THE GAUHATI HIGH COURT

(The High Court of Assam, Nagaland, Mizoram and Arunachal Pradesh)

Principal Seat at Guwahati

Arb. Appeal No.6/2010

M/S Ranjul Baruah,
Engineers and Contractors "Raha Villa",
Rehabari,
Guwahati,
PIN – 781008.

…… Appellant.

-**Versus**-

1. Indian Oil Corporation Limited Refineries Division,
Guwahati Refinery,
Noonmati,
Guwahati.

2. The General Manager,
Indian Oil Corporation Limited Refineries Division,
Guwahati Refinery,
Noonmati,
Guwahati.

3. Kinetics Technology India Limited,
Corporate Office,
Ansal Towar,
38 Nehru Place,
New Delhi,
PIN-110019.

…… Respondents.

BEFORE
HON'BLE MR. JUSTICE ROBIN PHUKAN

Advocate for the appellant	:-	Mr. G.N. Sahewalla, Senior Advocate Ms. K. Bhattacharya.
Advocate for the respondents	:-	Mr. N. Deka.
Date of Hearing	:-	20.08.2024.
Date of Judgment & Order	:-	18.11.2024.

JUDGEMENT & ORDER (CAV)

Heard Mr. G.N. Sahewalla, learned Senior Counsel, assisted by Ms. K. Bhattacharya, learned counsel for the appellant. Also heard Mr. N. Deka, learned counsel for the respondent No.1 and 2.

2. This appeal under Section 37 of the Arbitration and Conciliation Act, 1996 is directed against the judgement and order dated 16.08.2010 passed by the learned District Judge, Kamrup (M) at Guwahati in Misc (Arbitration) Case No. 9 of 2005.

3. It is to be noted here that vide impugned judgment and order the learned District Judge, Kamrup (M) has set-aside the arbitral award dated 05.04.2005, passed by the sole Arbitrator, Mrs. Justice M. Sharma (Retd.) in Case No. Arbi (MS) No. 02/2002.

4. In order to avoid confusion, the rank of the parties, assigned to them in this appeal, will be referred herein, for the sake of convenience.

The Background Facts:-

5. The background facts leading to filing of the present appeal are adumbrated herein below:-

> "The appellant herein, M/s Ranjul Baruah, Engineers and Contractors, of "Raha Villa", Rehabari, Guwahati was offered civil works (jobs) for setting up DCU (De-Cokering Unit) and CDU (Crude Distillation Unit) revamp project at Guwahati Refinery valued Rs. 1,74,01,950/- within time limits on condition that the materials jor steel, cement etc will be supplied by the respondent to the appellant and the value of the materials will be deducted from the Bills.
>
> Accordingly the appellant had accepted the offer and work order No. GR/TS/ES/09/WO-11/99, dated 16.2.99 was issued to him for carring out execution of the work, which had to be completed within the stipulated period. But, owing to some difficulties, the appellant had failed to complete the task within stipulated period. Extension of time of completion was granted on several occasions by the respondent authority, on condition of without any financial implication on either side. Ultimately, the appellant had given the work on Sub-Contract to one N.C. Kalita for completion. Thereafter, the Sub- Contractor, Mr. N.C. Kalita had completed the work on 30.9.2000. Thereafter, final bill was prepared in the month of May, 2001 and cheque was issued in the name of the appellant and his authorized Sub-Contractor N.C. Kalita had put his signatures on the measurement books, bills and

accepted the A/C payee cheque on behalf of the appellant without raising any objection.

Thereafter, dispute had arisen between the appellant and the respondent for which Hon'ble Mrs. Justice Meera Sarma (Retd.) was appointed as sole Arbitrator by the Hon'ble Chief Justice of Gauhati High Court to settle the alleged disputes and claims between the parties. The learned Arbitrator had framed the following issues for deciding the arbitral dispute in between the parties:-

(A) Whether payments due against the enhanced labour rates amounting to Rs. 27,72,649/-?

(B) Whether the claimant is entitled to claim compensation/payment due against escalation amount to Rs. 28,92,193/-?

(C) Whether claimant is entitled to incidental claims for damages and loss for breach of contract conditions for Lump Sum?

(D) Whether the claimant is entitled to the cost incurred in the arbitration proceeding?

(E) Whether the claimant is entitled to interest at the rate of 21% from the date it fallen due?

Thereafter, hearing both the parties, and considering the documentary evidence produced by the parties, the learned Arbitrator had decided Issues No. A., B and E, in favour of the appellant, however, reduced the rate of interest @ 21% per annum to @ 6% payable to the claimant on the total amount of payment

from the date of filing the arbitration petition U/S 11 of the Act before the Chief Justice of Gauhati High Court till payment is made by the respondent.

The amount claimed under different heads and the awarded amount is shown in the Table below:-

Sl. No.	Different Heads	Amounts claimed	Amounts awarded
A	Enhancement of labour wages	Rs.27,72,649	Rs.27,72,649
B	Escalation	Rs.28,92,193	Rs.28,92,193
C	Compensation for damages and loss of breach of contract	Rs,10,00,000	Nil
D	Cost of Arbitration		Nil
E	Interest	21% per annum	6% interest per annum from the date of filing of the application till payment

Then being highly aggrieved and dissatisfied with the arbitral award, so passed by the learned sole Arbitrator, the respondent herein had filed an application before the learned District Judge, Kamrup (M) Guwahati, under Section 34 of the Arbitration and Conciliation Act, 1996 for setting aside the award passed by the learned sole Arbitrator on the ground that the learned Sole Arbitrator had passed the award in contravention to the arbitral agreement as well as General Conditions of Contract (GCC) and admission of the appellant.

Thereafter, hearing learned Advocates of both sides, the learned District Judge, Kamrup (M) Guwahati had allowed the appeal by setting aside the arbitral award on the ground that the learned sole Arbitrator had passed the award contrary to the General Conditions of Contract (GCC) and tender agreement and acted beyond her arbitral jurisdiction.

Grounds:-

6. Being highly aggrieved, the appellant has preferred the present appeal under Section 37 of the Arbitration and Conciliation Act, 1996 on the following grounds that :-

(i) The learned Court below erred in law as well as in facts and clearly exceeded the powers and jurisdiction in entertaining the application and setting aside the award vide impugned judgment and order dated 16-8-2010;

(ii) The application for setting aside the award filed by the respondent in the District Court, Kamrup did not meet the requirement of Section 34 of the Act and did not satisfy any of the grounds stated in Sub-Section (2) thereof.

(iii) The dispute, when referred to arbitrator for adjudication, it is not open to the Court to set aside the findings of the arbitrator in awarding a claim on the ground that the award is beyond the scope of reference and/or that the Arbitrator has acted beyond the arbitral jurisdiction and this aspect of

the matter, having being failed to be considered by the learned Court below in its proper perspective;

(iv) It is well settled in catena of decisions of Hon'ble Supreme Court that in a proceeding under Section 34 of the Act the Court is not competent to undertake an in-depth scrutiny and re-examination of the materials before the Arbitral Tribunal and to interfere with the Arbitral Award on re-examination/appreciation of the said materials or by re-interpreting the terms of the contract. Such an exercise is impermissible in law and would run counter to the very scheme and object of the 1996 Act. And the impugned judgment clearly defeats the said objective.

(v) The learned District Judge had acted contrary to the law laid down by the Hon'ble Supreme Court and interfered with the Arbitral Award by giving his own interpretation to some of the provisions of the contract (ignoring others) and taking a different view on the interpretation of the said provision as given in the arbitration award, which is clearly beyond its jurisdiction. The Court had no jurisdiction to substitute its own view on the interpretation of the contract and then set aside the award on the ground that arbitrator gave a different interpretation to the contractual provisions. The object of the 1996 Act was to further minimize interference by the Courts in respect of arbitral award.

(vi) The learned Court below acted contrary to the law by re-examining and reassessing the materials before the Arbitral Tribunal and in coming to its own conclusion as if it was hearing an appeal from the award.

(vii) It is settled principle of law that even if the contract provides otherwise, the contractor is entitled to claim for delay as a result of the acts of the owner and the restrictive provisions in the contract would not operate after the stipulated period of the contract and if the period of works exceeds beyond the time schedule fixed under the contract, the contractual provisions prohibiting grant of compensation disappears. This aspect of the matter was not considered by the learned Court below in its proper perspective.

(viii) It is settled principle of law that an order on the objections to an arbitration award should comply with the provisions of Order 20 Rule 5 of the Code of Civil Procedure, 1908 and the Court should state its finding on decision with the reasons therefore upon each separate issue. But, the learned Court, in a most perfunctory manner without assigning any reason and without considering the pleaded case of the appellant, on the basis of surmises and conjectures and upon perverse appreciation of the materials and documents on records passed the impugned judgment and order dated 16-8-2010.

