate (1 $ = Rs 54) and is therefore not fixed. The same shall vary depending upon the fuel price in the market and the INR/USD exchange rate." 4.3.3. It has been the case of the claimant that initially, the Government of Goa agreed to a fixed per unit price but, when it was clarified that the price would not be fixed, the Government agreed to purchase the same considering the prevailing rates of fuel and dollar upto the expiry of the PPA while requiring that for this purpose, documentation showing the price of fuel and dollar be incorporated in the bills raised by the claimant. In this regard, a communication received by the claimant from the Chief Electrical Engineer dated 23.05.2013 has been relied upon. For its relevance, this communication dated 23.05.2013 is reproduced, in extenso, as under : -
>
> "GOVERNMENT OF GOA ELECTRICTY DEPARTMENT OFFICE OF THE CHIEF ELECTRICAL ENGINEER No. 20/3/CEE/Tech/13-14/824 Date: 23.05.2013 To, M/s. Reliance Infrastructure Limited, Goa Power Station, Opp. Sancoale Industrial Estate, Zurinagar, Goa- 403 726 Sub: Proposal for supply of power on RLNG Ref: 1. RINFRA/GPS/GOG/2013/16 dt. 21.03.2013 addressed to this office and a copy enclosed to the Hon'ble Chief Minister, State of Goa and others.

> Sir, ...
>
> In view of your offer under reference, the Government has decided to continue to purchase power as per your formulae proposed in the letter dated 21.03.2013 considering the prevailing rates of fuel and dollar up to the expiry of the existing PPA. The same may be noted for records and incorporated in your power bills with due documentations of prices of fuel and dollar ... Yours faithfully Sd/-
>
> (S. Lekshminath) Chief Electrical Engineer" 4.3.4. It has also been the case of the claimant that in fact, the decision to purchase power at fluctuating price was approved by a decision taken by the Cabinet Committee headed by the Chief Minister of the State of Goa.

4.4. The claimant's grievance has been that its monthly invoices were paid upto March 2013 and monthly invoice for April 2013 was paid partly; but, from May 2013 onwards, its invoices were not paid. In regard to the unpaid invoices of the claimant, partly for April 2013 and thereafter from May 2013 till April 2014 (after which the plant was shut down), several communications were exchanged between the parties and the claimant submitted revised invoices but the grievance of the claimant remained unredressed.

4.5. On 19.05.2015, the claimant filed a petition before the Joint Electricity Regulatory Commission7 for recovery of its dues. The State 7 'JERC', for short.

submitted before JERC that an Arbitrator be appointed in terms of PPA to adjudicate upon the disputes. On 11.12.2015, JERC, based on agreement of both the parties, referred the disputes to the Sole Arbitrator Mr. Justice B. P. Singh (Former Judge of this Court) in pursuance of its powers under Section 86(1)(f) of the Electricity Act, 2003. The arbitration proceedings under this reference have led to the present appeals. Arbitration proceedings and award

5. After long-drawn proceedings of arbitration with filing of claim, reply and counter claim, rejoinder, sur-rejoinder, amendment of counter claim, filing of various applications and written submissions, the Arbitral Tribunal ultimately passed the award dated 16.02.2018 whereby it directed the State to pay to the claimant a sum of Rs. 278.29 crore (principal amount) together with interest for the period up to 31.10.2017; to pay further interest from 31.10.2017 at the rate of 15% per annum from the date of award until the date of full payment of the amount including interest as on the date of the award until effective payment/realization; and further clarified that in case the non-claimant would pay the entire amount together with interest within two months from the date of the award, it shall not be liable for payment of interest after the date of the award.

5.1. We shall refer to the findings of the Arbitral Tribunal, to the extent relevant, at the appropriate juncture hereafter. However, to take into comprehension as to what was presented to the Arbitral Tribunal by way of dispute and as to what material points called for determination, it may be noticed that the parties jointly formulated the issues on which the Arbitral Tribunal was required to give its ruling; and the same were duly taken note of by the Arbitral Tribunal in the following

words:-

> "34. The parties in the joint statement submitted by them on computation of the claim amount payable by the Respondent to the claimant have themselves succinctly formulated the issues on which this Tribunal is required to give its ruling, which are as follows:
>
> a) Contention of the Respondent that Rated Capacity is required to be downrated from September 2000 till the expiry of the PPA, i.e. 13th August, 2014, relying on the draft Notification issued by the Ministry of Power, Government of India referred to by the Respondent during its arguments.
>
> b) Respondent's claim for credit to be given to it of 4 MW for 12 hours on daily basis for weekdays in computing the Tariff Heat Rate for arriving at the Fuel Cost (Variable Charges) from January, 2009 till 13th August 2014. The Respondent has made this claim by referring to letters dated 2nd January, 2009 and 19th January, 2009.
>
> c) Contention of the respondent that the claimant had agreed to supply power based on a fixed rate of Fuel price and a fixed rate of exchange in terms of US Dollar to INR for supply of power using RLNG as fuel from June, 2013 onwards;
>
> d) Claim of the Claimant that it is entitled to Fuel Facilitation Charges for supply of power by using RLNG from June 2013, and
>
> e) Contention of the respondent that back-up power supplied by it from May, 2014 till 13th August, 2014 was 1.25 times of Rs.

3.78/kWh, being the rate specified by the respondent in its letter dated 18th September, 2014." 5.2. Out of the five issues aforementioned, four were decided by the Arbitral Tribunal in favour of the claimant (except that relating to fuel facilitation charges). The parties also presented various alternatives of calculation for arriving at the amount payable in terms of findings. Having examined these alternatives and with reference to its findings, the Tribunal made the award in the following terms: -

"77. This Tribunal after considering all aspects of the matter has decided four of the issues in favour of the Claimant, and one in favour of the Respondent. The scenario attracted in view of the above findings is Scenario 22. Accordingly, the Claimant will be entitled to a sum of Rs.119.32 Crores by way of principal amount and a sum of Rs 158.98 Crores by way of interest for the period up to 31.10.2017 totaling Rs. 278.29 Crores. For the period subsequent to 31st October 2017, the Claimant shall be entitled to interest calculated at the same rate as for the period prior to that date, till the date of the award. The Claimant shall also be entitled to payment of interest at the rate of 15% per annum on the above amount from the date of the award till the actual payment of the full amount awarded together with interest. If the full payment of the amount awarded together with interest is made within the period of two months from the date of the award, the Respondent shall not be liable

to pay interest for any period subsequent to the date of the award, otherwise, it shall be liable to pay interest at the rate of 15% per annum from the date of the award till the date of payment/realisation in full. In this view of the matter the Tribunal makes the following.

AWARD

1. The Respondent shall pay to the Claimant a sum of Rs.278.29 Crores by way of payment of the principal amount together with interest for the period up to October 31, 2017.

2. The Respondent shall pay to the Claimant interest on the above amount, for the period from October 31, 2017 till the date of the award, calculated at the same rate as for the period prior to October, 31,2017.

3. The Respondent shall pay to the Claimant interest on the total amount awarded together with interest payable on October 31, 2017, at the rate of 15% per annum from the date of the Award till full payment of the amount, including interest as on the date of the Award is paid/realised.

4. Provided that, in case the Respondent pays to the Claimant the entire amount together with interest awarded within two months of the date of the Award, it shall not be liable to pay interest for the period subsequent to the date of the Award.

5. The parties shall bear their own respective costs of this proceeding." Challenge to the award under Section 34 of the Act

6. The award so made by the Arbitral Tribunal was challenged by the State under Section 34 of the Act before the Commercial Court. A vast variety of contentions urged on behalf of the parties were duly considered by the Court and the relevant points were answered in favour of the claimant and thereby, the award was upheld while rejecting the application under Section 34.

6.1. The relevant observations and findings of the Commercial Court, to the extent necessary, shall be referred hereafter at the appropriate stage. However, we may extract the points for determination formulated by the Commercial Court and their answers, as indicated in the impugned judgment and order dated 12.09.2019, as follows: -

> "27. Following points arise for my determination:
>
> | Sr. No. | Points | Findings |
> |---|---|---|
> | 1 | Whether the GOG had agreed to the fluctuating dollar rate? | In the Affirmative |
> | 2 | Whether the GOG was aware of the negotiations between the claimant and the fuel supplier? | In the Affirmative |

3	Whether in the absence of tariff petition filed by the claimant, the claimant could claim amount from GOG?	In the Affirmative
4	Whether the Ld. Arbitrator ought to have appointed an expert to ascertain the correctness and veracity of the invoices raised by the claimant from 14.08.1999 and calling upon the expert to submit his report?	In the Negative
5	Whether the arbitration proceedings are bad since there is no any order passed on the application filed by GOG on 30.03.2016 calling upon the claimant to produce documents.	In the Negative
6	Whether the interest awarded by the Ld. Arbitrator is exorbitant and against the PPA?	In the Negative
7	Whether the findings of the Ld. Arbitrator that 3.78 per unit was a fixed amount for supply of backup power by GOG to the claimant is illegal and contrary to the terms of PPA?	In the Negative
8	Whether the claimant could not levy variable charges on 4 MW deducted from rated capacity of 19 MW?	In the Negative
9	Whether the claim ought to have been rejected on the ground that the claimant did not consider downrating?	In the Negative
10	Whether the arbitral award is arbitrary and perverse and passed contrary to principles of natural justice and hence against the public policy?	In the Negative”

The appeal under Section 37 of the Act

7. In challenge to the aforesaid order dated 12.09.2019 as passed by the Commercial Court, the State preferred Commercial Appeal No. 12 of 2019 under Section 37 of the Act before the High Court of Judicature at Bombay, Goa Bench that has been partly allowed by the High Court by the impugned judgment and order dated 08.03.2021 and thereby, substantial and material parts of the findings in the award in question have been reversed.

7.1. Again, we shall refer to the relevant findings of the High Court at the appropriate stage but, in order to indicate the points taken up for determination by the High Court with reference to the rival contentions, the following extraction shall be apposite: -

> "39. We have considered the rival submissions made by the learned Counsel for the parties. We have also considered the material on record, which includes the impugned Award, as well as the impugned Judgment and Order made by the Commercial Court. Based on the rival contentions, the following points now arise for our determination:
>
> (A) The scope of the provisions of Section 34 of the Arbitration Act (as amended in 2017).
>
> (B) Whether the Appellant has made out a case of breach of natural justice in the course of the arbitral proceedings warranting interference with the impugned Award?
>
> (C) Whether the Appellant has made out a case that the impugned Award on the aspect of variable charges for Rs. 24.66 crores is required to be set aside?
>
> (D) Whether the Appellant has made out a case that the impugned Award on the aspect of downrating for Rs. 18.53 crores is required to be set aside?
>
> (E) Whether the Appellant has made out a case that the impugned Award on the aspect of variable charges on 4 MW power which was permitted to be traded for Rs. 3.94 crores is required to be set aside?
>
> (F) Whether the Appellant has made out a case that the impugned Award on the aspect of netting out for Rs. 2.36 crores is required to be set aside?
>
> (G) Whether the award of interest for the period up to the making of the impugned Award as well as the post Award period, warrants interference?
>
> (H) Whether the computations at Schedules 2 and 3 to the impugned Award are ex facie incorrect and were made without affording sufficient opportunity to the Appellant?

(I) Whether the impugned Judgment and Order made by the Commercial Court upholding the impugned Award is ex facie erroneous and warrants interference?" 7.2. As regards point (A) aforesaid, the High Court, though mentioned a decision of this Court in the case of Ssangyong Engineering and Construction Co. Ltd. v. NHAI: (2019) 15 SCC 131, wherein principles have been laid down for dealing with challenge to an award under Section 34 of the Act of 1996 but, thereafter, considered it appropriate to refer to the analysis by a learned Single Judge of the High Court and, after reproducing a few passages from that decision of the learned Single Judge, observed that the submissions would be evaluated with reference to the principles so stated. Be that as it may, thereafter, the High Court dealt with the questions raised by the State as regards the alleged breach of principles of natural justice in point (B) and rejected all such contentions with reference to the record of proceedings as also the pleadings and evidence of the parties. However, the High Court proceeded to disapprove the award in relation to the claims covered by the aforementioned points (C), (D), (E) and (F). Of course, on point (G), in relation to the award of interest for the pre-reference period and the period during which proceedings were pending before Arbitrator, the High Court found no reason to interfere but then, with reference to the decision of this Court in Vedanta Ltd. v. Shenzhen Shandong Nuclear Power Construction Co. Ltd: (2019) 11 SCC 465, considered it appropriate to reduce the rate of interest to 10% from 15% p.a. In point (H), the High Court found no fault in the computations attached to the award as Schedules 2 and 3 but, in point (I) observed that the Commercial Court only summarised the submissions of the parties and made a brief reference to the award without independent application of mind to the contentions raised. This, according to the High Court, had not been a satisfactory way of disposing of an application under Section 34 of the Act of 1996.