(ix) The learned Court had erred in law in setting aside the well reasoned award and the learned Court had failed to record

any finding whatsoever not to speak of assigning any reason, that there is any illegality in the award which goes to the root of the matter.

(x) It is also well settled principle of law that an objection/plea not taken/raised before the arbitrator nor pleaded before the Arbitrator cannot be allowed to be raised for the first time before the Court and said objection being categorically put forward by the appellant in his objection filed by application preferred by the appellant to the respondent under Section 34 of the Arbitration and Conciliation Act, the learned Court below failed to consider the same.

(xi) The applicability of the clauses 1.0.24.0., 6.6.1.0, 6.6.3.0, 6.6.3.1, 6.7.1.0, 6.6.0.0., 6.8.2.0 of the General Conditions of Contract, having being adjudicated by the Arbitrator assigning detail reasoning and arrived at the conclusion that the issue of maintainability of the proceeding, the learned Court below had no jurisdiction to substitute its own view on the interpretation of the contract and that too without assigning any reason in a most perfunctory manner.

xii) It is well settled that the Arbitrator is the sole judge of the quality as well as the quantity of evidence and it is not for the courts to take the task of the evidence led before the arbitrators and further, the arbitrators having been made the final arbiters of the disputes between the parties, the award is not open to challenged on the ground that the arbitrators

have reached a wrong conclusion or have failed to appreciate facts and on such count, the learned Court below erred in law in re-examining and reassessing the materials before the Arbitral Tribunal and substituting its view/opinion.

xiii) The finding recorded by the learned Court to the effect that the respondent contractor had failed to complete the jobs within the stipulated period in terms of the contract and hence on the prayer of the respondent contractor time was extended by the applicant for completion is perverse and contrary to materials on records.

xiv) The Arbitrator, having categorically arrived at the finding at paragraph 69 of the award to the effect that the claimant could not complete the job within the contractual completion time for reasons mentioned in the Note Sheet dated 15-9-99 and as such time extension was granted to the claimant up to 31-12- 1999, the learned Court below having not recorded any reason as to why it differs from the said finding of the Arbitrator, is perverse;

xv) The execution and validity of the letter bearing No. RB/GR/DCE-CDU/98-99/15, dated 3-7-1999 alleged to be sent by the appellant contractor to the Senior Manager of I.O.C. Ltd. being categorically denied and disputed by the claimant/appellant before the Arbitrator and the Arbitrator having acknowledged the same and categorically recorded its doubt as to the genuineness of the said letter in paragraph

74 of the award, and the learned Court below without assigning any reason as to the acceptance of the validity of the said letter, most perfunctorily and erroneously relied upon the said letter dated 3-7-1999 and also exceeded his power and jurisdiction under Section 34 of the Act.

xvi) The respondent for the first time adduced a letter dated 19-8-1999, before the learned Court below, and the learned Court below erred in taking consideration of the same and placing undue reliance upon the same and arriving at the finding to the effect that the respondent contractor vide his letter dated 19-8-1999 sub-let the works to Shri N.C. Kalita contractor inspite of the fact that the claimant/appellant had categorically denied that vide letter dated 19-8-1999, he sub-let the job to one Shri N.C. Kalita.

xvii) The respondents herein having not tendered the said letter dated 19-8-1999, before the Arbitrator, is estopped from pleading and bringing on record for the first time in its application preferred under Section 34 of the Arbitration and Conciliation Act, 1996, and this aspect of the matter was ignored by the learned Court below.

xviii) That, unless and until the respondent, as per clause 4.7.1.0 G.C.C and Article 8 of the Contract dated 5-3-1999, approves contract, sub-contracting, sub-letting of the work was impermissible and in fact no sub-contract was given to Shri N.C. Kalita and the letter dated 19-8-1999 was never given

effect to and the same stands further fortified by the fact that the respondent also acknowledged vide their letter No. GR/PS/09/215 dated 11-8-1999 that Shri N.C. Kalita have been engaged by the claimant/appellant as his authorized supervisor in connection with issuing gate passes only and moreover in paragraph 33 of the statement of defence also, the respondents have acknowledged the fact that Shri N.C. Kalita was respondent's authorized agent. The appellant himself executed the work and the cheques were all along issued in the name of the appellant.

xix) The finding of the learned Court below to the effect that in terms of the agreement between the respondent contractor and the sub-contractor N.C. Kalita the sub-contractor N.C. completed the works on 30-9-2000, is patently incorrect and perverse.

xx) The finding of the learned Court below to the effect that it also appears that the last part of the work was done by the sub-contractor N.C. Kalita and not by the respondent contractor is patently incorrect and perverse.

xxi) The Arbitrator had arrived at a categorical finding to the effect that "the Final bill was prepared and cheque payment was made without the knowledge of the claimant and the same was signed and accepted by someone else" the learned Court below erred in law in not assigning any reason as to why the learned Court below differs from said finding and in

arriving at the purported finding to the effect "that the final bill has been prepared in the month of May, 2001 and cheque was issued towards the dues of the final bill and the sub-contractor N.C. Kalita signed on the measurement books, bills and accepted the A/C payee cheque on behalf of the respondent contractor without raising any objection or protest towards escalation of labour charge etc" is perverse appreciation on the materials on records.

xxii) The Arbitrator had arrived at the finding that the admitted position is that the respondents prepared and submitted the final bill without including the notified claims of the claimant and without the knowledge of the claimant, which was signed by someone else in the name of the claimant. Thereafter, the respondents released payment against the said Final Bill to the claimant. And vide letter No. RB/GR/DCU/CDU/98-99/33, dated 17-8-2000 addressed to the Senior Project Manager, I.O.C.L the claimant informed that all the papers including the Final Bills etc., will be signed by the appellant and that nobody is authorized to sign any paper on behalf of the claimant. Claimant also raised objection against such action before the General Manager, I.O.C.L and also requested to review or refer the dispute to arbitration. These facts and circumstances are not denied by the respondents. It is further noted that the cheque was issued with undue haste, without giving any opportunity of hearing and reasonable time, when there were communication and correspondences

between the parties to the dispute and even there was scope for review of the alleged Final Bill. The correspondences on record establish that the claims of the claimant for reimbursement etc., are notified claims, as per clause 6.6.3.0 of the GCC and the claimant vide letter No. RB/GR/DCU/CDU/98-99/41 dated 14-5-2001 in accordance with the provisions of Clause 6.6.1.0 of the GCC, notified the claims. As the claim as per the letter dated 4-5-2001 was not paid, claimant contemplated to include it as per provisions of clause 6.6.30 of the GCC in the Final Bill. As the Final Bill was prepared and cheque payment was made without the knowledge of the claimant and the same was signed and accepted by someone else, the claimant could not include the same in the Final Bill. But, the learned Court below without assigning any reason arrived at the finding that it appears that till preparation of the Final Bill there was no notified claim on the part of the respondent contractor for escalation of the prices of the material and for enhancement of the labour charges and thereby ignored the materials on records.

xxiii) The finding of the learned Court below to the effect that if any loss has been sustained or incurred towards labour charges in completion of the works due to the alleged labour charges it will be the sub-contractor Shri N.C. Kalita who performed and completed the works taking all the risks and not by the respondent contractor, is patently incorrect and perverse and contrary to the materials on records.

xxiv) The finding of the learned Court below to the effect that it appears that the major portion of the materials such as cements, steels have been supplied by the IOC Ltd. to the respondent contractor at a reasonable fixed rate below the prevailing market price till completion of the works, is patently incorrect and perverse and contrary to the materials on records.

xxv) The finding of the learned Court below to the effect that the learned sole Arbitrator has passed the award contrary to the General Conditions of Contract and tender agreement and acted beyond her arbitral jurisdiction, is based on surmises and conjectures and without any reason.

xxvi) The learned Court below clearly exceeded his powers and jurisdiction in seeking to re-examine the facts and that too being not supported by the materials on records.

xxvii) The Arbitral Award allowed certain claims made by the appellant are supported by the relevant materials on record and are consonance with the applicable law and the award does not warrant any interference, not only for the reason that none of the grounds under Section 34 of the Act are satisfied in the present case, but also because even if the proceedings were in the nature of an appeal from the Arbitral Award no interference is warranted.

xxviii) The learned Court had totally failed to appreciate and consider the pleaded case of the appellant in its proper

perspective and as such the impugned judgment and order dated 16-8-2010 is liable to be set aside and quashed.

Submissions:-

7. Mr. G.N. Sahewalla, the learned Senior Counsel for the appellant has confined his arguments mainly on following points:-

(a) The learned District Judge had committed grave error in setting aside the arbitral award. Mr. Sahewalla, submits that the Arbitrator is the master of both facts and laws and considering all the facts and circumstances, the learned Arbitrator had arrived at finding that the claims so raised are notified claim and as such the same are arbitrable, but the learned District Judge without considering the same and ignoring its jurisdiction, without assigning any reason and in a cryptic manner, set aside the same.

(b) Mr. Sahewalla, further submits that there was delay on the part of the respondent authorities as they could not shut down the machineries in time, for which the appellant here could not complete the work in time and the respondent therefore extended the time.

(c) It is an admitted fact that there was escalation of price of all the articles including the cement and steel and as such the Arbitrator had rightly arrived at the finding and made the award under the said head and the learned District Judge had without

any basis and without assigning any reason had set aside the same.

(d) It is also an admitted fact that labour rate had increased during the execution of the work and the Arbitrator had taken note of the same and make award under the said head, but, the learned District Judge had failed to take note of the same.

(e) The final bill was prepared by the respondent and payment was made to one N.C. Kalita and the appellant had not received the same and at no point of time the appellant had appointed N.C. Kalita as Sub-Contractor and for the first time the respondent had produced a letter dated 19-8-1999, before the learned Court below, and the same was not given effect to and that as per clause 4.7.1.0 G.C.C and Article 8 of the Contract dated 5-3-1999, approves contract, sub-contracting, sub-letting of the work was impermissible unless approved by the respondent.

(f) The finding of the learned District Judge in respect of sub-letting of the work is without any reason and basis and contrary to the provision of Section 34(2) of the Arbitration and Conciliation Act, and therefore, liable to set aside.

7.1. In support of his submission the learned Senior Counsel has referred following case laws:-

(1) International Airport Authority of India vs. Mohindor Singh, reported in AIR 1996 Bom. 167.

(2) **Nilkanth and Bros Construction vs. Superintending Engineer N.H. Salem and others, reported In AIR 1988 SC 2045.**

(3) **Olympus Superstructure Pvt. Ltd vs. Vijay Khetan and others, reported in (1999) 5 SCC 651.**

8. Per contra, Mr. Neelanjan Deka, the learned Counsel for the respondents has raised following points for consideration of this Court:-

(a) That, a claim to be the subject matter of the arbitration proceeding has to be a 'notified claims' within the meaning of the General Conditions of Contract (GCC), but in the present proceeding none of the claims are notified claims and as such the same are not disputes within the meaning of the arbitration clause.

(b) That the claim was not made before the Site Engineer and Engineer-In-Charge, and it was first made on 29.09.2000, one day before the preparation of final bill;

(c) That, the appellant herein had failed to produce the Labour Payment Register despite asking by the respondents to substantiate the claim of increase of labour charge;

(d) That, the entire materials were supplied by the respondents and as such there was no evidence/materials before the Arbitrator to establish/prove the escalation of price of materials;

(e) That, vide his letter dated 19-8-1999, the appellant herein had sub-let the works to Shri N.C. Kalita contractor and the same was a pleaded fact in the additional written statement filed by the respondent herein before the Arbitrator and from

there the learned District Judge had found the letter dated 19.08.1999 and arrived at the finding, and that no counter was filed to the additional written statement by the appellant;

(f) That, after payment of the final bill by way of cheque to the sub-contractor, the respondents herein had discharged their liability and in such a case the arbitrator has no power to resolve such disputes.

(g) That, the award so passed by the Arbitrator is contrary to the arbitral agreement entered into by the parties and that the arbitrator has no jurisdiction to entertain the claim of the appellant.

8.1. Mr. Deka has referred following decisions in support of his submissions:-

(i) West Bengal State Warehousing Corporation and Another vs. Sushil Kumar Kayan and Others, reported in **(2002) 5 SCC 679.**

(ii) Rajasthan State Mines and Minerals Ltd. vs. Eastern Engineering Enterprises and Another, reported in **(1999) 9 SCC 283.**

(iii) OIL and Natural Gas Corporation Ltd. vs. Saw Pipes Ltd., reported in **(2003) 5 SCC 705.**

(iv) National Insurance Company Ltd. vs. Boghara Polycab Private Ltd., reported in **(2009) 1 SCC 267.**

(v) M/s P.K. Rammalah and Company vs. Chairman and Managing Director, National Thermal Power

Corporation, reported in **1994 Supp (3) SCC 126.**

9. Having heard the submissions of learned Advocates of both sides, I have carefully gone through the memo of appeal and documents placed on record and the arbitral award so passed by the learned sole Arbitrator and the documentary evidence produced by the parties in the arbitral proceeding as well as the impugned judgment and order dated 16.08.2010 and also gone through the case laws referred by learned Advocates of both the parties.

The Issue Before This Court:-

10. In view of the contentions of the parties, and the submissions, so advanced, by their respective counsels, the issue, that has arisen for consideration of this Court is:-

> **Whether the learned District Judge, Kamrup, Guwahati (M) had exceeded its jurisdiction conferred under Section 34 of the Arbitration and Conciliation Act, 1996 in setting aside the Arbitral award dated 05.04.2005, while the Arbitrator is the master of both law and facts?**

Legal Proposition:-

11. Before a discussion is directed into the issues raised in this application, it would be in the interest of justice to understand the power of the Courts under Section 34 and 37 of the Arbitration and Conciliation Act, 1966. While dealing with the power of the Court under Section 34(2)

of the aforesaid Act, Hon'ble Supreme Court in **Saw Pipes Ltd.(Supra),** has held as under:-

(A) (1) The court can set aside the arbitral award under Section 34(2) of the Act if the party making the application furnishes proof 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.

(2) The court may set aside the award:

(i)(a) if the composition of the Arbitral Tribunal was not in accordance with the agreement of the parties,

(b) failing such agreement, the composition of the Arbitral Tribunal was not in accordance with Part I of the Act.

(ii) if the arbitral procedure was not in accordance with:

(a) the agreement of the parties, or

(b) failing such agreement, the arbitral procedure was not in accordance with Part I of the Act.

However, exception for setting aside the award on the ground of composition of Arbitral Tribunal or illegality of arbitral procedure is

that the agreement should not be in conflict with the provisions of Part I of the Act from which parties cannot derogate.

(c) If the award passed by the Arbitral Tribunal is in contravention of the provisions of the Act or any other substantive law governing the parties or is against the terms of the contract.

(3) The award could be set aside if it is against the public policy of India, that is to say, if it is 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.

(4) It could be challenged:

(a) as provided under Section 13(5); and
(b) Section 16(6) of the Act.

12. In the case of **Associate Builders vs. DDA**, reported in **(2015) 3 SCC 49,** while dealing with the issue of patent illegality has held that it has comprises of three requirements:-

"42. In the 1996 Act, this principle is substituted by the "patent illegality" principle which, in turn, contains three subheads:

42.1. (a) A contravention of the substantive law of India Would result in the death knell of an arbitral award. This must be understood in the

sense that such illegality must go to the root of the matter and cannot be of a trivial nature. This again is really a contravention of Section 28(1) (a) of the Act which reads as under:

> **"28.Rules applicable to substance of dispute.-(1) Where the place of arbitration is situated 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 Inida;"**

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

42.3.(c)Equally, the third subhead of patent illegality is really a contravention of Section 28(3) of the Arbitration Act, which reads as under:

> **"28.Rules applicable to substance of dispute,-(1) - (2) *****

(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."

This last contravention must be understood with a caveat. An Arbitral Tribunal must decide in accordance with the terms of the contract, but if an arbitrator construes a term of the contract in a reasonable manner, it will not mean that the award can be set aside on this ground. Construction of the terms of a contract is primarily for an arbitrator to decide unless the arbitrator construes the contract in such a way that it could be said to be something that no fair-minded or reasonable person could do.

13. Again in the case of **Haryana Tourism Ltd. v. Kandhari Beverages Ltd.,** reported in **(2022) 3 SCC 237** Hon'ble Supreme Court has held as under:-

"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*) <u>if it is patently illegal</u>. 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 [*Kandhari Beverages Ltd.* v. *Haryana Tourism Ltd.*, 2018 SCC OnLine P&H 3233] passed by the High Court is hence not sustainable.

14. In the case of **UHL Power Co. Ltd. v. State of H.P.,** reported in **(2022) 4 SCC 116,** Hon'ble Supreme Court has held that:-

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. In *MMTC Ltd.* v. *Vedanta Ltd.* [*MMTC Ltd.* v. *Vedanta Ltd.*, (2019) 4 SCC 163], the reasons for vesting such a limited jurisdiction on the High Court in exercise of powers under Section 34 of the Arbitration Act have been explained in the following words : (SCC pp. 166-67, para 11)

"*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 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 Ltd.* 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."