7.3. The High Court concluded on the matter with the following observations and directions: -

> "195. For all the aforesaid reasons, we partly allow this appeal and set aside both the impugned judgment and order as well as the impugned award on the issues of variable charges (Rs. 24.66 crores approx), downrating (Rs. 18.53 crores approx.), variable charges on 4MW power (Rs. 3.94 crores approx.), and netting out (Rs. 2.36 crores approx.). We reduce the interest rate from 15% to 10% per annum, payable from the date of Award till the date of payment of the determined amount. The rest of the impugned Award is however not interfered with.
>
> 196. Since we have rejected the challenge to the summary of computations in Schedule 2 of the impugned Award, even after holding the issues of downrating, 4 MW power, fuel formula, facilitation fuel charges, and netting out in favour of the Appellant, the Appellant is still due and payable principal amount of Rs. 70.58 crores together with interest component with which we have not interfered with. This amount comes to Rs. 151.97 crores as of 31.10.2017. On this amount of Rs. 151.97 crores, the Appellant will have to pay interest at the approved rate for the period from 31.10.2017 till the date of the Award i.e. 16.2.2018. Thereafter, however, the Appellant will have to pay interest at the rate of 10% per annum from the date of Award till the payment of the amount to the Respondent.

197. The Appellant had already deposited an amount of Rs. 25 crores before the Commercial Court as a condition for a stay on the execution of the impugned Award. Thereafter, the Appellant deposited a further amount of Rs. 94 crores in this Court in terms of our order dated 8.11.2019. The Respondent was permitted to withdraw both these amounts by furnishing bank guarantees of a Nationalized Bank. The Respondent was directed to keep alive such bank guarantees until the disposal of this Commercial Appeal and for 15 days thereafter.

198. Though we have partly allowed this appeal, it is unlikely that the Respondent might have to bring back any portion of the amounts withdrawn by it. The Respondent to, therefore, assess this position and deposit such amount, if any, in this Court within 14 days from today. Only if no amount is to be brought back, the Respondent need not keep the bank guarantees alive beyond 15 days from today.

199. Further, if despite our order partly allowing this appeal, the Appellant is still due and payable to the Respondent the amounts over and above those which the Respondent has already withdrawn against bank guarantees, then, obviously, the Respondent need not keep the bank guarantees alive for more than 15 days from today. The Appellant to then deposit the balance amount in this Court within four weeks from today. The Respondent will have the liberty to withdraw such amount, once the same is deposited.

200. The appeal is partly allowed in the aforesaid terms. There shall be no order for costs." Rival Submissions

8. In view of the above, the claimant has approached this Court challenging the judgment and order of the High Court to the extent it sets aside the award partially. The State of Goa, on the other hand, has laid a limited challenge to the judgment of the High Court. We may briefly summarise the principal contentions urged on behalf of the parties.

9. Mr. Parag P. Tripathi, learned senior counsel appearing on behalf of the claimant, has made a variety of submissions in challenge to the part of the impugned judgment and order dated 08.03.2021 whereby, substantial part of the award in question has been upturned by the High Court.

9.1. At the outset, learned senior counsel has submitted that the scope of interference under Section 37 of the Act of 1996 is limited and is restricted to the grounds mentioned in Section 34 thereof; and if the view of the Arbitrator is a plausible view, the Court will not interfere or substitute its own view with that of the Arbitrator. Further, re-appreciation of evidence or review on merits is not permissible under the provisions of the Act unless the award is shown to be in conflict with the 'public policy of India' or vitiated by 'patent illegality appearing on the face of the award'. 9.2. With respect to the submission that the application of the State for appointment of expert under Section 26 of the Arbitration Act had not been decided by the Arbitral Tribunal, learned senior counsel has submitted that the High Court had noted in paragraphs 51 and 52 of the impugned judgment that the prayer seeking appointment of expert was deleted by the State itself. Further, the State never challenged rejection of its counter claim and the amounts were calculated jointly by both the parties.

9.3. As regards variable charges to the tune of about Rs. 24.66 crore, learned senior counsel for the claimant has submitted that the Arbitral Tribunal came to a categorical finding of fact that the parties had agreed that sale of electricity by using alternate fuel RLNG would not be at fixed price and would be based on the fluctuating price of US dollar and fuel. It has also been submitted that although the State had argued before the High Court that certain clauses of PPA had not been considered by the Arbitral Tribunal, and the High Court held that the Arbitral Tribunal did not consider the issue raised regarding non-compliance with clauses 12.1.4. to 12.1.7. of the PPA but, the said clauses related only to Fuel Supply Contract8 for Naphtha, and not the alternate fuel. There was a separate clause i.e., clause 12.1.9. relating to change in fuel in terms of use of alternate fuel and hence, clauses 12.1.4. to 12.1.7 were inapplicable. In fact, the Arbitral Tribunal had observed that the Government of Goa had even agreed to the formula on the basis of which the tariff would be computed for alternate fuel. According to learned senior counsel, the High Court applied an inapplicable clause, while ignoring the fact that all the relevant documents including the price certificate and dollar rate received from PSUs were forwarded along with invoices. Further, the Government of Goa continued to take power from the claimant without dispute or demur. Even otherwise, no issues were raised contemporaneously by the Government of Goa, and the supposed non-compliance of clauses 12.1.4. to 12.1.7 was raised for the first time in the sur-rejoinder before the Arbitral Tribunal.

9.4. As regards downrating amount of about Rs. 18.53 crore, learned senior counsel has recapitulated the contention of the Government of Goa before the Arbitral Tribunal that the Rated Capacity was required to be downrated from September 2000 until 13.08.2014 (date of expiry of PPA), on the basis of a draft notification issued by the Ministry of Power, Government of India. Learned counsel has countered this by relying on 8 'FSC', for short.

the observations of the Arbitral Tribunal that the issue of downrating was irrelevant given the subsequent amendment to the PPA, restricting the assured supply to 19.8 MW as the New Rated Capacity, without referring to downrating of such capacity. Hence, the State was not justified in contending that there was an annual downrating of the Rated Capacity. It has been argued that the Arbitral Tribunal had considered the definition of 'contracted capacity' and other contractual provisions as well as various provisions of the PPA and supplementary PPAs by which, there was a reduction to Rated Capacity of 19.8 MW to hold that the parties were bound by the contractual provisions. These findings of the Arbitral Tribunal were supported by the Original Equipment Manufacturer's9 Certificate dated 08.11.2005 and Minutes of Meeting dated 05.04.2007, based on which, all the invoices were reconciled and it was agreed that future invoices would be calculated in the same manner. The Arbitral Tribunal found that this agreement was the basis of all the future invoices and the said invoices were both approved and paid by the Government of Goa up to March 2013 and a part of April 2013. It was also held that this issue of downrating capacity should not be reagitated having already been settled by the parties. Learned counsel would submit that the High Court has erroneously proceeded to draw an adverse inference against the claimant owing to its failure to produce the OEM's recommendation and has erroneously entered into the process of interpretation of the Minutes of Meeting dated 9 'OEM', for short.

05.04.2007. Learned senior counsel, while relying on the decisions of this Court in Delhi Airport Metro Express Pvt. Ltd. v. Delhi Metro Rail Corporation Ltd.: (2022) 1 SCC 131 and Haryana Tourism Ltd. v. Kandhari Beverages Ltd.: (2022) 3 SCC 237, has submitted that in the appeal under Section 37 of the Act, re-appreciation of evidence was not permissible at all.

9.5. In regard to the question of variable charges on 4 MW power, it has been argued that the issue before the Arbitral Tribunal was as to whether the Government of Goa was justified in claiming credits for 4 MW in computing tariff heat rate for arriving at the fuel cost variable charges from January, 2009 to 30.08.2014. This claim was made by the Government in reference to the letters dated 02.01.2009 and 19.01.2009. It has been contented that the Arbitral Tribunal, after appreciating the evidence including the said letters, concluded that Government of Goa was exempted from payment of only fixed cost with regard to this 4 MW power permitted to be supplied to the other consumers; and the said letter dated 19.01.2009, in no way, affected the committed power supply by the claimant to the Government. Moreover, the Government had maintained its right to revert to take the said 4 MW power in future with all the terms and conditions of PPA remaining the same; and variable charges billed to the Government for supply to them were as per PPA. According to the learned counsel, the High Court erroneously re-appreciated the letters to substitute its own view with that of the Arbitral Tribunal. 9.6. With respect to the issue related to supply of backup power by the Government to the claimant in case of a scheduled outage (when the plant was shut between May and August, 2014), the Government claimed its entitlement to 1.25 times the approved rate of Rs. 3.78 per unit which was agreed to in the letter dated 18.09.2014. Learned senior counsel has submitted that the Arbitral Tribunal rightly came to the finding that the rate per unit was a fixed amount since determination of average cost of energy had become irrelevant, by relying on office memorandums dated 13.08.2014 and 18.09.2014. According to the learned counsel, this again has only been a matter of re-appreciation of evidence by the High Court. 9.7. In respect of reduction of interest post-award from 15% to 10% p.a. based on the principles of proportionality and reasonableness with reliance on the decision in Vedanta Ltd. (supra), learned senior counsel has submitted that post-award interest was awarded under Section 31(7)(b) of the Act of 1996 and the claimant had handed over the statement indicating that prime lending rate was approximately 13% p.a. and above and, therefore, award of interest @ 15% p.a. was justified.

10. Mr. R. Venkataramani, the learned Attorney General for India, appearing on behalf of the State has countered the submissions made on behalf of the claimant and has argued that the High Court has rightly interfered with the award in question that suffered from patent illegalities. The learned Attorney General has also questioned the observations and findings in the impugned judgment and order dated 08.03.2021 to the extent the submissions of the State have been rejected or overruled. 10.1. Learned Attorney General has referred to various decisions of this Court on the scope of interference under Sections 34 and 37 of the Act of 1996 including those in Ssangyong Engineering (supra); MMTC Limited v. Vedanta Limited: (2019) 4 SCC 163; and PSA SICAL Terminals (P) Ltd. v. Board of Trustees of V.O. Chidambranar Port Trust Tuticorin and Ors.: (2021) SCC Online SC 508. It has been submitted that this is not a case of two plausible views by the Arbitral Tribunal but a case of non- advertence to, and non-consideration of, the relevant contractual clauses leading to patent illegalities. According to the learned Attorney General, the Arbitral Tribunal had approached the entire case from an altogether wrong angle; and when the Arbitrator adverted to wrong questions,

the result has been of wrong answers. Learned Attorney General would submit that the High Court rightly interfered with the order under Section 34 of the Act of 1996 considering the fact that the Commercial Court did not adjudicate upon the arbitral award and rather framed separate issues like a regular Appellate Court.

10.2. It has been strenuously argued by the learned Attorney General that in the award in question, the Arbitral Tribunal proceeded to rely upon certain correspondence between the parties but, failed to examine the root question as to whether such correspondence had the effect of variation of terms of contract and as to whether such correspondence changed the fundamentals of contract. The learned Attorney General has re-emphasised that the Arbitral Tribunal has not considered the relevant clauses of the contract and this had been a matter of patent illegality. Two decisions of this Court have been relied on in this regard, namely State of Chhattisgarh and Ors. v. Sal Udyog Pvt. Ltd.: (2022) 2 SCC 275 and Associate Builders v. Delhi Development Authority: (2015) 3 SCC 49. Hence, it has been contended that the award would be liable to be set aside on the ground of patent illegality under Section 34(2A) of the Act of 1996 because an Arbitral Tribunal cannot rewrite the contract between parties and the award was made in ignorance of vital evidence. 10.3. As regards procedural aspects, it has been argued on behalf of the State that there had been clear violation of the principles of natural justice since the application seeking appointment of an expert in terms of Section 26 of the Act was not disposed of by the Arbitral Tribunal, although an order was passed by the Tribunal that it would be decided at an appropriate time. It has been contended that failure of the Tribunal to consider the application for appointment of expert had resulted in denial of equal opportunity to the State to the present its case, in violation of Section 18 of the Act. It has also been submitted that the High Court overlooked the purpose and intent behind appointment of an expert under Section 26 of the Act of 1996. 10.3.1. Another application was filed by the State seeking production of 13 documents by the claimant, including drafts of progress and developments in negotiations of each Fuel Supply Contract, minutes of meetings with fuel suppliers as well as the OEM recommendations with respect to downrating of net generating capacity. It has been submitted that this application was also not disposed of by the Arbitral Tribunal. Learned Attorney General would submit that non-production of documents has seriously prejudiced the State because certain documents like the OEM manual were crucial for its defence; and it was incumbent upon the claimant to produce the documents in its exclusive possession; and an adverse inference ought to have been drawn against the claimant for want of production of these documents.