17. A similar view, as stated above, has been taken by this Court in *K. Sugumar* v. *Hindustan Petroleum Corpn. Ltd.* [*K. Sugumar* v. *Hindustan Petroleum Corpn. Ltd.*, (2020) 12 SCC 539], wherein it has been observed as follows: (SCC p. 540, para 2)

> **"*2.* The contours of the power of the Court under Section 34 of the Act are too well established to require any reiteration. Even a bare reading of Section 34 of the Act indicates the highly constricted power of**

the civil court to interfere with an arbitral award. The reason for this is obvious. When parties have chosen to avail an alternate mechanism for dispute resolution, they must be left to reconcile themselves to the wisdom of the decision of the arbitrator and the role of the court should be restricted to the bare minimum. Interference will be justified only in cases of commission of misconduct by the arbitrator which can find manifestation in different forms including exercise of legal perversity by the arbitrator."

18. It has also been held time and again by this Court that if there are two plausible interpretations of the terms and conditions of the contract, then no fault can be found, if the learned arbitrator proceeds to accept one interpretation as against the other. In *Dyna Technologies (P) Ltd.* v. *Crompton Greaves Ltd.* [*Dyna Technologies (P) Ltd.* v. *Crompton Greaves Ltd.*, (2019) 20 SCC 1], the limitations on the Court while exercising powers under Section 34 of the Arbitration Act has been highlighted thus : (SCC p. 12, para 24)

"*24.* There is no dispute that Section 34 of the Arbitration Act limits a challenge to an award only on the grounds provided therein or as interpreted by various Courts. We need to be cognizant of the fact that arbitral awards should not be interfered with in a casual and cavalier manner, unless the Court comes to a conclusion that the perversity of

the award goes to the root of the matter without there being a possibility of alternative interpretation which may sustain the arbitral award. Section 34 is different in its approach and cannot be equated with a normal appellate jurisdiction. The mandate under Section 34 is to respect the finality of the arbitral award and the party autonomy to get their dispute adjudicated by an alternative forum as provided under the law. If the Courts were to interfere with the arbitral award in the usual course on factual aspects, then the commercial wisdom behind opting for alternate dispute resolution would stand frustrated."

19. In *Parsa Kente Collieries Ltd.* v. *Rajasthan Rajya Vidyut Utpadan Nigam Ltd.* reported in (2019) 7 SCC 236, adverting to the previous decisions of this Court in *McDermott International Inc.* v. *Burn Standard Co. Ltd.* reported in (2006) 11 SCC 181 and *Rashtriya Ispat Nigam Ltd.* v. *Dewan Chand Ram Saran* reported in (2012) 5 SCC 306], wherein it has been observed that an Arbitral Tribunal must decide in accordance with the terms of the contract, but if a term of the contract has been construed in a reasonable manner, then the award ought not to be set aside on this ground, it has been held thus: [*Parsa Kente Collieries Ltd.* v. *Rajasthan Rajya Vidyut Utpadan Nigam Ltd.*, (2019) 7 SCC 236]

"9.1. … It is further observed and held that construction of the terms of a contract is primarily for an arbitrator to decide unless the arbitrator construes the contract in

> ***such a way that it could be said to be something that no fair-minded or reasonable person could do*. It is further observed by this Court in the aforesaid decision in para 33 that when a court is applying the "public policy" test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. *A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award*. It is further observed that thus an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score.**
>
> ***9.2*. Similar is the view taken by this Court in *NHAI* v. *ITD Cementation India Ltd.* [*NHAI* v. *ITD Cementation India Ltd.*, (2015) 14 SCC 21 (para 25) and *SAIL* v. *Gupta Brother Steel Tubes Ltd.* [*SAIL* v. *Gupta Brother Steel Tubes Ltd.*, (2009) 10 SCC 63 para 29]"**
>
> **(emphasis supplied)**

20. In *Dyna Technologies* [*Dyna Technologies (P) Ltd.* v. *Crompton Greaves Ltd.*, (2019) 20 SCC 1], the view taken above has been reiterated in the following words:

> **"*25*. Moreover, umpteen numbers of judgments of this Court have categorically held that the courts should not interfere with an**

award merely because an alternative view on facts and interpretation of contract exists. The courts need to be cautious and should defer to the view taken by the Arbitral Tribunal even if the reasoning provided in the award is implied unless such award portrays perversity unpardonable under Section 34 of the Arbitration Act."

15. The proposition of law, which can be crystallized from the aforesaid discussion, is that the jurisdiction conferred on courts under Section 34 of the Arbitration Act is fairly narrow. And 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. The apparent reason behind this is that when parties have chosen to avail an alternate mechanism for dispute resolution, they must be left to reconcile themselves to the wisdom of the decision of the arbitrator and the role of the court should be restricted to the bare minimum. However, the same can be interfered only in cases of commission of misconduct by the arbitrator which can find manifestation in different forms including exercise of legal perversity by the arbitrator if the award goes to the root of the matter without there being a possibility of alternative interpretation which may sustain the arbitral award. The jurisdiction under Section 34 cannot be equated with a normal appellate jurisdiction. The mandate under this section is to respect the finality of the arbitral award and the party autonomy to get their dispute adjudicated by an

alternative forum as provided under the law. Interference with the arbitral award in the usual course by the courts on factual aspects would frustrate the commercial wisdom behind opting for alternate dispute resolution by the parties. Under Section 34 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. 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 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.. Construction of the terms of a contract is primarily for an arbitrator to decide and unless the arbitrator construes the contract in such a way that it could be said to be something that no fair-minded or reasonable person could do, the court should not interfere. If there are two plausible interpretations of the terms and conditions of the contract, then no fault can be found, if the learned arbitrator proceeds to accept one interpretation as against the other.

Discussion:-

16. It is not in dispute that there is an arbitration clause in the General Conditions of Contract (GCC), being Clause No. 9.0.0.0. Clause 9.0.1.0, which provides that subject to the provisions of Clause 6.7.1.0 and 6.7.2.0, hereof, any dispute or difference between the parties hereto, arising out of any 'notified claim' of the contractor included in his Final Bill in accordance with the provision of Clause 6.6.3.0 hereof, and/or arising out of any amount claimed by the owner (whether or not the amount claimed by the owner or any part thereof shall have been deducted from the final bill of the contractor or any amount paid by the owner to the contractor in respect of the work) shall be referred to arbitration by a sole arbitrator selected by the contractor from a panel of three persons nominated by the General Manager.

17. Thus, a careful perusal of the aforesaid clauses reveals that a dispute may be referred to arbitration when the same relates to a 'notified claim'.

Notified Claim:-

18. What is a "Notified Claim" has been dealt with in Clause 1.0.24.0, which means a claim of the contractor notified in acceptance with the provision of Clause 6.6.1.0, which clearly states that if the contractor considers that he is entitled to any extra payment or compensation in respect of the work, over and above the amounts due in terms of the contract, as specified in Clause 6.3.1.0 hereof, or should the contractor dispute the validity of any deduction made or threatened by the owner

from any running account bills, or any payments due to him in terms of the contract the contractor shall forthwith give notice in writing of his claim in this behalf to the Engineer-In-charge and the Site Engineer within 10 days from the date of the issue of orders or instructions relative to the works for which the contractor claims such additional payment or compensation or on the happening of any other event upon which the contractor based such claim.

18.1. The said clause further provides that such notice shall contain full particulars of the nature of such claim and the grounds on which such claims is based and the amounts claimed. The contractor shall not be entitled to raise any claim nor shall the owner anyway be liable in respect of any claim by the contractor unless notice of such claim shall have been given by the contractor to the Engineer-in-Charge and the Site- Engineer in the manner and within the time aforesaid and the contractor shall be deemed to have waived any or all claims and all his rights in respect of any claim not notified to the Engineer-in-Charge and the Site-Engineer in writing in the manner and within the time aforesaid.

18.2. Further, Clause 6.6.3.0 provides that any or all claims of the contractor notified in accordance with the provision of Clause 6.6.1.0., hereof as shall remain at the time of preparation of final bill by the contractor shall be separately included in the final bill prepared by the contractor in the form of a Statement of Claims attached thereto, giving particulars of the contractor in the claim, grounds on which it is based, and the amount claimed and shall be supported by a copy(ies) of the notices(s) sent in respect thereof by the Engineer-in-Charge and Site Engineer under Clause 6.6.1.0 hereof. In so far as such claim shall in any

manner particular be at variance with the claim notified by the contractor within the provision of Clause 6.6.1.0 hereof, it shall be deemed to be a claim different from the notified claim with consequence in respect thereof indicated in Clause 6.6.1.0 hereof, and with consequences in respect of the notified claim as indicated in Clause 6.6.3.1 hereof.