10.3.2. It has further been submitted that the request of the State to file additional written submissions was not granted by the Arbitral Tribunal even after additional written submissions were placed on record by the claimant. Merely because a joint exercise was done and 24 permutations of calculation were submitted by the parties, at no point did the State give up its claims regarding interest or the quantum thereof. 10.4. In regard to variable charges, learned Attorney General has submitted that applicability of clauses 12.4 to 12.7 of the PPA was not considered or discussed in the award. These clauses had a material bearing on the question of liability of the Government of Goa to pay Rs. 24.66 crore on account of variable charges relatable to change in fuel from Naphtha to RLNG; and there had not been any finding by the Arbitral Tribunal that the aforesaid clauses were not applicable when there was change to RNLG from Naphtha. It has further been contended that the claimant was obligated to keep the Government updated about its

negotiations with fuel suppliers and provide the correspondence with potential suppliers and other drafts. The letter dated 23.05.2013 stated that all the terms and conditions of the PPA were to remain unaffected and the non-production of FSCs and detailed invoices took the opportunity to object to the same away from the Government. In light of the terms of the PPA, the submission of the claimant that the Government could not have frozen dollar rate and RLNG rate, would be unsustainable. Moreover, it would be wrong to assert that if fuel facilitation charges had not been given to the claimant by the Arbitral Tribunal, the requirement of providing FSCs would be waived off.

10.5. As regards downrating amounting to Rs. 18.53 crore, learned Attorney General has submitted that the Arbitral Tribunal wrongly held that the issue of downrating was resolved between parties on 05.04.2007 and failed to appreciate the relevant contractual provisions concerning downrating. The definition of 'contractual capacity' as defined under the PPA required that downrating be taken into account, and this definition was not amended by the Supplementary PPAs. Therefore, it was not open for the Tribunal to hold that downrating had been given a go-by. Given that the claimant did not produce the OEM recommendations, the State had to rely upon a draft notification issued by the Ministry of Power to calculate downrating. It has been submitted that this failure to produce the OEM recommendations would necessitate an adverse inference being drawn against the claimant and the claimant could not have subsequently relied on the certificate dated 08.11.2005 to argue that no degradation had taken place, vitiating the applicability of downrating. It has been submitted that the certificate dated 08.11.2005 cannot be held to be conclusive as to the degradation of the plant beyond the date of issuance of the aforesaid certificate and, therefore, the contractual stipulation could not have been ignored. Downrating would have to be applied in terms of the contract irrespective of changes in contracted capacity because, if the concept of downrating had become redundant, the claimant would have pointed it out in the year 2007 itself.

10.6. Insofar as the award of Rs. 3.94 crore towards variable charges on 4 MW power is concerned, learned Attorney General has submitted that variable charges were only to be paid in respect of power actually purchased, whereas fixed charges were payable regardless of actual purchase since there was no connection with infrastructure costs. The contention on this score has been that they are not liable to pay variable charges for electricity which had not been supplied to them, particularly when the parties had also agreed to waive fixed charges in that respect. Therefore, the Arbitral Tribunal erred in directing payment towards variable charges for 4 MW electricity, which was never supplied to the Government of Goa. The contracted capacity for the duration when the claimant was permitted to sell to third parties was reduced by 4 MW and; hence, while billing the variable charges for that period, contracted capacity also had to be reduced. It has been submitted that the failure to do so has resulted in a situation where the Government was charged by the claimant for variable charges on units sold to third parties. This has resulted in a dual profit to the claimant, for having been held entitled to recover variable costs for 4 MW electricity from the State despite not supplying electricity to it; and also being compensated for both fixed charges and variable charges for 4 MW electricity by such third parties. It has further been submitted that the Arbitral Tribunal relied on the letter dated 19.01.2009 which permitted the claimant to trade 4 MW of electricity to third parties but, failed to observe that this was in response to a previous communication by the claimant in which, the issue of fixed charges was specifically raised. Thus, the

letter dated 19.01.2009 cannot be viewed as acquiescence to payment of variable charges on 4MW power; and the finding of the Arbitral Tribunal in this regard had been perverse.

10.7. Learned Attorney General has also submitted that the Arbitral Tribunal has again ignored the contractual clauses mandating netting-out while making an award in the sum of Rs. 2.36 crore. It has been argued that clause 15 of the Second Supplementary PPA provided that all the backup energy supplied by the Government during an unscheduled or forced outage would be netted-out against energy supplied by the power station to the Government in the subsequent billing period in the ratio of one unit of backup power equal to one and quarter of unit of energy supplied. Both parties had construed this to mean that the claimant would be liable to pay charges for the netted-out energy at the prevailing rate in the proximate billing period. The Arbitral Tribunal has failed to take note of the mandatory nature of netting-out for unscheduled power outages under clause 15 and solely focused on the interpretation of the document dated 18.09.2014. It has been submitted that the determination of rate at Rs. 3.78 per unit was the base rate for calculation of netting-out and could not be construed as waiver of the said provisions of the contract. Further, the claimant had failed to supply electricity during the relevant billing period which led to a need to determine the base rate. The claimant was liable to pay for 1.25 times the units supplied to consumer by the Government, although the claimant contended that they would only be liable to return 1 unit. In fact, the base rate of Rs. 3.78 was much lower than the last paid rate, which was Rs. 12.57 per unit. In any event, there was no amendment to exclude netting from the calculation of the rate in terms of clause 23.1 of the PPA and no waiver on the part of the Government.

10.8. Finally, as regards the question of interest, it has been argued that there was no reason for the Arbitral Tribunal to award any interest before the date of award as the invoices were not paid being in dispute because the claimant was charging inflated bills; and the amount that was payable could not be crystallized for the claimant having failed to provide the Government of Goa with the necessary details and documents. Such documents were provided only during the arbitration proceedings and thus, if at all any amount towards interest was considered due and payable; the same could start only from the date when the final amount was crystallized. It has also been suggested that the contractual provisions for interest were in terrorem and liable to be discarded having regard to Section 74 of the Contract Act, 1872. Although the High Court rightly reduced the post-award interest but only modified the amount. It has been further submitted, by relying on NHAI v. M. Hakeem: (2021) 9 SCC 1, that such course of action was not permissible as modification of an award would not be possible under Section 34 of the Act of 1996. Thus, the award of interest of the Tribunal was liable to be set aside as being patently illegal. 10.9. A few other submissions have also been made by the learned Attorney General with reference to the calculation of the awarded amount. It has been contended that as per the PPA, the claimant was required to submit its bills according to the forecast period and thereafter for each subsequent financial year; however, the claimant submitted bills for the tariff period which resulted in inflated bills. Further, the Arbitral Tribunal calculated the amount to be awarded based on the supposed mutually agreed upon table of calculations; however, the set of calculations provided by the claimant was disputed by the State. The Tribunal did not advert to the submission that the principal amount to be paid would be Rs. 60.76 crore as opposed to Rs. 70.58 crore claimed by claimant. According to the learned Attorney General, the claimant has resorted to exorbitant billing de hors the contract and the amount payable

could not be crystallized on account of the fact that the claimant did not provide details of the electricity sold to third parties so as to ascertain liability, and this documentation was only provided during arbitration proceedings.

11. We have given anxious consideration to the rival submissions and have examined the record with reference to the law applicable. Relevant Statutory provisions

12. Since the present appeals relate to an arbitral award, which was carried in challenge under Section 34 and in appeal under Section 37 of the Act of 1996; and looking to the variety of submissions made, we may usefully take note of the relevant statutory provisions contained in Sections 26, 28, 34 and 37 of the Act of 1996 as follows:

> "26. Expert appointment by arbitral tribunal.-(1) Unless otherwise agreed by the parties, the arbitral tribunal may—
>
> (a) appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal, and
>
> (b) require a party to give the expert any relevant information or to produce, or to provide access to, any relevant documents, goods or other property for his inspection.
>
> (2) Unless otherwise agreed by the parties, if a party so requests or if the arbitral tribunal considers it necessary, the expert shall, after delivery of his written or oral report, participate in an oral hearing where the parties have the opportunity to put questions to him and to present expert witnesses in order to testify on the points at issue. (3) Unless otherwise agreed by the parties, the expert shall, on the request of a party, make available to that party for examination all documents, goods or other property in the possession of the expert with which he was provided in order to prepare his report.
>
> **** **** ****
>
> 28. Rules applicable to substance of dispute.-(1) Where the place of arbitration is situate in India,—
>
> (a) in an arbitration other than an international commercial arbitration, the arbitral tribunal shall decide the dispute submitted to arbitration in accordance with the substantive law for the time being in force in India;
>
> (b) in international commercial arbitration,—
>
> (i) the arbitral tribunal shall decide the dispute in accordance with the rules of law designated by the parties as applicable to the substance of the dispute;

(ii) any designation by the parties of the law or legal system of a given country shall be construed, unless otherwise expressed, as directly referring to the substantive law of that country and not to its conflict of laws rules;

(iii) failing any designation of the law under clause (a) by the parties, the arbitral tribunal shall apply the rules of law it considers to be appropriate given all the circumstances surrounding the dispute.

(2) The arbitral tribunal shall decide ex aequo et bono or as amiable compositeur only if the parties have expressly authorised it to do so. 10[(3) While deciding and making an award, the arbitral tribunal shall, in all cases, take into account the terms of the contract and trade usages applicable to the transaction.] **** **** ****

34. Application for setting aside arbitral award.-(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub- section (2) and sub-section (3).

(2) An arbitral award may be set aside by the Court only if--

(a) the party making the application 11[establishes on the basis of the record of the arbitral tribunal that] --

(i) a party was under some incapacity, or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a 10 Subs. by Act 3 of 2016, sec. 14, for sub-section (3) (w.r.e.f. 23-10-2015). Sub-section (3), before substitution, stood as under:

> "(3) In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.".

11 Subs. by Act 33 of 2019, sec 7, for "furnishes proof that" [w.e.f. 30-8-2019, vide S.O.

3154(E), dated 30th August, 2019].

provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

(b) the Court finds that--

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

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

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

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

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

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

Explanation 2.--For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.] 13[(2A) An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the Court, if the Court finds that the award is vitiated by patent illegality appearing on the face of the award:

Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by reappreciation of evidence.] (3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal:

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

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

action as in the opinion of 12 Subs. by Act 3 of 2016, sec. 18(I), for the Explanation (w.r.e.f. 23-10-2015). The Explanation, before substitution, stood as under:

> "Explanation. -Without prejudice to the generality of sub-clause (ii) it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81." 13 Ins. by Act 3 of 2016, sec. 18(II) (w.r.e.f. 23-10-2015).

arbitral tribunal will eliminate the grounds for setting aside the arbitral award.

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

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

37. Appealable orders.-(1) 15[Notwithstanding anything contained in any other law for the time being in force, an appeal] shall lie from the following orders (and from no others) to the Court authorised by law to hear appeals from original decrees of the Court passing the order, namely:--

16[(a) refusing to refer the parties to arbitration under section 8;

(b) granting or refusing to grant any measure under section 9;

(c) setting aside or refusing to set aside an arbitral award under section 34.] (2) An Appeal shall also lie to a court from an order of the arbitral tribunal.-

(a) accepting the plea referred to in sub-section (2) or sub-section (3) of section 16; or

(b) granting or refusing to grant an interim measure under section

17. (3) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to the Supreme Court." 12.1. Section 31(7) of the Act of 1996 as regards interest in award may also be usefully noticed which reads as under:-

> "31. Form and contents of arbitral award.-
>
> xxx xxx xxx (7) (a) Unless otherwise agreed by the parties, where and in so far as an arbitral award is for the payment of money, the arbitral tribunal may include in the sum for which the award is made interest, at such rate as it deems reasonable, on the whole or any part of the money, 14 Ins. by Act 3 of 2016, sec. 18(III) (w.r.e.f.

23-10-2015).

15 Subs. by Act 33 of 2019, sec 8, for "An appeal" [w.e.f. 30-8-2019, vide S.O. 3154(E), dated 30th August, 2019].

16 Subs. by Act 3 of 2016, sec. 20, for clauses (a) and (b) (w.r.e.f. 23-10-2015). Clauses (a) and

(b), before substitution stood as under:

"(a) granting or refusing to grant any measure under section 9;

(b) setting aside or refusing to set aside an arbitral award under section 34." for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made. 17[(b) A sum directed to be paid by an arbitral award shall, unless the award otherwise directs, carry interest at the rate of two per cent. higher than the current rate of interest prevalent on the date of award, from the date of award to the date of payment. Explanation.-The expression "current rate of interest" shall have the same meaning as assigned to it under clause (b) of section 2 of the Interest Act, 1978 (14 of 1978)] xxx xxx xxx" The scope of challenge to an arbitral award under Section 34 and the scope of appeal under Section 37 of the Act

13. Having regard to the contentions urged and the issues raised, it shall also be apposite to take note of the principles enunciated by this Court in some of the relevant decisions cited by the parties on the scope of challenge to an arbitral award under Section 34 and the scope of appeal under Section 37 of the Act of 1996.

13.1. In MMTC Limited (supra), this Court took note of various decisions including that in the case of Associate Builders (supra) and exposited on the limited scope of interference under Section 34 and further narrower scope of appeal under Section 37 of the Act of 1996, particularly when dealing with the concurrent findings (of the Arbitrator and then of the Court). This Court, inter alia, held as under: -

"11. As far as Section 34 is concerned, the position is well-

settled by now that the Court does not sit in appeal over the arbitral award and may interfere on merits on the limited ground provided under Section 34(2)(b)(ii) i.e. if the award is against the public policy of India. As per the legal position clarified through decisions of this 17 Subs. by Act 3 of 2016, sec. 16(i), for clause (b) (w.r.e.f. 23-10-2015). Clause (b), before substitution, stood as under:

> "(b) A sum directed to be paid by an arbitral award shall, unless the award otherwise directs, carry interest at the rate of eighteen per centum per annum from the date of the award to the date of payment." Court prior to the amendments to the 1996 Act in 2015, a violation of Indian public policy, in turn, includes a violation of the fundamental policy of Indian law, a violation of the interest of India, conflict with justice or morality, and the existence of patent illegality in the arbitral award.

> Additionally, the concept of the "fundamental policy of Indian law" would cover compliance with statutes and judicial precedents, adopting a judicial approach, compliance with the principles of natural justice, and Wednesbury [Associated Provincial Picture Houses v. Wednesbury Corpn., (1948) 1 KB 223 (CA)] reasonableness. Furthermore, "patent illegality" itself has been held to mean contravention of the substantive law of India, contravention of the 1996 Act, and contravention of the terms of the contract.

12. It is only if one of these conditions is met that the Court may interfere with an arbitral award in terms of Section 34(2)(b)(ii), but such interference does not entail a review of the merits of the dispute, and is limited to situations where the findings of the arbitrator are arbitrary, capricious or perverse, or when the conscience of the Court is shocked, or when the illegality is not trivial but goes to the root of the matter. An arbitral award may not be interfered with if the view taken by the arbitrator is a possible view based on facts. (See Associate Builders v. DDA [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204]. Also see ONGC Ltd. v. Saw Pipes Ltd. [ONGC Ltd. v. Saw Pipes Ltd., (2003) 5 SCC 705]; Hindustan Zinc Ltd. v. Friends Coal Carbonisation [Hindustan Zinc Ltd. v. Friends Coal Carbonisation, (2006) 4 SCC 445]; and McDermott International Inc. v. Burn Standard Co. Ltd. [McDermott International Inc. v. Burn Standard Co. Ltd., (2006) 11 SCC 181])

13. It is relevant to note that after the 2015 Amendment to Section 34, the above position stands somewhat modified. Pursuant to the insertion of Explanation 1 to Section 34(2), the scope of contravention of Indian public policy has been modified to the extent that it now means fraud or corruption in the making of the award, violation of Section 75 or Section 81 of the Act, contravention of the fundamental policy of Indian law, and conflict with the most basic notions of justice or morality. Additionally, sub-section (2-A) has been inserted in Section 34, which provides that in case of domestic arbitrations, violation of Indian public policy also includes patent illegality appearing on the face of the award. The proviso to the same states that an award shall not be set aside merely on the ground of an erroneous application of the law or by reappreciation of evidence.

14. As far as interference with an order made under Section 34, as per Section 37, is concerned, it cannot be disputed that such interference under Section 37 cannot travel beyond the restrictions laid down under Section 34. In other words, the court cannot undertake an independent assessment of the merits of the award, and must only ascertain that the exercise of power by the court under Section 34 has not exceeded the scope of the provision. Thus, it is evident that in case an arbitral award has been confirmed by the court under Section 34 and by the court in an appeal under Section 37, this Court must be extremely cautious and slow to disturb such concurrent findings."
13.2. In the case of Ssangyong Engineering (supra), this Court has set out the scope of challenge under Section 34 of the Act of 1996 in further details in the following words: -

> "37. Insofar as domestic awards made in India are concerned, an additional ground is now available under sub-section (2-A), added by the Amendment Act, 2015, to Section 34. Here, there must be patent illegality appearing on the face of the award, which refers to such illegality as goes to the root of the matter but which does not

amount to mere erroneous application of the law. In short, what is not subsumed within "the fundamental policy of Indian law", namely, the contravention of a statute not linked to public policy or public interest, cannot be brought in by the backdoor when it comes to setting aside an award on the ground of patent illegality.

38. Secondly, it is also made clear that reappreciation of evidence, which is what an appellate court is permitted to do, cannot be permitted under the ground of patent illegality appearing on the face of the award.

39. To elucidate, para 42.1 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , namely, a mere contravention of the substantive law of India, by itself, is no longer a ground available to set aside an arbitral award. Para 42.2 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , however, would remain, for if an arbitrator gives no reasons for an award and contravenes Section 31(3) of the 1996 Act, that would certainly amount to a patent illegality on the face of the award.

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. What is important to note is that a decision which is perverse, as understood in paras 31 and 32 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , while no longer being a ground for challenge under "public policy of India", would certainly amount to a patent illegality appearing on the face of the award. 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." 13.3. The limited scope of challenge under Section 34 of the Act was once again highlighted by this Court in the case of PSA SICAL Terminals (supra) and this Court particularly explained the relevant tests as under :-

"43. It will thus appear to be a more than settled legal position, that in an application under Section 34, the court is not expected to act as an appellate court and reappreciate the evidence. The scope of interference would be limited to grounds provided under Section 34 of the Arbitration Act. The interference would be so warranted when the award is in violation of "public policy of India", which has been

held to mean "the fundamental policy of Indian law". A judicial intervention on account of interfering on the merits of the award would not be permissible. However, the principles of natural justice as contained in Section 18 and 34(2)(a)(iii) of the Arbitration Act would continue to be the grounds of challenge of an award. The ground for interference on the basis that the award is in conflict with justice or morality is now to be understood as a conflict with the "most basic notions of morality or justice". It is only such arbitral awards that shock the conscience of the court, that can be set aside on the said ground. An award would be set aside on the ground of patent illegality appearing on the face of the award and as such, which goes to the roots of the matter. However, an illegality with regard to a mere erroneous application of law would not be a ground for interference. Equally, reappreciation of evidence would not be permissible on the ground of patent illegality appearing on the face of the award.

44. A decision which is perverse, though would not be a ground for challenge under "public policy of India", would certainly amount to a patent illegality appearing on the face of the award. However, 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.

45. To understand the test of perversity, it will also be appropriate to refer to paragraph 31 and 32 from the judgment of this Court in Associate Builders (supra), which read thus:

"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.

32. A good working test of perversity is contained in two judgments. In Excise and Taxation Officer-cum-Assessing Authority v. Gopi Nath & Sons [1992 Supp (2) SCC 312], it was held : (SCC p. 317, para 7) "7. ... It is, no doubt, true that if a finding of fact is arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant material or if the finding so outrageously defies logic as to suffer from the vice of irrationality incurring the blame of being perverse, then, the finding is rendered infirm in law."" 13.4. In Delhi Airport Metro Express (supra), this Court again surveyed the case-law and explained the contours of the Courts' power to review the arbitral awards. Therein, this Court not only re-affirmed the principles aforesaid but also highlighted an area of serious concern while pointing out "a disturbing tendency" of the Courts in setting aside arbitral awards after dissecting and re-assessing factual aspects. This Court also underscored the pertinent features and scope of the expression "patent illegality" while reiterating that the Courts do not sit in appeal over the arbitral award. The relevant and significant passages of this judgment could be

usefully extracted as under: -

> "26. A cumulative reading of the UNCITRAL Model Law and Rules, the legislative intent with which the 1996 Act is made, Section 5 and Section 34 of the 1996 Act would make it clear that judicial interference with the arbitral awards is limited to the grounds in Section 34. While deciding applications filed under Section 34 of the Act, Courts are mandated to strictly act in accordance with and within the confines of Section 34, refraining from appreciation or reappreciation of matters of fact as well as law. (See Uttarakhand PurvSainikKalyan Nigam Ltd. v. Northern Coal Field Ltd. [Uttarakhand PurvSainik Kalyan Nigam Ltd. v. Northern Coal Field Ltd., (2020) 2 SCC 455 : (2020) 1 SCC (Civ) 570] , Bhaven Construction v. Sardar Sarovar Narmada Nigam Ltd. [Bhaven Construction v. Sardar Sarovar Narmada Nigam Ltd., (2022) 1 SCC 75] and Rashtriya Ispat Nigam Ltd. v. Dewan Chand Ram Saran [Rashtriya Ispat Nigam Ltd. v. Dewan Chand Ram Saran, (2012) 5 SCC 306] .) **** **** ****

28. This Court has in several other judgments interpreted Section 34 of the 1996 Act to stress on the restraint to be shown by Courts while examining the validity of the arbitral awards. The limited grounds available to Courts for annulment of arbitral awards are well known to legally trained minds. However, the difficulty arises in applying the well-established principles for interference to the facts of each case that come up before the Courts. There is a disturbing tendency of Courts setting aside arbitral awards, after dissecting and reassessing factual aspects of the cases to come to a conclusion that the award needs intervention and thereafter, dubbing the award to be vitiated by either perversity or patent illegality, apart from the other grounds available for annulment of the award. This approach would lead to corrosion of the object of the 1996 Act and the endeavours made to preserve this object, which is minimal judicial interference with arbitral awards. That apart, several judicial pronouncements of this Court would become a dead letter if arbitral awards are set aside by categorising them as perverse or patently illegal without appreciating the contours of the said expressions.

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

within the expression “patent illegality”.

30. Section 34(2)(b) refers to the other grounds on which a court can set aside an arbitral award. If a dispute which is not capable of settlement by arbitration is the subject-matter of the award or if the award is in conflict with public policy of India, the award is liable to be set aside. Explanation (1), amended by the 2015 Amendment Act, clarified the expression “public policy of India” and its connotations for the purposes of reviewing arbitral awards. It has been made clear that an award would be in conflict with public policy of India only when it is induced or affected by fraud or corruption or is in violation of Section 75 or Section 81 of the 1996 Act, if it is in contravention with the fundamental policy of Indian law or if it is in conflict with the most basic notions of morality or justice.

**** **** ****

42. The Division Bench referred to various factors leading to the termination notice, to conclude that the award shocks the conscience of the court. The discussion in SCC OnLine Del para 103 of the impugned judgment [DMRC v. Delhi Airport Metro Express (P) Ltd., 2019 SCC OnLine Del 6562] amounts to appreciation or reappreciation of the facts which is not permissible under Section 34 of the 1996 Act. The Division Bench further held [DMRC v. Delhi Airport Metro Express (P) Ltd., 2019 SCC OnLine Del 6562] that the fact of AMEL being operated without any adverse event for a period of more than four years since the date of issuance of the CMRS certificate, was not given due importance by the Arbitral Tribunal. As the arbitrator is the sole Judge of the quality as well as the quantity of the evidence, the task of being a Judge on the evidence before the Tribunal does not fall upon the Court in exercise of its jurisdiction under Section 34. [State of Rajasthan v. Puri Construction Co. Ltd., (1994) 6 SCC 485] On the basis of the issues submitted by the parties, the Arbitral Tribunal framed issues for consideration and answered the said issues. Subsequent events need not be taken into account.” (emphasis supplied) 13.5. In the case of Haryana Tourism Ltd. (supra), this Court yet again pointed out the limited scope of interference under Sections 34 and 37 of the Act; and disapproved interference by the High Court under Section 37 of the Act while entering into merits of the claim in the following words: - “8. So far as the impugned judgment and order passed by the High Court quashing and setting aside the award and the order passed by the Additional District Judge under Section 34 of the Arbitration Act are concerned, it is required to be noted that in an appeal under Section 37 of the Arbitration Act, the High Court has entered into the merits of the claim, which is not permissible in exercise of powers under Section 37 of the Arbitration Act.

9. As per settled position of law laid down by this Court in a catena of decisions, an award can be set aside only if the award is against the public policy of India. The award can be set aside under Sections 34/37 of the Arbitration Act, if the award is found to be contrary to: (a) fundamental policy of Indian Law; or (b) the interest of India; or (c) justice or morality; or (d) if it is patently illegal. None of the aforesaid exceptions shall be applicable to the facts of the case on hand. The High Court has entered into the merits of the claim and has decided the appeal under Section 37 of the Arbitration Act as if the High Court was deciding the appeal against the judgment and decree passed by the learned trial Court. Thus, the High Court has exercised the jurisdiction not vested in it under

Section 37 of the Arbitration Act. The impugned judgment and order passed by the High Court is hence not sustainable." 13.6. As regards the limited scope of interference under Sections 34/37 of the Act, we may also usefully refer to the following observations of a 3-Judge Bench of this Court in the case of UHL Power Company Limited v. State of Himachal Pradesh: (2022) 4 SCC 116: -

> "15. This Court also accepts as correct, the view expressed by the appellate court that the learned Single Judge committed a gross error in reappreciating the findings returned by the Arbitral Tribunal and taking an entirely different view in respect of the interpretation of the relevant clauses of the implementation agreement governing the parties inasmuch as it was not open to the said court to do so in proceedings under Section 34 of the Arbitration Act, by virtually acting as a court of appeal.