18.3. It also appears from the said clause that any and all notified claim not specifically reflected and included in the final bill in accordance with the provisions of Clause 6.6.3.0 hereof shall be deemed to have been waived by the contractor and the owner shall have no liability in respect thereof and the contractor shall not be entitled to raise or include in the final bill any claim(s) other than a notified claim conforming in all respect in accordance with the provision of C lause 6.6.3.0 of GCC.

18.4. On the other hand, Clause 6.6.4.0 provides that no claim(s) shall on any account be made by the contractor after the final bill, with the intent the final bill prepared by the contractor shall reflect any and all claims, whatsoever, of the contractor against the owner arising out of or in connection with the contract or work performed by the Contractor there under, or in relation thereto and the Contractor shall notwithstanding any enabling provision in any law or contract and notwithstanding any claim in quantum meruit that the contractor could have in respect thereof, be deemed to have waived any and all such claims not included in the final bill and to have absolved and discharged the owner from and against the same, even if in not including the same as aforesaid, the contractor shall have acted under a mistake of law or fact.

Finding of the Arbitrator:-

19. The sole Arbitrator had categorically held that the claims so raised are notified claim. While dealing with the issue in para No. 29, the Arbitrator had held that the admitted position is that the respondent prepared and submitted the Final Bill without including the notified claims of the claimant and without the knowledge of the claimant, which was signed by someone else in the name of the claimant. Thereafter, as alleged, the respondents released payment against the said Final Bill to the claimant. It is to be noted here that vide letter No. RB/GR/DCU/CDU/98-99/33 dated 17.08.2000 (Annexure-XXXIII) addressed to the Senior Manager, I.O.C.L. the claimant informed that all the papers including the Final Bills etc. be signed by the claimant, Ranjul Baruah, who is the sole proprietor and that nobody is authorised to sign any paper on behalf of the claimant. Claimant also raised objection to such action before General Manager, I.O.C.L. and also requested to review or refer the dispute to arbitration. These facts and circumstances are not denied by the respondents.

19.1. Further, in para No.30, it has been held that –'In view of this, I hold that the respondents are aware of the claims which are apparently notified claims. It is further noted that the cheque was issued with undue haste, without giving any opportunity of hearing and reasonable time, when there were communications and correspondence between the parties to the dispute and even there was scope for review of the alleged Final Bill. The correspondence on record established that the claims of the claimant for re-imbursement etc. are notified claim.

Contention of the appellant:-

20. It is the contention of the appellant that the Arbitrator is the master of both facts and laws. And once the Arbitrator has formed an opinion based upon materials, placed before it, the courts ought not to have interfered with the same merely because in the given facts and circumstances placed on record another view is possible. It is the further contention of the appellant that there was delay on the part of the respondent authorities as they could not shut down the machineries in time for which the work could not be completed in time and that it is an admitted fact that labour rate had increased and the learned District Judge had failed to take note of the same and that the payment was made to one N.C. Kalita and the appellant had not received the same and at no point of time the appellant had appointed N.C. Kalita as Sub-Contractor and the finding of the learned District Judge in this regard is perverse.

Contention of the respondent:-

21. The claims, so raised by the appellant herein, before the learned Arbitrator in arbitration proceeding were not notified claims, and as such the claims were barred by the contract and the Arbitrator could not have awarded any amount against such claim. It is the further contention of the respondent that once the final bill is paid and the security deposit of the contractor is released the respondent is discharged of its obligation under the contract in view of clauses 6.7.1.0, 6.8.2.0 and 6.8.3.0 of the GCC.

Finding of the learned District Judge:-

22. The learned District Judge, in the impugned judgment, taking note of the Clause 6.6.3.0., 6.6.3.1., 6.7.1.0., and 6.8.2.0. of the GCC and the letter dated 03.07.1999, No. RB/GR/DCU-CDU/98-99/15, and the letter dated 19.08.1999, No. RB/GR/DCU/CDU/98-99/21, held that till preparation of Final Bill, there was 'no notified claim' on the part of the Contractor for escalation of the prices of the materials and for enhancement of the labour charges. And thereafter, arrived at the finding that the sole Arbitrator has passed the award contrary to the General Conditions of Contract (GCC) and tender agreement and acted beyond her arbitral jurisdiction.

Finding of this Court:-

23. Here in this case, it appears that the appellant Contractor had not given any notice in writing of his claim in this behalf to the Engineer-In-Charge and the Site Engineer within 10 days from the date of the issue of orders or instructions relating to the works for which the Contractor claims such additional payment or compensation or on the happening of any other event on which the contractor based such claim, in terms of Clause 6.6.1.0. He had given notice to the Chief Technical Services Manager of Indian Oil Corporation, on 29.09.2000, as is apparent from the Document No. XX, in page 32 of the written argument filed by the respondent, instead of to the Engineer-In-Charge and the Site- Engineer, within 10 days, from the date of the issue of orders or instructions relative to the works. Thus, the claims so made by the appellant, in the given facts and circumstances placed on the record, appears to be not 'notified claim' in as much as the same were not made in accordance with the terms of General Conditions of Contract. In holding so, this

Court derived authority from a decision Hon'ble Supreme Court in the case of **Indian Oil Corpn. Ltd. v. NCC Ltd.** reported in **(2023) 2 SCC 539,** wherein it has been held that only those claims which are notified after following the procedure shall be considered as notified claim. The relevant paragraph is reproduced herein below :-

> **"80. Thus, on a fair reading of the aforesaid provisions, it can be seen that only those claims which are notified after following the procedure as referred to hereinabove shall be considered as "notified claim" and in respect of any claim other than the notified claim, the owner is not liable to pay and as such is absolved and discharged under the said clauses."**

23.1. It has also been held in paragraph No. 85 of the aforesaid case that on a fair reading of Clause 9.0.0.0, only the dispute arising out of a notified claim of the contractor included in the final bill in accordance with the provisions of Clause 6.6.3.0 shall be referred to arbitration, that too, subject to Clause 9.0.2.0 and any dispute/matter falling within Clause 9.0.2.0 shall have to be first decided by the General Manager, including, whether or not a claim sought to be referred to arbitration by the contractor is a notified claim. Therefore, if the claim is not a notified claim, as per Clause 6.6.1.0 and the same is not included in the final bill, such a claim is outside the purview of the arbitration agreement.

23.2. Besides, a perusal of Clause 6.7.1.0. of GCC reveals that the acceptance by the contractor of any amount paid by the owner to the contractor in respect of the final dues of the contractor determined in accordance with the provisions of Clause 6.3.1.0 hereof, upon condition

that the said payment is being made in full and final settlement of all the said dues to the contractor shall without prejudice to the claim of the contractor included in the final bill in accordance with the provisions under Clause 6.6.0.0. hereof and associated provisions there under be deemed to be in full and final satisfaction of all such dues to the contractor not withstanding any qualifying remarks protest or condition imposed or purported to be imposed by the contractor relative to the acceptance of such payment, with the intent that upon acceptance by the contractor of any payment made as aforesaid, the contract (including the arbitration clause) shall subject to the provisions of Clause 6.8.2.0., hereof stand discharged and extinguished except in respect of the notified claims of the contractor included in the final bill and except in respect of the contractor's entitlement to receive the unadjusted portion of the security deposit in accordance with the provision of Clause 6.8.2.0., hereof on successful completion of the defect liability period.

23.3. Perusal of the Clause 6.7.2.0 indicates that the acceptance by the Contractor of any amount paid by the owner to the contractor in respect of the notified claims of the contractor included in the final bill in accordance with the provisions of Clause 6.6.0.0. hereof and associated provisions there under upon the condition that such payment is being made in full and final settlement of all the claims of the contractor shall subject to the provisions of Clause 6.7.3.0. thereof, be deemed to be in full and final satisfaction of all claims of the contractor notwithstanding any qualifying remarks, protest or condition imposed or purported to be imposed by the contractor relative to the acceptance of such payment

with the intent that upon acceptance by the contractor of any payment made as aforesaid, the contract (including arbitration clause) shall stand discharged and extinguished in so far as relates to and/or concerns the claims of the contractor.

23.4. Clause 6.8.2.0., provided that within 15 days of application made by the contractor in this behalf accompanied by the final certificate, or within 15 days of passing of the contractor's final bill by the owner, whichever shall be later, the owner shall pay/refund to contractor the unadjusted balance (if any) of the security deposit for the time being remaining in the hands of the owner and upon such payment/refund the owner shall stand discharged of all obligations and liabilities under the contract.

23.5. In the case in hand, it appears that the appellant himself applied for releasing his security deposit, vide his letter dated 24.09.2001, and on receipt of the same, the security deposit was released vide cheque No. 964079, on 05.10.2001 and the same was received by the appellant on 08.10.2001. Thus, it appears that once the final bill is paid and the security deposit of the appellant was released, the respondent herein stands discharged from all its obligation under the contract in view of Clause 6.7.1.0, 6.8.2.0 and 6.8.3.0 of the GCC.