16. As it is, the jurisdiction conferred on courts under Section 34 of the Arbitration Act is fairly narrow, when it comes to the scope of an appeal under Section 37 of the Arbitration Act, the jurisdiction of an appellate court in examining an order, setting aside or refusing to set aside an award, is all the more circumscribed." 13.7. The learned Attorney General has referred to another 3-Judge Bench decision of this Court in the case of Sal Udyog Private Limited (supra), wherein this Court indeed interfered with the award in question when the same was found suffering from non-consideration of a relevant contractual clause. In the said decision too, the principles aforesaid in Delhi Airport Metro Express, Ssangyong Engineering and other cases were referred to and thereafter, this Court applied the principles to the facts of that case. We shall refer to the said decision later at an appropriate juncture.

13.8. Keeping in view the aforementioned principles enunciated by this Court with regard to the limited scope of interference in an arbitral award by a Court in the exercise of its jurisdiction under Section 34 of the Act, which is all the more circumscribed in an appeal under Section 37, we may examine the rival submissions of the parties in relation to the matters dealt with by the High Court.

Questions relating to proceedings and procedure

14. It has been argued on behalf of the State that in the arbitration proceedings, it had made an application for appointment of an expert under Section 26 of the Act but the same was not decided by the Arbitral Tribunal. In our view, the High Court has dealt with this issue in its proper perspective and this baseless objection has rightly been rejected. We find it rather strange that such an objection standing at contradiction to its own stand before the Arbitral Tribunal and against its own amended pleading has at all been projected by the State as a ground of challenge to the award in question. It appears that in the counter claim filed by Government of Goa before the Arbitral Tribunal, initially it was prayed that all transactions and invoices raised by the claimant need to be re-examined through a technical cum financial expert so as to ascertain the correctness of the bills in terms of Section 26 of the Act but, thereafter, the Government itself amended its counter claim, as permitted under Section 23 of the Act by the Arbitral Tribunal, and dropped this prayer. It was then pleaded by the Government that it had engaged the services of an expert and with his assistance, had reworked the amount which was payable by the claimant to it. The High Court has held that after such deletion of the prayer, it was reasonable for the Arbitral Tribunal to proceed on the basis

that the application under Section 26 of the Act was either rendered infructuous or was abandoned by Government of Goa; and that it had not been able to show any prejudice on account of non-disposal of the application. We are in agreement with the High Court on this score. It is also noticeable that in challenge to the award, the Government of Goa has not agitated the rejection of its counter claim. In fact, there remains no ambiguity as regards the Arbitral Tribunal attending on all the relevant aspects of the matter. In this regard, we may usefully reproduce paragraph 31 of the award where the Arbitral Tribunal specifically noticed the submissions made on behalf of the Government of Goa about exercise having been undertaken to workout the details pertaining to the counter claim and permitted the Government to specify the amount with reference to different heads and with necessary particulars. Paragraph 31 of the award reads as under:- "31. In the course of hearing of the matter, on 18.10.2016, learned counsel appearing on behalf of the Respondent stated that his client has undertaken an exercise to work out the details pertaining to the counter claim, since no specified amount had been claimed by the Respondent in its counter claim. He submitted that he would like that the figures be placed before this Tribunal by way of amendment of the pleadings, if necessary. The Tribunal permitted the Respondent to convey to the Claimant in writing the amount which the Respondent claimed by way of counter claim in the instant proceedings under different heads and with necessary particulars. The Claimant was given liberty to file its objections." 14.1. Another submission on behalf of the Government has been that for non-production of certain documents by the claimant, an adverse inference ought to have been drawn against them by the Arbitral Tribunal. It is again a rule of evidence as to whether adverse inference is to be drawn or not; and to what effect. The High Court has dealt with this issue and has held that most of the documents were made available to the Government of Goa. High Court has further held that the other documents sought for by Government of Goa were not made available to it because the claimant had clearly stated that such documents were not available with it at the relevant time or did not exist at the relevant time. It has further been held that in absence of Government of Goa establishing any serious prejudice, there was no breach of principles of natural justice merely because the Arbitral Tribunal had failed to make a formal order on the application seeking production of documents. We are in agreement with the said observations and findings of the High Court.

14.2. Government of Goa's contention that opportunity was not granted by the Arbitral Tribunal to file additional written submission has also been dealt with by the High Court with the finding that sufficient opportunity was given by the Arbitral Tribunal since there were at least two meetings/hearings before the learned Arbitrator where the Government of Goa did neither file nor seek leave to file written submissions in response to the claimant's written clarifications/submissions. We are in agreement with these findings too.

14.3. In fact, the submissions of the aforesaid nature, attempting to find fault with the proceedings of arbitration on such hyper-technical but baseless grounds only show an attempt on the part of the State to somehow question the award and seek interference, irrespective of the principles laid down by this Court.

14.4. In regard to the aforesaid procedural aspects of the matter, the High Court has cautiously taken note of the record of proceedings and has proceeded only within the confines of its jurisdiction

to reject these contentions.

15. The question, however, is as to whether the High Court remained within those confines while dealing with the other points of challenge pertaining to the items of claim and consideration of the Arbitral Tribunal in that regard. We may examine the point-wise consideration of the High Court with reference to the applicable principles.

The award relating to variable charges on use of alternate fuel

16. The claimant has assailed the judgment of the High Court by which it has set aside the award towards variable charges of Rs. 24.66 crore. It is the case of the claimant that the ground on which the High Court has set aside the award was not at all an issue before the Arbitral Tribunal; that in any case, the State has referred to such clauses of the PPA which were not applicable to supply of electricity by using RLNG as alternate fuel; and that these clauses were applicable only for supply of electricity using 'Naphtha' as fuel. Per contra, it has been argued on behalf of the State that the Arbitral Tribunal has approached the entire case from an altogether wrong angle; and when the Tribunal adverted to wrong questions, the result has been of wrong answers. This, according to the learned Attorney General, has been a gross illegality and perversity on the part of the Arbitral Tribunal.

16.1. We find it difficult to accept the submission of the learned Attorney General. In our view, on the issue of entitlement to raise invoices based on fluctuating price of fuel and rate of dollar, the Arbitral Tribunal has held in favour of the claimant after thorough examination of the documentary evidence before it and while focusing on core issue raised before it. 16.2. After taking note of relevant submissions and after having examined the entire documentary evidence, the Arbitral Tribunal returned a clear finding on facts in the following terms: -

> "41. The facts noticed above which are based entirely on the documentary record placed before the Tribunal clearly establish that the proposal made by the Claimant under its letter dated 21st of March 2013 was an offer for supply of energy at a rate based on the formula contained in the aforesaid communication. It was clearly mentioned that the entire PPA and all other terms and conditions shall remain unchanged except for change in calculation of Variable charges in Monthly Tariff. The formula for working out the costs was also described as "Proposed Monthly Variable Charge Formula" A Monthly Sample Calculation based on assumed values of landed cost of oil, and dollar rate, was appended to the proposal to show that the cost would be less than what was being paid by the Respondent. When the Respondent accepted the proposal and responded by its letter of 26th of April 2012 which referred to the cost at the rate of Rs. 8.58 per unit, which was described as the " revised fixed rate", the Claimant clarified the position immediately by stating in its letter of 30th of April 2013 to the Respondent that the price mentioned in the proposal dated 21st of March 2013, was not for a fixed cost of power supplied, and that the same shall vary depending upon the fuel price in the market and the exchange rate.

They therefore requested the Respondent to confirm that the tariff was formula based and shall vary with changes in the fuel price in the market and dollar variation. Thereafter it appears that the parties were not able to resolve the differences that surfaced,, and ultimately the matter was placed before the Cabinet of the Government of Goa on May 22, 2013. After having considered the matter, the Cabinet took a very clear and categoric decision to purchase power from the Claimant at the rate given in the proposal of the Claimant, which would vary, based on the international price of gas and exchange rate fluctuations. The decision was communicated to all offices concerned with a request to report compliance. On the very next day, the Respondent by its letter dated 23rd of May 2013 confirmed that the Government had decided to continue to purchase power as per the formula proposed by the Claimant in their letter dated 21st of March 2013 considering the prevailing rates of fuel and dollar up to the expiry of the existing PPA. The same communication also directed that the power bills must be submitted with due documentation of prices of fuel and dollar.

42. These facts clearly establish that the price of power to be supplied by the Claimant was not based on fixed dollar rate or landing cost of fuel. The proposal clearly made these charges variable, and clarified the position further when the Respondent wrongly understood it to mean a fixed rate formula. Ultimately, the Cabinet of the Government of Goa took a decision clearly in favour of the stand of the Claimant. It was faintly argued that the Cabinet decision was not binding because, pursuant to it no order was drawn up by the State Government. Relying on the decision of the Hon'ble Supreme Court (AIR 1963 S.C 395) in Bachhittar Singh Vs State of Punjab, it was contended that unless the Cabinet decision is followed by a formal order drawn up by the State Government, it does not have any binding effect. The submission is wholly untenable. On facts, in the decision referred to the Court was concerned with the note of the Revenue Minister in the file,, and was not a decision taken by the Cabinet at its meeting. Secondly, in the instant case the decision of the Cabinet was communicated to all concerned officers directing them to act in accordance with the order and report compliance. Pursuant to the said decision, a letter was written by the Respondent to the Claimant accepting the proposal based on variable charge in accordance with the prevailing cost of fuel and dollar. This clearly shows that the Government acted upon the said decision of the Cabinet.

43. For all these reasons, the Tribunal finds that the plea of the Claimant that the Respondent was obliged to pay for the power purchased by it pursuant to the proposal accepted by it, on the basis of invoices prepared and submitted by the Claimant taking into account the variable cost of oil and dollar, must be accepted, and the plea of the Respondent to the contrary, must be rejected." 16.3. Insofar as the contention of State with regard to non-consideration of clauses 12.1.4 to 12.1.7 of PPA is concerned, in our view, the claimant is right in its submission that the main issue raised before the Arbitral Tribunal was only as to whether the agreement was to supply power on a fixed rate of fuel price and fixed rate of exchange in terms of US dollar to Indian rupee.

16.4. It might appear that in the latter part of the pleadings, the Government of Goa referred to the aforesaid clauses 12.1.4 to 12.1.7 of PPA but, fact of the matter remains that they were not as such considered by the parties to be forming material propositions of law or facts so as to form the part of the issue before the Arbitral Tribunal. Even on the first principles pertaining to settlement of issues, like those in Order XIV Rule 1 of the Code of Civil Procedure, 190818, the Court, while dealing with regular 18 Order XIV Rule 1 CPC reads as under: -

"1. Framing of issues.—(1) Issues arise when a material proposition of fact or law is affirmed by the one party and denied by the other.

(2) Material propositions are those propositions of law or fact which a plaintiff must allege in order to show a right to sue or a defendant must allege in order to constitute his defence. (3) Each material proposition affirmed by one party and denied by the other shall form the subject of a distinct issue.

(4) Issues are of two kinds:

(a) issues of fact,

(b) issues of law.

(5) At the first hearing of the suit the Court shall, after reading the plaint and the written statements, if any, and after examination under rule 2 of Order X and after hearing the parties or their pleaders, ascertain upon what material propositions of fact or of law the civil suit, would be ascertaining as to upon what material proposition of fact or law the parties are at variance, and thereupon would frame and record the issues on which the right decision of the case appears to depend. The present case had been that of arbitration and, obviously, the Arbitral Tribunal was not obliged to frame issues on each and every fact pleaded or disputed. The Arbitral Tribunal was only expected to arbitrate on the dispute presented to it. Significantly, in the present case, the parties themselves succinctly formulated the issues on which the Arbitral Tribunal was required to give its ruling and therein, as regards this matter of variable charges, the question posed was with reference to assertion of the Government of Goa that the claimant had agreed to supply power based on fixed rate of fuel price and a fixed rate of exchange in terms of price of US dollar to INR for supply of power using RLNG as fuel from June, 2013 onwards (vide point C in paragraph 34 of the award-reproduced hereinabove). The Tribunal, therefore, rightly indicated that the real issue was as to whether the invoices prepared by the claimant were in accordance with the terms and conditions of the proposal made by the claimant and accepted by the Government; and the core of dispute was as to whether price of energy to be supplied was based upon a fixed dollar rate and a fixed import price irrespective of actual fluctuations. The Tribunal parties are at variance, and shall thereupon proceed to frame and record the issues on which the right decision of the case appears to depend. (6) Nothing in this rule requires the Court to frame and record issues where the defendant at the first hearing of the suit makes no defence." indeed adverted to all the relevant facts and evidence in that regard and determined this issue in favour of the claimant.

16.5. In view of the real issue projected and agitated before the Arbitral Tribunal, reference to clauses 12.1.4 to 12.1.7 of PPA had obviously been unnecessary. This is coupled with the submissions of the claimant that the definition of "Fuel Supply Contract" in PPA was restricted to a contract entered into between the claimant and a fuel supplier for supply of "Naphtha", and not pertaining to alternate fuel also. For ready reference, we may reproduce the definitions of "Fuel" as also "Fuel Supply Contract" in the PPA which read as under: -

> " 'Fuel' means Naphtha or any Alternate Fuel;

> *** *** *** 'Fuel Supply Contract' shall mean any contract entered into between RSPCL and any Fuel Supplier for the supply of Naphtha pursuant to clause 12;" 16.5.1. If "Alternate Fuel" is also to be read alongwith "Naphtha" in the aforesaid definition, that would be either re-writing the contract or at least reading something into the contract by stretching the principles of construction of document. This would, in our view, be travelling into the area of such construction of the terms of contract which were not forming the part of the material propositions of fact on which the parties were at variance. As noticed, the core of variance of the parties had only been as to whether the claimant was to supply energy on a fixed rate of fuel and fixed rate of foreign currency after the parties had agreed to the use of alternate fuel.

16.6. We have only broadly referred to the salient features of the dealings between the parties. In fact, not much dilation and dissection of the record is required because the Arbitral Tribunal has indeed examined all the relevant aspects of the matter in necessary details. 16.7. In any case, all documents which showed the cost at which alternate fuel was procured and the prevailing dollar rate were supported by price certificates forwarded to Government of Goa with each and every invoice, and such certificates had been from Public Sector Undertakings. There is nothing on record to show nor has Government of Goa demonstrated that it had either contemporaneously asked for any documents or had disputed or denied the correctness of such certificates. 16.8. The Arbitral Tribunal has noticed that the decision of the cabinet was produced before it by Government of Goa itself. There is also a finding of fact in the award that the communication dated 23.05.2013 to purchase power at a fluctuating rate of fuel and exchange rate of dollar, conveyed to the claimant by Government of Goa, was pursuant to the cabinet decision taken on 22.05.2013. This has been a particular view taken by the Arbitral Tribunal of the evidence on record. We are unable to appreciate as to how such a view on evidence could have been substituted by another view on the same evidence by the High Court. In an overall view of the record, we are unable to agree that the Arbitral Tribunal had approached the case from an altogether wrong angle or it had asked wrong questions. In our view, the Arbitral Tribunal had squarely answered the issue, which was raised jointly by the parties before it.

17. True it is that consideration of any adjudicatory forum would be vitiated by asking wrong questions but then, in our view, this flaw operates against the consideration of the High Court rather than against the consideration of the Arbitral Tribunal.

17.1. As noticed, the High Court has reproduced all the said clauses of the contract under the heading "Fuel Supply" and then, elaborately discussed the features related with their operation, particularly clauses 12.1.4 to 12.1.7. The High Court has found this aspect to be a vital issue and non-consideration thereof has been taken to be a patent illegality. It was observed and held, inter alia, as under:

> "88. According to us, the issue about the applicability and the non- compliance of contractual clauses 12.1.4 to 12.1.7 was one of the most relevant and vital issues which arose before the learned Arbitrator. A substantial claim was made by the Respondent towards variable charges, of which, the fuel component was the most dominant.

> Ultimately, the learned Arbitrator has made an Award in an amount of Rs. 24.66 crores (approximately) towards variable charges post the switch of the fuel from Naphtha to RLNG. Such a substantial award has been made without even adverting to, much less considering or evaluating the issue raised by the Appellant about applicability and non-compliance with the contractual clauses 12.1.4 to 12.1.7. This amounts to patent illegality because the Award to that extent can be said to have been made ignoring or even disregarding contractual provisions to be found in clauses 12.1.4 to 12.1.7 of the PPA. The Award to this extent will have to be held as vitiated by patent illegality because Award ignores vital evidence on the issue of applicability and non-

compliance with the contractual provisions in clauses 12.1.4 to 12.1.7." 17.2. The High Court has also proceeded to observe and reiterate that interference was being made not because of the Court disagreeing with any interpretation of the contractual clauses by the Arbitrator but because the Arbitrator failed to look into the relevant contractual provisions. The High Court justified its interference while observing as under: -

> "98. According to us, all these predicates are attracted when it comes to impugned Award concerning the variable charges. The interference is by no means, merit-based. Interference is because the Arbitrator in the present case has failed to even advert to much less go into the merits of one of the most vital and relevant issues concerning the applicability and non-compliance with the contractual provisions. The interference is not because the interpretation of the contractual clauses by the learned Arbitrator is wrong or because we disagree with such interpretation. The interference is because the learned Arbitrator failed to even look into the contractual provisions to find out if the same were given a go by post the switch of fuel from Naphtha to RLNG. The interference is because the learned Arbitrator failed to take note of and interpret the contractual clauses to find out whether they were breached as alleged by the Appellant though denied by the Respondent. Without even adverting to much less taking into consideration the contractual provisions which governed the relationship between the parties, the learned Arbitrator was not justified in making an Award of Rs. 24.66 crores in favour of the Respondent. Accordingly, we set aside the impugned Award to the extent it awards Rs. 24.66 crores to the Respondent towards the variable charges."

18. As noticed, arbitral award is not an ordinary adjudicatory order so as to be lightly interfered with by the Courts under Sections 34 or 37 of the Act of 1996 as if dealing with an appeal or revision against a decision of any subordinate Court. The expression "patent illegality" has been exposited by this Court in the cases referred hereinbefore. The significant aspect to be reiterated is that it is not a mere illegality which would call for interference, but it has to be "a patent illegality", which obviously signifies that it ought to be apparent on the face of the award and not the one which is culled out by way of a long-drawn analysis of the pleadings and evidence. Of course, when the terms and conditions of the agreement governing the parties are completely ignored, the matter would be different and an award carrying such a shortcoming shall be directly hit by Section 28(3) of the Act,

which enjoins upon an Arbitral Tribunal to decide in accordance with the terms of contract while taking into account the usage of trade applicable to the transaction. As said by this Court in Associate Builders (supra), if an Arbitrator construes the term of contract in a reasonable manner, the award cannot be set aside with reference to the deduction drawn from construction. The possibility of interference would arise only if the construction of the Arbitrator is such which could not be made by any fairminded and reasonable person.

19. The case of SAL Udyog Private Limited (supra) cited by learned Attorney General is an apposite example as to when the principles governing "patent illegality" come into operation. In that case, in the contract concerning supply of Sal seeds, the respondent-contractor had continued to operate until 21.12.1998, when the contract was terminated in accordance with the change in legislation. The respondent thereafter levied a claim for refund of a sum of about 1.72 crore, allegedly paid in excess to the State. The dispute ultimately led to arbitration and an arbitral award was made in favour of the respondent which was not interfered with under Sections 34 and 37 of the Act.

19.1. Therein, the specific ground of challenge by the appellant-State had been that the Arbitrator ignored the binding term of contract governing the parties relating to recovery of "supervision charges". Such a binding term was brushed aside by the Arbitrator while observing that there was no basis to admit any such "indirect expenses". This Court found that the supervision charges were levied by the State and paid by the respondent without any demur right from the date parties entered into agreement and it was only after termination of the contract that the respondent raised a dispute towards supervision charges. It had been a classic case of the Arbitrator ignoring and rather overriding the terms of contract, as would appear from the following observations of this Court with reference to the facts of the case:

> "23. On a conspectus of the facts of the case, it remains undisputed that though the appellant State did raise an objection before the Arbitral Tribunal on the claim of the respondent Company seeking deduction of supervision charges, for which it relied on Clause 6(b) of the agreement and the Circular dated 27-7-1987 to assert that recovery of supervision charges along with expenses was a part and parcel of the contract executed with the respondent Company, the said objection was turned down by the learned sole arbitrator by giving a complete go-by to the terms and conditions of the agreement governing the parties and observing that there is no basis to admit any such "indirect expenses". The Circular dated 27- 7-1987 issued by the Government of Madhya Pradesh that provides for imposition of 10% supervision charges on the amounts calculated towards the cost of the Sal seeds in the expenditure incurred, was also ignored. Pertinently, the respondent Company has not denied the fact that supervision charges were being levied by the appellant State and being paid by it without any demur as a part of the advance payment made on an annual basis, right from the date the parties had entered into the first agreement i.e. from 30-8-1979. This fact is also borne out from the specimen copies of the orders filed by the appellant State with the appeal that amply demonstrate that the cost of the Sal seeds required to be paid by the respondent Company included "supervision charges" described as "Paryavekshan vyay" in vernacular language. It was only after the

appellant State had terminated the second contract on 21-12-

1998, that the respondent Company raised a dispute and for the first time, claimed refund of the excess amount purportedly paid by it to the appellant State towards supervision charges incurred for supply of Sal seeds. In our opinion, this is the patent illegality that is manifest on the face of the arbitral award inasmuch as the express terms and conditions of the agreement governing the parties as also the Circular dated 27-7-1987 issued by the Government of Madhya Pradesh have been completely ignored." 19.2. In view of such an error apparent on the face of the record, this Court found the matter to be of patent illegality which was going to the root of the matter and the impugned award, insofar permitting deduction of the supervision charges recovered from the respondent, was quashed and set aside being in direct conflict with the terms of the contract and the relevant circular. This Court held thus:

> "26. To sum up, existence of Clause 6(b) in the agreement governing the parties, has not been disputed, nor has the application of the Circular dated 27-7-1987 issued by the Government of Madhya Pradesh regarding imposition of 10% supervision charges and adding the same to cost of the Sal seeds, after deducting the actual expenditure been questioned by the respondent Company. We are, therefore, of the view that failure on the part of the learned sole arbitrator to decide in accordance with the terms of the contract governing the parties, would certainly attract the "patent illegality ground", as the said oversight amounts to gross contravention of Section 28(3) of the 1996 Act, that enjoins the Arbitral Tribunal to take into account the terms of the contract while making an award. The said "patent illegality" is not only apparent on the face of the award, it goes to the very root of the matter and deserves interference. Accordingly, the present appeal is partly allowed and the impugned award, insofar as it has permitted deduction of "supervision charges" recovered from the respondent Company by the appellant State as a part of the expenditure incurred by it while calculating the price of the Sal seeds, is quashed and set aside, being in direct conflict with the terms of the contract governing the parties and the relevant circular.

The impugned judgment dated 21-10-2009 is modified to the aforesaid extent." 19.3. The aforesaid had not been a case of the fundamental alteration of the terms of contract during the currency of contract and for that matter, the parties having definitely exchanged communication and having brought into existence an agreement which, even if construed as supplemental to original one, had been of material difference in regard to the use of particular fuel and then raising of invoices on that basis with reference to fluctuating price of fuel as also the exchange rate of foreign currency (US dollar).

20. The matter can be examined from yet another angle. If the terms agreed to by the parties with exchange of communications commencing from 20.03.2013 were to be ignored, the result would be of ignoring such terms of contract of the parties which had come into existence and which were binding on both. Viewed thus, coupled with the fact that only the limited dispute was presented for arbitration (i.e., as to whether power was to be supplied on the basis of fixed rate of fuel and fixed

rate of currency or on variable charges), the Arbitral Tribunal, in our view, has been justified in focusing on the core issue raised, rather than going astray and entering into such an analysis which was not germane to the issue at hand.

21. For the reasons aforesaid, in our view, no ground for challenge under Sections 34 or 37 of the Act was made out in relation to the award pertaining to variable charges. Hence, the High Court has not been right in setting aside the award relating to variable charges on the ground of so- called non-consideration of clauses 12.1.4 to 12.1.7 of PPA. 21.1. Putting it in other words, the High Court, even while reminding itself of the limitation of jurisdiction, has committed the same error by extensively dissecting the evidence while assuming that clauses 12.1.4 to 12.1.7 were decisive of the matter without taking a close look at the material propositions which formed the dispute and which were presented by the parties before the Arbitral Tribunal. As regards variable charges, the core question before the Tribunal had been as to whether the claimant agreed to supply electricity on fixed charges with fixed rate of foreign currency while using the alternate fuel. This question was essentially to be determined with reference to the new contract that came into existence with exchange of communications between the parties. The Arbitrator precisely decided the matter with reference to, and after analysis of, that evidence. It had neither been a case of the Arbitrator not taking into consideration the terms of contract applicable to the issue at hand nor of any such finding which no fair-minded or reasonable person could have possibly rendered ever. Viewed in the light of core dispute presented to the Arbitral Tribunal by the parties, the submissions of the learned Attorney General, that the Arbitral Tribunal has not examined the question as to whether the correspondence in question resulted in change of fundamentals of contract, do not make out a case for interference because novation of the terms of contract as regards fuel had not been a matter of dispute at all. The core question was as to how the new terms were to operate. The Arbitral Tribunal has precisely dealt with the same in accordance with law.