23.6. It is to be noted here that in the case of **Indian Oil Corpn. Ltd.(Supra)** in paragraph No. 82, Hon'ble Supreme Court has held that once such payment is being made in full and final settlement of all the claims of the contractor shall, subject to the provisions of Clause 6.7.3.0, be deemed to be in full and final satisfaction of all claims of the

contractor notwithstanding any qualifying remarks, protest or condition imposed or purported to be imposed by the contractor relative to the acceptance of such payment with the intent that upon acceptance by the contractor of any payment made, the contract (including the arbitration clause) shall stand discharged and extinguished insofar as relates to and/or concerns the claims of the contractor.

23.7. In view of the decision of Hon'ble Supreme Court in **Saw Pipes Ltd.(Supra)** the Court can set aside the arbitral award under Section 34(2) of the Act if the party making the application furnishes proof that the arbitral award deals with a dispute not contemplated by and not falling within the terms of the submission to arbitration. Here in this case, it is established that the arbitral award deals with a dispute not contemplated by and not falling within the terms of the submission to arbitration.

23.8. Though, the appellant has contended that the final bill was prepared by the respondent and payment was made to one N.C. Kalita and the appellant had not received the same and at no point of time the appellant had appointed N.C. Kalita as Sub-Contractor and for the first time the respondent had produced a letter dated 19-8-1999, before the learned Court below, and the same was not given effect to and that as per Clause 4.7.1.0 of G.C.C and Article 8 of the Contract dated 5-3-1999, approves contract, sub-contracting, sub-letting of the work was impermissible unless approved by the respondent, yet the same appears to be incorrect in as much as the letter dated 19.08.1999, No. RB/GR/DCU-CDU/98-99/21 was part of the Additional Written Statement,

being Document-R-21, filed by the respondent herein, on 22.01.2003. But, the said piece of document was not taken into consideration by the learned Arbitrator. Further, from the Document No.R-18 of the respondent herein, which is a letter dated 04.10.1999, addressed to the Senior Project Manager, (Engineer-in-Charge) IOCL, indicates that the appellant herein authorised Sri N.C. Kalita Sub-Contractor, to sign MB, Bills, etc. and to draw A/C Payee Cheques on behalf of his company, and also attested signature of N.C. Kalita, in the said letter.

23.9. Thus, drawing premises from the illuminating discourse as above, and considering the well settled legal proposition, this Court is of the considered opinion that the finding, so arrived at by the learned District Judge that till preparation of Final Bill, there was no notified claim on the part of the Contractor for escalation of the prices of the materials and for enhancement of the labour charges, and that the sole Arbitrator has passed the award contrary to the General Conditions of Contract (GCC) and tender agreement and acted beyond her arbitral jurisdiction, cannot be said to be illegal or arbitrary. And being the arbitral award deals with a dispute not contemplated by and not falling within the terms of the submission to arbitration, under Section 34(2) of the Act, the learned District Judge has the power to set aside the award on the said ground, and exercise of such power cannot be said to be beyond jurisdiction.

The Issue of Escalation of Price of Materials:-

24. The appellant, before the Arbitrator had made a claim of Rs. 28,92,193/- on account of escalation of price of materials calculated @15% on the basis of job awarded.

24.1. It also appears that the Sole Arbitrator had granted escalation @ 15%.

Contention of the appellant:-

25. It is the contention of the appellant that the finding of the learned District Judge to the effect that it appears that the major portion of the materials such as cement, steel have been supplied by the IOC Ltd. to the respondent contractor at a reasonable fixed rate below the market price till completion of the works, is patently incorrect.

Contention of the respondent:-

26. The respondent has contended that the claim of price escalation is barred by the contract. And as such no award can be made under this head. Further contention of the respondent is that the award here in this case was granted without evidence and if a party raises a claim for loss or profit, it has to prove the same in accordance with law, in view of decision of Hon'ble Supreme Court in **M/s Unibros vs. All India Radio** reported in **(2023) 14 SCR 683** and in **Batliboi Environmental Engineers Ltd. vs. Hindustan Petroleum Corporation Ltd.,** reported in **(2024) 2 SCC 375,** and since the appellant had not produced any material to show that there was any increase in the rate of Cement, Steel etc. he is not entitled to any relief on this count. The further contention of the respondent is that major portion of the materials such as Cement, Tor steel, Structural steel were supplied by the I.O.C. Ltd. to the appellant contractor at a reasonable fixed rate below the prevailing market price till completion of the works. It is the further contention of the appellant that the rate of price

escalation was calculated on the basis of Reserve Bank of India's price index submitted at the time of arbitration proceeding, which according to the respondent related to consumer products only and nothing to do with the case in hand.

Discussion:-

27. A careful perusal of Clause 6.3.2.0 of the GCC reveals that without prejudice to generality of the provisions of Clause 6.3.1.0 thereof, the schedule of rates shall be deemed to be included and cover:-

……

(vii) The cost of all escalation (foreseen and unforeseen) including but not limited to increase in Government taxes and dues, labour cost and material cost.

……

27.1. On the other hand Clause 6.3.3.0 indicates that the rates stated in the schedule of rates shall not be subject to escalation or increase on any account whatsoever.

27.2. Thus, it appears that there is clear bar in respect of the claim for escalation of rates. It is well settled in the case of **Ramachandra Reddy & Co. v. State of A.P.,** reported in **(2001) 4 SCC 241,** that an arbitrator being a creature of the agreement, unless the agreement either specifically or inferentially provides for a higher rate to be awarded for any additional or excess work done by the contractor, it would not be permissible for the Arbitrator to award for the so-called

additional work at a higher rate. Again in the case of **The State of Madhya Pradesh vs. M/s Sew Construction Limited & Ors.,** reported in **(2022) 9 SCR 731,** Hon'ble Supreme Court has held that a contractual clause which provides for the finality of rates quoted by the contractor and disallows any future claims for escalation is conclusive and binding on the parties. If the clause debarring future claims permits escalation subject to certain conditions, no claim is admissible if the conditions are not satisfied. However, if the conditions are satisfied, the Contractor will have a right to claim escalation. This is a contractual right. The right originates and subsists by virtue of the contract itself.

27.3. In the instant case, it appears that the appellant contractor had failed to complete the jobs within the stipulated period in terms of the contract. As per work order, the schedule time of completion of job, Part A- DCU revamp project was 2 months, and Part-B CDU revamp project was 3 months. Admittedly, and also indisputably, the projects could not be completed within stipulated period. The appellant herein had made several requests to the respondent for extension of time. And on his prayer, the time was extended by the applicant respondent for completion of the job. It also appears from the letter No. RB/GR/DCE-CDU/98-99/15, dated 03.07.99 sent by the appellant contractor to the Senior Manager of I.O.C. Ltd. that for extension of time for completion of the work there will be no financial implication on either sides and considering this aspect the time was extended for completion of the works. Thereafter also, vide letter dated 19.08.1999 and vide another undated letter, extension of time was sought for and granted till

30.09.2000. In the said two letters also no claim for escalation was made.

27.4. Even thereafter also, the appellant contractor had failed to complete the works due to labour strike and some other grounds. Ultimately, the appellant contractor vide his letter No. RB/GR/DCU/ CDU/98-99/21, dated 19.8.99, sub-let the works to Sri N.C. Kalita, Contractor, Guwahati Refinery, Noonmati, Guwahati for completion on condition that charge of materials issued by him or by Guwahati Refinery will be recovered from the payment of the sub-contractor. Payment will be released only after getting payment by him from the owner within a week. All standard deductions towards Income Tax, Sales Tax, Security deposit or any other deductions as applicable will also be deducted from the bills of the sub-contractor. Issue rate of materials for cement, reinforcement steel and structural steel received by the sub-contractor from I.O.C.L., Guwahati Refinery will be as per G.C.C. and tender agreement. Any excess or less issue of materials by the owner shall be on the account of the sub-contractor. Other materials such as steel, cement, stone chips, sand issued by the contractor to the sub-contractor shall be recovered from the bill on market rate and the shuttering plates' plywood and steel board shall be recovered from the sub-contractor. The machineries such as mixture machine, vibrator, pump, concrete breaker, dewatering pump etc the hire charge of the same will be recovered on market rate. The work so far done by the contractor shall be measured and no payment for the same will be given to the sub-contractor.

27.5. It is also stated in the said letter that the rates are firmed and no escalation in any case will be given to the sub-contractor. The labour

escalation, from Rs. 60 to Rs. 75, which the contractor is likely to get from the respondent, as per tender provision, is no way payable to the sub-contractor. Further, it is stated the retention money of 10% towards security deposit will be shared @ 5% each of the parties on release of the same after defect liability period.

27.6. Though Mr. Sahewalla submits that the letter dated 19.08.1999 was produced for the first time before the learned District Judge, in the proceeding on the petition under Section 34 of the Arbitration and Conciliation Act, yet, said submission left this court unimpressed in view of the fact that in the additional written statement, at paragraph No.7 the respondent had taken a stand to that effect and enclosed the said letter as document No. R-21. Notably, the appellant herein had not filed any counter to the additional written statement filed by the respondent herein. It is incorrect to say that the letter dated 19.08.1999, was produced for the first time before the learned District Judge, in the proceeding on the petition under Section 34 of the Arbitration and Conciliation Act. It was very much before the Arbitrator.

27.7. It also appears that in terms of the agreement between the respondent contractor and the sub-contractor N.C. Kalita, the sub-contractor, Shri N.C. Kalita had completed the works on 30.9.2000. Further, it appears that before preparing the final bill, notice was issued to the contractor for depositing the labour register. But, the appellant herein had failed to produce the labour register. Thereafter, the final bill was prepared in the month of May, 2001 and cheque was issued towards the dues of the final bill and the sub-contractor N.C. Kalita had signed on the measurement books, bills and accepted the A/C payee cheque on

behalf of the appellant contractor, on being authorised by him, vide his letter dated 04.10.1999, without raising any objection or protest towards escalation as well as labour charge etc.

Finding of This Court:-

28. It is well settled in the case of **M/s Unibros(Supra)** and also in the case of **Batliboi Environmental Engineers Ltd.(Supra)** that in order to sustain a claim for loss of profit from a delayed contract it is imperative upon the claimant to substantiate the same by adducing convincing evidence that he had executed the contract promptly. But, in the case in hand, it is not in dispute that the claimant has sought for extension of time on several occasions. In the letter, No. RB/GR/DCE-CDU/98-99/15, dated 03.07.1999, written by the appellant to the Senior Manager, IOC Ltd. the extension was sought for without any financial implication on either side. Though, the appellant has denied sending the said letter and also incorporating the line ***'without any financial implication on either side'*** and taken a stand that somebody, without the authority knowledge and consent of the appellant inserted the said words, yet, he could not discharge the burden, And this aspect of the matter would be dealt with in later part of the this judgment.

28.1. Thus, there appears to be substance in the contention so made by the respondent herein, in this regard. It is also not in dispute that major portion of the materials, such as Cement, Tor Steel, Structural steel were supplied by the I.O.C. Ltd. to the appellant contractor at an agreed rate. Moreover, no evidence, whatsoever, was produced before the learned Arbitrator, who had calculated the escalation @ 15% on the basis of

Reserve Bank of India's price index, which, according to the respondent, has nothing to do with the case in hand.

28.2. Further, in the letter dated 19.08.1999, the appellant, while sub-letting the work to N.C. Kalita, had stated that the rates are firm and no escalation on any account would be payable to him.

28.3. In view of the discussion made herein above and in view of the legal position, the award so made by the Arbitrator under this head, appears to be contrary to the contract. And the award, therefore, cannot sustain under this head. The learned District Judge, therefore, appears to be right in interfering with the award.

The Issue of Enhanced Labour Wages :-

29. The appellant, before the Arbitrator has made a claim of Rs. 27,72,649/- on account of enhanced labour wages, which is 14.38% of the entire contract value, due to the increase of the labour wages by Rs. 15/- on the ground that the labour component of the job was 50%.

29.1. It also appears that the sole Arbitrator had held that the claimant is entitled to actual labour component of Rs. 14.38% of the total value of the labour component 50% value of which was given under notified claim.

Contention of the Appellant:-

30. The appellant has contended that during execution of the work the labour wages was increased by Rs. 15/- and he had paid the same. But, he has categorically denied the execution and validity of the letter No.

RB/GR/DCE-CDU/98-99/15 dated 03.07.1999, alleged to be sent by the appellant contractor to the Senior Manager, IOC Ltd. before the sole Arbitrator and the Arbitrator also acknowledged the same and recorded its doubt about the genuineness of the letter, but, the learned Court had re-appreciate the materials on record and arrived at a different finding, and under Section 34 of the Act the same is not permissible.

30.1. The appellant also contended that vide letter dated 19.08.1999, it has not sub-let the work to N.C. Kalita and that N.C. Kalita was authorised Supervisor in connection of the issuance of Gate Pass only and the said fact is admitted by the respondent.

30.2. It is also contended that the finding of the learned District Judge to the effect that in terms of the agreement between contractor and the sub-contractor N.C. Kalita, the sub-contractor had completed the works on 30.09.2000 is patently incorrect and perverse.

30.3. Further contention of the appellant is that the finding of the learned District Judge, without assigning any reason, had set aside the finding of the sole Arbitrator to the effect that **'the Final Bill was prepared and cheque payment was made without the knowledge of the claimant and the same was signed and accepted by someone else'** is a perverse appreciation of the materials on record.

30.4. And also it is contended that the finding of the learned District Judge that if any loss is incurred towards labour charge then it will be the sub-contractor who had performed and completed the work is perverse and contrary to the materials on the record.

Contention of the respondent:-

31. The contention of the respondent is that the claim for enhanced labour wages is not tenable in view of the terms and conditions of the GCC as well as under facts and circumstances of the case. It is the further contention of the respondent that no evidence was led or produced to establish that the labour component of the job was 50%. It is also stated that the wages of contract labourers were revised by the respondent No.1, vide its communication No. P/Cont.Lab/ 6/98/4431 dated 19.09.1998, which is document R12 of the statement of defence, whereby the rate of wages was revised based on the Memorandum of Settlement arrived at between the Contractor's Association and the Contract Labour Association and at the time of submission of the tender by the appellant for the present contract, the revised rate of wage was already prevailing.

31.1. It is the further contention of the respondent that under the contract clauses (Clause 11.3 of the General Instructions to the Tenderers), the respondent was not required to pay any amount to the appellant on account of escalation of labour wages, yet, the respondent vide letters dated 14.9.2000, 26.03.2001, 26.04.2001 (Documents - 14, 15 and 16 of the SOD) and other letters requested the appellant to produce the labour payment register so as to prove that the labourers were indeed paid as per the enhanced labour rates. But, the appellant refused to submit the register and instead raised the aforesaid claim.

31.2. It is also the contention of the respondent that no Contractor can engage contract labourers without obtaining a labour licence from the competent authority under the Contract Labour (Abolition and Regulation) Act, 1970. The appellant had a labour license dated 31.03.1999, document - R8 of the statement of defence, for a maximum number of 60 contract labourers for the period from 31.3.99 to 30.3.2000. Thereafter, the appellant obtained another labour license dated 27.7.2000 (Document R20) for the period from 24.7.2000 till the end of the contract for 20 contract labourers, and during the intermediate period the appellant did not have any labour licence i.e. the appellant could engage less than 20 contract labourers and even assuming, but not admitting, that the appellant had indeed paid the labourers at the enhanced rate, the maximum, the appellant would have paid is for the aforesaid number of labourers only. And since the labour payment register was not produced by the appellant even after several requests, the respondent enquired into with the Employees Provident Fund Organization and vide letter dated 06.11.2003 (Document - R22) [Page 49 of this written argument] the Provident Fund authorities were requested to furnish the details of the Provident Fund contribution made by the appellant in respect of the workers engaged by him during the period of the contract i.e. between 23.3.99 to 30.9.2000, and the Regional Provident Fund Commissioner, vide letter dated 07.11.2003 (Document - R23) informed that during the period of execution of the contract i.e. during the year 1999-2000 and 2000-2001, the appellant had enrolled only 3 persons as members of the Provident Fund.

31.3. And it is further contended that there is grave doubt regarding payment to the labourers as vide his letter dated 19.08.1999 (Document - R21) the appellant had sub-contracted the job to one Shri N. C. Kalita, who is the person who had received the security deposit amount on behalf of the appellant. And vide aforesaid letter the appellant also made it clear to the sub-contractor N.C. Kalita that payment would be made to him shall be firm and no escalation on any account would be payable to him and that the appellant will not pay to him the escalation of the labour rate from Rs. 60/- to Rs. 75/-, which according to the appellant was likely to be received by the appellant from the respondent, which goes to shows that the work was executed at the rates prevailing at the time of award of the work and no escalation had taken place. It is the further contention of the respondent that at the time of sub-contracting the job, the balance work to be completed was about 90%.