22. What has been observed hereinabove and held in disapproval of interference by the High Court in the item of award pertaining to variable charges more or less apply to the other items too, where the High Court has interfered and has upturned the award. In view of the detailed discussion foregoing, we need not elaborate on all other items. Suffice it would be to deal briefly with the same as we find that on every such score, the High Court has rather entered into merits of the matter as if dealing with a regular appeal. It has been a clear case of the High Court travelling beyond the periphery of Section 34 as also Section 37 of the Act of 1996. The award relating to downrating of the plant

23. As regards downrating, the issue before the Arbitral Tribunal was as to whether the plant was required to be downrated till the expiry of PPA as contended by Government of Goa relying on a draft notification issued by Ministry of Power, Government of India.

23.1. The Arbitral Tribunal considered the contractual terms of the parties and came to a specific finding on interpretation of such terms and conditions that various Supplementary PPAs executed between the parties show that the Rated Capacity of the plant was reduced to 19.8 MW and the obligation of the claimant was restricted to assuring supply upto 19.8 MW without any reference to degradation of such capacity. On considering the material on record, the Arbitral Tribunal held that

Government of Goa was not justified in contending that there was any downrating annually of Rated Capacity. In regard to this issue, it is more than apparent that the Arbitral Tribunal had considered the provisions of the contract and had taken a particular view thereupon. The Tribunal said, inter alia, as under:-

> "48. An issue was raised at the stage of arguments relating to the down rating the generating capacity of the plant annually commencing from the first year after Commercial Operation of the plant. Such a plea does not appear to have been raised in the Statement of Defence by the Respondent even though it is contended that down rating a small fraction of generating capacity will have a huge impact on the monthly invoices. Learned counsel for the Claimant brought to the notice of the Tribunal that it was in paragraph 12 of the sur rejoinder that the Respondent sought documents relating to Original Equipment Manufacturer's (OEM) recommendations towards down rating of generating capacity as envisaged in the definition of "Contracted Capacity" which was required to ascertain the implementation of the down rating of the generating capacity in accordance with the recommendations of the Original Equipment Manufacturer.

49. According to the Respondent in terms of the PPA, the contracted capacity was defined to be 39.402 KW in the first year of commercial operation and down rated annually as per original equipment manufacturer's recommendation in successive years. However, the Claimant did not take into account the down rating factor in any of the bills which it submitted to the Respondent. After the dispute arose, the Respondent observed that the down rating factor ought to have been applied from the year 2000 onwards, which was the second year of commercial operation, in terms of OEM recommendations. It was therefore that the Respondent sought necessary documents from the Claimant as regards the recommendations of the OEM, but the same were not provided, contending that the said documents were not available with the Claimant. In the circumstances, the Respondent had to go by other material to calculate the down rating factor. The Respondent has relied upon a draft notification issued by the Government to calculate the down rating. The said notification provides that the down rating would start from the second year of operation and would proceed till the fifth year, after which the plant had to be overhauled as a result of which in the sixth year, the down rating would be negligible. Based upon the draft notification issued by the Ministry for Power, the Respondent has made calculations taking into account the down rating right from the year 2000.

50. The Claimant responded by contending that a draft notification issued by the Ministry for Power has no value unless the same is duly notified in the Gazette. The Respondent has not relied upon any final notification duly notified. The Government may have thought of not issuing the notification for good reasons. Being only a draft notification which was never finally issued, it has no value in law and the Respondent cannot derive any benefit from such a draft notification.

51. It is the case of the Claimant that the contracted capacity under the PPA dated 10th of January 1997 was equal to 39,402 kilowatts in the first year of commercial operation and down rated annually thereafter as per original equipment manufacturer's recommendation in the subsequent

years. Later, the parties agreed to convert the generating station from Open Cycle into a Combined Cycle generating station of 48 MW capacity. On 10th September 1997, a supplementary PPA was entered into which permitted the Claimant to sell power directly in excess of 39.8 MW to consumers in Goa. After the Claimant commenced commercial operation of the power station on 14th of August 1999, on completion of one year thereafter, a second supplementary agreement was entered into on 20 September 2000 whereunder the Respondent agreed to consent to sale of electricity in full or in part, to the extent of 2000 KW generated at the power station directly to any consumer in Goa. Referring to such other supplementary agreements it was submitted that the earlier definition of the contracted capacity was given a go by, and completely changed. The issue with regard to down rating thus became irrelevant, and in any event by subsequent written agreement, inter alia, amending the earlier agreement, there was no question of any further down rating as alleged. The parties are bound by the contractual provisions. The various supplementary PPAs executed between the parties clearly show that the rated capacity was subsequently reduced to 19.8 MW and the obligation of the Claimant was restricted to assuring supply up to 19.8 MW without any reference to degradation of such capacity. The Respondent is therefore not justified in contending that there was an alleged down rating annually of the rated capacity." 23.2. The Arbitral Tribunal then considered the documentary evidence produced before it, including a certificate issued by OEM dated 08.11.2005 and Minutes of Meeting dated 05.04.2007, where the issue was settled and all bills till that date were reconciled and future bills were raised on the basis that there was no downrating. This is clear from the following findings in the award in question: -

> "52. What is even more significant is the reliance placed upon the certificate issued by the OEM namely BHEL-GE Gas Turbine Services, Private Limited dated November 8, 2005. It is certified by the OEM that subsequent to the commissioning of the Goa plant of the Claimant recommended inspections of Gas Turbine were carried out and Turbine was found to be generating the Rated Output without any degradation. Similarly, BGGTS had carried out the Hot Gas Path Inspection of GT during Annual Inspection in September 2005. All operating parameters were checked and the Turbine was found to be generating its Rated Output without any degradation.

53. The Respondent submitted that the certificate refers to there being no degradation of the plant. The degradation and down rating are two different and distinct concepts which cannot be confused with one another. It is not possible to accept this contention because down rating becomes necessary only if there is degradation of the plant.

54. The Claimant has also referred to the meetings held between the parties, on 5th April 2007, when the Respondent was duly satisfied on the issue relating to down rating of contracted capacity as per OEM's recommendation which were discussed in the said committee. The Claimant explained that the plant was maintained as per OEM's recommendation and there had been no down rating of contracted capacity. The Claimant had already submitted OEMs letter in this regard, which is dated 8th November 2005. The parties agreed at the said meeting that the invoices were to be reconciled as per what was stated in the said meeting and all future invoices were to be calculated in the same manner. The minutes of the said meeting dated 5th April 2007 have been placed on record. Thus, the question of down rating of contracted capacity is completely irrelevant. It is not disputed that,

based on the minutes of the said meeting and the agreement arrived there at, the invoices for the period April 2004 to April 2007 were reconciled and the reconsideration was duly approved by the Respondent and the payment was made on the basis thereof by the Respondent to the Claimant. All future invoices were raised on the basis of the said agreement arrived at the meeting and the invoices were duly approved by the Respondent and have been paid by the Respondent for the period up to March 2013 and a part of April 2013. In the circumstances, therefore, the issue relating to the down rating of capacity of the plant appears to have been settled between the parties, and should not be allowed to be re-agitated in this proceeding. This claim is accordingly, rejected." 23.3. The Arbitral Tribunal thus held that the issue relating to downrating of capacity was settled between the parties and the parties should not be allowed to reagitate the same.

24. As regards this issue of downrating, again, we find that the High Court has found shortcomings in the discussions of the Arbitral Tribunal as regards the meaning and effect of the certificate dated 08.11.2005 and as to whether the claimant could have made any claim on that basis or not. The High Court even proceeded to analyse the minutes of the meeting. It has clearly been a case of value and worth attached to a particular evidence by Arbitral Tribunal, which was considered not satisfactory by the High Court; and rejection of the contention of the Government by the Arbitral Tribunal was found to be erroneous. However, thereafter, the High Court again observed that it was not a case of re-appreciation of evidence but being a case of no evidence, there had been patent illegality. The High Court observed as under: -

> "124. The impugned Award has recorded a finding based on the bald statement in the certificate dated 8th November 2005 and there was no degradation of the plant and further, in the absence of degradation of the plant, the concept of downrating will not apply, Again, this is, with respect, patent illegality. The certificate could hardly have been regarded as a recommendation of OEM. In any case, the certificate referred to the absence of degradation in the year 2005, and based on such a certificate, there was no question of inferring that there was no degradation of the plant even thereafter. Therefore, the contractual stipulation regards downrating, which was never amended or deleted by any subsequent agreements, could not have been ignored or bypassed based on the certificate dated 8th November 2005 or the minutes of the meeting dated 5th April 2007.

125. The impugned award to the extent it rejects the Appellant's contention based on the downrating, will, therefore, have to be set aside on the ground that the same is vitiated by patent illegality on the face of the record. The findings recorded in the impugned Award are based only on the certificate dated 8th November 2005 and the minutes of the meeting dated 5 th April 2007. None of the documents suggests that the contractual term of the downrating was either done away with or complied with. This is not a case of either reappreciation of the evidence on record or a case of insufficiency of evidence. This is a case of no evidence. This is a case of ignoring the contractual provision by incorrectly assuming that such provision was amended or deleted. The tentative findings to the contrary are, therefore, ex facie perverse and suffer from patent illegality on the face of the record. The impugned Award, to the extent it rejects the defence of the Appellant on the issue of downrating and proceeds to make an award of Rs. 18.53 crores in favour of the Respondent is

liable to be set aside on the ground of perversity and patent illegality." 24.1. In regard to this issue, in our view, the High Court has again travelled beyond its jurisdiction under Section 37 and rather than remaining within the confines of consideration under Section 34 of the Act, has entered into the arena which is exclusively within the Arbitrator's domain. What the Arbitral Tribunal has held in regard to this item had exclusively been its view on the evidence on record and the relevant surrounding facts/factors. The view so taken by the Arbitral Tribunal cannot be said to be wholly perverse or suffering from patent illegality so as to be interfered with. Needless to observe that even if two views are possible, the Court cannot substitute its own view with that of the Arbitral Tribunal.

25. The questions raised by the learned Attorney General, in relation to the issue concerning downrating, that adverse inference ought to be drawn against the claimant for failure to produce OEM recommendations, are only pertaining to the principles of appreciation of evidence. Of course, in the regular adjudicatory process, the Court may presume existence of certain facts under Section 114 of the Indian Evidence Act, 1872; and in terms of Illustration (g) thereof, the Court is entitled to draw an inference that the evidence which could be but not produced would, if produced, be unfavourable to the person who withholds it. However, in a given case, while determining the dispute by way of arbitration, whether the Arbitrator draws such adverse inference or not, is essentially a matter of appreciation of evidence; and if not drawing of adverse inference is also permitted to be raised as a ground of challenge under Section 34, it would open the confines of limited interference in an award; and would carry the propensity of converting the proceedings under Section 34 and under Section 37 into the proceedings of regular appeal/revision against the award and thereby, again violating the principles that re-appreciation of evidence is not envisaged in the proceedings under Section 34 of the Act of 1996. It gets per force reiterated that an award could be said to be suffering from "patent illegality" only if it is an illegality apparent on the face of the award and not to be searched out by way of re-appreciation of evidence. The submissions as regards drawing of adverse inference are themselves adverse to the ethos of Sections 34 and 37 of the Act of 1996 and are required to be rejected.

25.1. In other words, as regards the question of downrating, the questions relating to the value of certificate dated 08.11.2005 and the effect of the claimant not taking up this issue earlier would again fall directly within the arena of appreciation of evidence and reach to the extent of rendering the finding on preponderance of probabilities. The Arbitral Tribunal has taken a particular view of the evidence before it. If it were an appeal against the award, the approach of the Court could have been different but, not so while examining the award within the confines of Section 34 of the Act. We would hasten to observe in this regard too that even in a regular appeal against a decree of the Trial Court, the Appellate Court would not substitute its own views without specifically recording a finding as to the error in the decision under challenge. In any case, if the approach of the High Court in the present case is countenanced, the result would only be of making every award susceptible to challenge before the Court on those very grounds which are, otherwise, of appeal or revision and which are not permitted by the legislature to be taken under Section 34 of the Act of 1996.

26. Having found the two major issues dealt with by the High Court not standing within the confines of limited jurisdiction under Section 34 of the Act of 1996, we may again observe that the approach of the High Court in relation to the other two comparatively minor issues relating to variable

charges on 4MW power and netting-out principles is also suffering from the same error, where the High Court has deeply analysed the evidence on record to hold that the Arbitral Tribunal has not been correct in its propositions or inferences.

The award relating to variable charges on 4 MW power

27. The Arbitral Tribunal examined the documentary evidence, viz. letters exchanged between the parties dated 02.01.2009 and 19.01.2009 and came to a finding that State was not justified in its submission that the available capacity of the plant stood reduced.