31.4. It is also contended by the respondent herein that the contention of the appellant that letter dated 19.08.1999, was not given effect to is belied by the fact that the said N. C. Kalita was all along associated with the appellant and immediately after the letter dated 19.08.1999, the appellant, vide another letter, dated 04.10.1999, (Document - R18 of the SOD) had authorised N. C Kalita to sign bills, receive account payee cheques etc. and the signature of N. C. Kalita was also attested by the appellant and in the final bill and security deposit, which was paid by account payee cheques in the name of the appellant was received by N. C Kalita and the appellant had nowhere alleged that the appellant had

not received any payment against those cheques as the cheques were account payee cheques drawn in favour of the appellant.

31.5. Further it is stated that the contention of the appellant that as Shri N.C. Kalita was not authorised to sign the Final bill and as such, the claims of escalation and labour wages could not be included in the Final Bill and therefore, the said claims should be considered as notified claims is untenable and barred by the principles of approbation and reprobation. A party cannot be permitted to take advantage of a particular transaction and thereafter deny the same, as held by Hon'ble Supreme Court in the case of **Union of India Vs. N Murrugesen,** reported in **(2022) 2 SCC 25,** wherein, considering its earlier decisions in **Nagubai Ammal Vs. B Shama Rao,** reported in **AIR 1956 SC 593** and **Rajasthan State Industrial Development and Investment Corporation and Another Vs. Diamond & Gem Development Corporation Limited and Another,** reported in **(2013) 5 SCC 470** and held that a party cannot be permitted to blow hot and cold. When a party accepts the benefit of any contract or conveyance, he is estopped from denying the validity thereof. And on such count the appellant cannot be allowed to turn around and to say that the final bill, which was signed by the said N. C. Kalita was without any authority. Besides, the appellant had received the final bill and the security deposit, without any objection and no issue was raised as regard preventing him from including the claims made before the Arbitrator, in the final bill. Now, he cannot be allowed to contend that the final bill was prepared by someone else without his authority.

31.6. Referring to the clauses in the contract, specially Clause No. 8.3.1.0 and 8.3.4.0, it is stated that the contractor is bound to comply with all labour laws and referring to the decision of Hon'ble Supreme Court in **Rajasthan State Mines and Minerals Ltd. (Supra),** it is contended that when a claim for escalation is barred by the contract, the same cannot be allowed by the Arbitrator and allowing such claim by the Arbitrator by disregarding the specific terms of the contract would amount to misconduct and may even be treated to be a mala-fide act. Referring to another decision in **Union of India Vs. Varinedra Constructions,** reported in **(2018) 7 SCC 794**, it is contended that when parties voluntarily agree that the prices shall not be subject to escalation, any departure from the said clause cannot be permitted even though there may be an increase in labour wages due to a statutory hike.

31.7. And that the learned District Judge has arrived at a categorically finding that the final bill was prepared in the month of May and account payee cheque, for the work was issued by the respondent in favour of the appellant, which was accepted by the appellant without raising any objection regarding escalation of labour charge etc. It is also contended that the work being executed by the sub contractor, if any loss towards labour escalation was suffered then it was suffered by the sub-contractor and not by the appellant. It is also contended that the finding of the learned District Judge is supported by the judgment of the Hon'ble Supreme Court in the case of **Delhi Development Authority Vs.**

R.S Sharma and Company, reported in **(2008) 13 SCC 80,** wherein it has been held that when an award is against the terms of the contract, the award is liable to be set aside u/s 34 of the Arbitration and Conciliation Act, 1996. It is also stated that the learned Court had rightly arrived at the aforesaid findings and as such, the same warrants no interference.

Findings:-

32. The learned District Judge, considering the legal positions and the record, found that till preparation of the final bill there was no notified claim on the part of the respondent contractor for escalation of the prices of the material and for enhancement of the labour charges and the learned sole Arbitrator has passed the award contrary to the General Conditions of Contract (GCC) and tender agreement and acted beyond her arbitral jurisdiction. And accordingly, set aside the arbitral award passed by the sole Arbitrator on 5.4.2005, in case No. Arbi(MS) No. 2/2002.

32.1. The contentions, so made by the respondent herein appears to have substance in as much as there was no evidence before the sole Arbitrator to show that the labour component of the job was 50%. Further, it appears that the wages of the contract labourers were revised by respondent No.1 vide letter dated 19.09.1998, and the same was in force at the time of submission of the tender by the appellant. Besides, the appellant had failed to produce the labour payment register despite asking by the respondents to substantiate payment of wages to the

labourers at the enhanced rate. Further, in the letter dated 19.08.1999, the appellant, while sub-letting the work to N.C. Kalita, it was stated that the rates are firm and no escalation on any account would be payable to him. Thus, in view of the terms and conditions of GCC and Clause 11.3 of the General Instruction to the Tenderers, the respondents are not required to pay any amount. And when the claim of escalation is barred by the contract, any departure is not permissible in view of decision of Hon'ble Supreme Court in **Rajasthans Mines and Minerals Ltd. (supra)** and **Varindra Constructions (supra).** Since the award is against the term of the contract the learned District Judge has the authority to set aside same in view of decisions of Hon'ble Supreme Court in **Delhi Development Authority (supra).**

32.2. Thus, it also appears that the finding of the sole Arbitrator that 'the Final Bill was prepared and cheque payment was made without the knowledge of the claimant and the same was signed and accepted by someone else', cannot be said to be based on materials placed on record as the letter dated 19.08.1999, indicates that the appellant had not only sub-let the work, but also immediately after the letter dated 19.08.1999, the appellant, vide another letter, dated 04.10.1999, document - R18 of the statement of defence, had authorised N. C Kalita to sign bills, receive account payee cheques etc. and the signature of N. C. Kalita was also attested by the appellant and in the Final Bill and security deposit, which was paid by account payee cheques in the name of the appellant was received by N. C. Kalita. The appellant had nowhere alleged that the he had not received any payment against those cheques as the cheques were account payee cheques drawn in favour of the appellant. That

being so, the contention of the appellant that N.C. Kalita was not authorised to sign the Final Bill for which the claim of escalation could not be incorporated in the Final Bill is not acceptable in as much as he cannot be allowed to approbate and reprobate at the same time, as held by Hon'ble Supreme Court in the case of **N. Murrugesen (supra)**.

32.3. It also appears that though the appellant has categorically denied the execution and validity of the letter No. RB/GR/DCE-CDU/98-99/15 dated 03.07.1999, alleged to be sent by the appellant contractor to the Senior Manager, IOC Ltd. before the sole Arbitrator and the Arbitrator also acknowledged the same and recorded its doubt about the genuineness of the letter, yet it appears that the appellant had doubted before the learned Arbitrator about incorporation of one line i.e. ***'without any financial implication on either side'*** but the learned Counsel for the appellant, before the Arbitrator had admitted issuing the said letter by the appellant but no stipulation with regard to ***'without any financial implication on either side'*** was there and somebody without the authority knowledge and consent of the appellant inserted the said words. **(Para 73 of the Arbitral Award)**. It is to be noted here that the burden to prove that the said line was not there in the letter dated 03.07.1999, is upon the appellant. But, he could not discharge the burden. When fraud, misrepresentation or undue influence is alleged by a party in a proceeding, normally, the burden is on him to prove such fraud, undue influence or misrepresentation. Reference in this context can be made to a decision of Hon'ble Supreme Court in **Gian Chand and Bros. v. Rattan Lal,** reported in **(2013) 2 SCC 606** and also in **Krishna Mohan**

Kul v. Pratima Maity reported in **(2004) 9 SCC 468.** Thus, denial simpliciter by the appellant is not sufficient. It is to be noted here that the learned District Judge, while arriving at the conclusion, had not solely relied upon the letter dated 03.07.1999, but also relied upon other materials on record.

32.4. It has already been held that the power of this Court under Section 37 of the Arbitration and Conciliation Act, 1996 is very constricted. This court while dealing with the appeal under Section 37 of the Arbitration and Conciliation Act, cannot entered into the merits of the claim, unlike deciding an appeal against the judgment and decree passed by the learned trial court as held by Hon'ble Supreme Court in the case of **Haryana Tourism Ltd.(supra).**With such constricted power and limited scope of interference, and in view of the settled legal proposition, while the impugned judgment of the learned District Judge, Kamrup is examined, this Court is unable to satisfy itself that there exists any scope of interference in the impugned judgment of the learned District Judge, since no patent illegality appears to be committed. No doubt the learned District Judge has not entered into detailed discussion by analysing each and every aspect of the matter, which is also not at all permissible. But, it appears that reasons are assigned in arriving at such a finding by the learned District Judge. With the limited scope of interference, under Section 34 of the Arbitration and Conciliation Act, 1996, it is neither desirable nor permissible to enter into elaborate discussion of materials placed on record.

32.5. In the result, I find this appeal bereft of merit and accordingly, the same stands **dismissed**. Send down the record of the learned Court below with a copy of this judgment. The parties have to bear their own costs.

JUDGE

Comparing Assistant