28. In this item too, the High Court has reinterpreted the said communications dated 02.01.2009 and 19.01.2009 by which parties agreed to the manner of billing for supply of 15.8 MW power out of 19.8 MW capacity of the power station reserved for Government of Goa by permitting the balance 4 MW to be sold to third parties; and the High Court arrived at a different finding of fact on the evidence on record. We may usefully reproduce the summation of the findings by the High Court as regards variable charges on 4 MW power as follows:-

> "137. The circumstance that there was a specific clause excluding the payment of fixed costs, could not lead to the inference that the Appellant had agreed to bear the variable costs in respect of this 4 MW power, which variable costs were even otherwise not payable by the Appellant to the Respondent in terms of the original PPA or PSA and the supplementary PPAs. If there was any proposal for encumbering the Appellant with any charges over and above the charges undertaken by it under the contract, then surely this ought to have been specified. Such an additional burden cannot be imposed by implication. Therefore, the reasoning that because there was no reference to variable charges in the communication dated 19.1.2009, the same was agreed to be paid by the Appellant is quite perverse and constitutes patent illegality on the face of the record. According to us, the impugned Award to the extent it so unjustly enriches the Respondent to the extent of Rs. 3.94 crores conflicts with the most basic notions of morality and justice. The impugned Award, to this extent, is also vitiated by unreasonableness, perversity, and patent illegality apparent on the face of the record."

29. The High Court has once again stepped into the arena which is reserved for the Arbitral Tribunal. It is noticed that the parties had agreed to a particular methodology of billing for supply of 15.8 MW power but, at the same time, retained with them the right to revert back to 19.8 MW supply at any future point of time. With reference to the dealings of the parties, the Arbitral Tribunal has taken a particular view of the matter. It cannot be said that the view as taken by the Arbitral Tribunal was entirely impermissible or implausible. There was no scope for interference by the Court.

The award relating to netting-out principle

30. The aspect of netting-out, again, depended on the terms of contract of the parties and the deductions to be drawn from the evidence on record. The Arbitral Tribunal had drawn the particular conclusion on the basis of notes dated 13.09.2014 and 18.09.2014. The Arbitral Tribunal considered the documentary evidence before it, as well as the provisions of the contract relating to supply of backup power by Government of Goa to the claimant when the power station was under shutdown for the period May 2014 to August 2014. The Arbitral Tribunal further referred to the communications which also include the decision of the Government of Goa as to the rate at which power during the shut down period was to be supplied to the claimant and on this basis, came to the finding that a fixed rate which was not to be multiplied as per the provisions of the PPA was agreed between the parties. The award also gave reasons for such finding. Even if it be assumed that another view is possible, it cannot be said that the Arbitral Tribunal has taken such a view which no fair-minded and reasonable person could have ever taken.

31. The High Court has again justified its interference in this item in the following terms: -

> "148. According to us, the impugned Award on the aspect of netting out is again vitiated by perversity and patent illegality. The note dated 13/8/2014, as well as the communication dated 18/9/2014 on its plain terms, refers only to the determination of a rate of Rs. 3.78 P. KWh. for applying the contractual provisions concerning netting.

This note or this communication was necessitated because for the relevant proximate billing period there were no supplies made by the Respondent to the Appellant and therefore there was no ready rate available based on which the contractual provisions could be worked for netting out. Therefore, the Appellant determined the rate of Rs. 3.78 P. KWh. as the base rate for purposes of netting out. There is nothing either in the noting or in the communication dated 18/9/2014 to even remotely suggest that by determining such base rate, the parties intended to give a complete go-by to the clear and specific contractual provisions for the multiplication of this base rate into 1.25 for purposes of netting out in the eventuality of an unscheduled shut down of the power plant by the Respondent. Therefore, based on the noting and the communication dated 18/9/2014, the finding or the conclusion that the parties had agreed to do away with the clear and specific contractual provisions, is not even a plausible finding or conclusion. Such a finding or a conclusion is vitiated by perversity and patent illegality on the face of the record. The Award of an amount of Rs. 2.36 crores (approximately) to the Respondent on this score is, therefore, liable to be set aside on the grounds of perversity and patent illegality on the face of the record." 31.1. On this item too, the High Court has substituted its own view and has reinterpreted the documentary evidence before it for setting aside the award. Such a substitution of view is not permissible for the Court under Section 34 of Act. There arise no question of it being permissible under Section 37 of the Act.

Interest in award

32. It has been argued on behalf of the State that the High Court ought not to have rejected its contention with regard to the interest for pre- reference period since the liability to pay interest would arise only once the amount to be paid has been determined.

32.1. In regard to the question of interest, the High Court has rightly held that the Arbitral Tribunal was justified in following the contractual provisions and the provisions of Section 31(7) of the Act; and has rightly not interfered with the award of interest for the pre-reference period and the period during which the proceedings were pending before the Arbitral Tribunal. In our view, the State is not right in contending that the interest could not have been awarded during the period of reference to the Arbitrator. In regard to this aspect, the submissions to the effect that pre-reference period interest was not based on any compelling reasons and contractual provisions for interest were in terrorem are liable to be discarded, could only be rejected for being not even standing within the periphery of Section 34 of the Act of 1996.

33. However, insofar as post-award period is concerned, the High Court has reduced the rate of interest from 15% to 10% by following the decision of this Court in the case of Vedanta Ltd. (supra). The High Court has relied on the principles of proportionality and has scaled down the rate of interest to 10% p.a. while observing as under:-

> "175. Mr. Bhat handed in a statement indicating the interest rates (Benchmark Prime Lending Rates) of the State Bank of India. For the period 2017-18, the rates indicated range around 13 to 14% per annum. This is no doubt one of the factors to be taken into consideration for determining the prevailing economic conditions when the impugned Award was made. Again, reference is also necessary to the principle of proportionality of the amount awarded as an interest to the principal sums awarded. Having cumulative regard to all the factors referred to above, we feel that in the facts and circumstances of the present case, the award of interest at the rate of 15% per annum is excessive and contrary to the principle of proportionality and reasonableness and the same will have to be scaled down to 10% per annum. In Vedanta Ltd. (supra), the Award was dated 9/11/2017 and the Court awarded interest at the rate of 9% per annum for the INR component. The impugned Award, in our case, was made on 16/2/2018."

34. We are of the view that the aforesaid reduction of rate of interest by the High Court is also unjustified. We have noticed the provisions of Section 31(7)(b) that unless the award otherwise directs, the sum payable under the arbitral award shall carry interest at the rate of 2% higher than the current rate of interest prevalent on the date of the award, from the date of the award to the date of payment. The expression "current rate of interest" has been explained in the Explanation to the said Section to have the same meaning as assigned under Section 2(b) of the Interest Act, 1978. The High Court has referred to the decision in Vedanta Ltd. (supra) to hold that a Court may reduce interest awarded by the Arbitrator when such interest does not reflect the prevailing economic condition or where it is not found reasonable or where it promotes interest of justice. We do not find any basis in the impugned judgment of the High Court for reducing the rate of interest, as in the case of Vedanta Ltd., wherein this Court was dealing with an International Commercial Arbitration involving rupee as well as euro components. Moreover, in the case of Vedanta Ltd., the rate of interest was reduced in respect of the foreign currency component to bring the interest rate in line with the international rate on the ground that the rate of interest prevailing on the rupee debt in India and on international currency abroad were different and the international rates were lower.

Such a situation is not obtaining in the present case.

34.1. The High Court seems to have not considered the relevant factual aspects. On the contrary, as has been submitted before us as well as the High Court, the prevailing interest rate being the prime lending rate of State Bank of India was in the range of 13% to 14% per annum. Thus, the Arbitral Tribunal was justified in granting interest at the rate of 15% per annum post- award. In our view, the Arbitral Tribunal was well within its jurisdiction under Section 31 of the Act to award interest at the rate of 15% p.a. and there was no justification to reduce the same to 10% p.a. We may observe with respect that the High Court was not exercising any equity jurisdiction so as to resettle the rate of interest as deemed fit by it. It had been a matter relating to an award made by the Arbitral Tribunal in a commercial dispute. Final comments, observations, and conclusion

35. In the foregoing discussion, we have not elaborated on the discussions and findings of the Commercial Court in its order dated 12.09.2019. Instead, we have directly dealt with the consideration of the High Court vis-à-vis the award in question. As noticed, the High Court could only be said to have misdirected itself on the major issues concerning merits of the award. However, before concluding, we may observe that it had not been as if the Commercial Court did not examine the material issues arising for determination while dealing with the case in terms of Section 34 of the Act of 1996.

35.1. It is noticed that after taking note of the submissions of parties, the Commercial Court precisely framed the points for determination and then, dealt with every point on the anvil of Section 34 of the Act of 1996. With respect, we do not find the High Court justified in making a comment about framing of points for determination by Commercial Court and then observing that the Commercial Court merely reproduced the findings of the award. The Commercial Court dealing with Section 34 application was not acting as a Court of Appeal. Yet, looking to the long-drawn arguments, the Commercial Court enumerated the issues raised and then returned the findings after examining the record and while rejecting the submissions made on behalf of the State. There had been no such flaw in the judgment and order passed by the Commercial Court which called for interference by the High Court on the parameters and within the periphery of Sections 34/37 of the Act of 1996. We may, for illustration, reproduce paragraph 49 of the order of the Commercial Court where, in relation to the issue of variable charges, after taking note of all the factual aspects and contentions of the parties, the Commercial Court held as under: -

> "49. Above facts clearly show that GOG clearly accepted and understood that the price of electricity was to be calculated on the basis of price of fuel and dollar conversion rate and that letter dated 30.08.2013 and cabinet note were on a guiding factor to know the understanding between parties. The Ld. Arbitrator rightly appreciated that the cabinet of GOG took a decision clearly in favour of the stand of the claimant. Ld. Advocate General has argued that the cabinet decision was not binding because pursuant to it no any decision was taken by the State Government nor any decision was conveyed to the claimant. Reference was made to Judgment in the case of Bachhittar Singh (supra) wherein it is held that unless the cabinet decision is followed by a formal order drawn up by The State Government, it does not have

binding effect. Ld. Advocate General also made reference to judgment in the case of Bombay Chemicals Ltd. v/s.

Union of India – 2006(201) ELT 167 Bombay wherein cabinet note was considered on merits but it was held that the cabinet note was only to make budgetary provision. Without prejudice Ld. Advocate General also submitted that even if the cabinet note was to be considered it could at the most be for an amount of Rs.

0.76 paise increase and nothing more than that. In the present case subsequent conduct of GOG in making payments based on variable fuel price shows that they implemented the said cabinet decision. In the present case even if the said cabinet note is considered to be internal note, it will have to be considered because GOG accepted variable fuel price and also made payments. Making of payments thereafter are variable factors which distinguish the above two judgments.

For the reasons mentioned above, Point No.1 is answered in the Affirmative."

36. The narrow scope of "patent illegality" cannot be breached by mere use of different expressions which nevertheless refer only to "error" and not to "patent illegality". We are impelled to reiterate what has been stated and underscored by this Court in Delhi Airport Metro Express (supra) that restraint is required to be shown while examining the validity of arbitral award by the Courts, else interference with the award after reassessing the factual aspects would be defeating the object of the Act of 1996. This is apart from the fact that such an approach would render several judicial pronouncements of this Court redundant if the arbitral awards are set aside by categorizing them as "perverse" or "patently illegal" without appreciating the contours of these expressions.

37. In the passing, we cannot help noticing that in the impugned judgment, the High Court though referred to the principles laid down by this Court in Ssangyong Engineering (supra) but then, reproduced an analysis by a learned Single Judge of the High Court and proceeded to decide the matter with reference to the passages so extracted. With respect, we are of the view that enunciation of this Court ought to have been examined by the Division Bench of the High Court while dealing with the matter at hand, rather than relying on the analysis by a learned Single Judge of the High Court. We say no more in this regard, essentially because the latter decisions of this Court like those in Delhi Airport Metro Express and Haryana Tourism Limited were not available before the High Court at the time of passing of the impugned judgment and order dated 08.03.2021. Nevertheless, the principles expounded by this Court in Associate Builders and Ssangyong Engineering (supra) were available and the matter was required to be dealt with in reference to those principles. Leaving this aspect at that, suffice it would be to observe for the present purpose that the impugned judgment and order dated 08.03.2021, insofar it interferes with the findings and the conclusions of the award in question, cannot be sustained and is required to be set aside.

38. For what has been discussed hereinabove, a few other submissions made by the learned Attorney General in regard to the calculation of the awarded amount and ancillary aspects do not require elaborate discussion. Fact of the matter remains that nothing of a patent illegality apparent on the face of the award has been pointed out. The submissions essentially are of indicating some

alleged errors on the merits of the case which, as noticed, do not fall within the parameters of Section 34 of the Act of 1996.

39. Hence, that part of the impugned judgment and order dated 08.03.2021 as passed by the High Court, which modifies the award dated 16.02.2018 and the order of the Commercial Court dated 12.09.2019, is set aside and consequently, the award in question is restored in its entirety.

40. The appeal filed by the claimant is allowed accordingly and that filed by the State is dismissed. No costs.

..... J.

(DINESH MAHESHWARI) ..... J.

(SANJAY KUMAR) NEW DELHI;

MAY 10, 2023.