* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Judgment reserved on : 03 December 2024**
Judgment pronounced on: 08 January 2025

\+ FAO (COMM) 161/2022

CENTER FOR RESEARCH PLANNING AND ACTION
.....Appellant

Through: Mr. Suryavansh Vashisth, Mr. Jayant Upadyay and Mr. Akshay Srivastava, Advs.

versus

NATIONAL MEDICINAL PLANTS BOARD MINISTRY OF AYUSH GOVERNMENT OF INDIA ....Respondent

Through: Mr. Ruchir Mishra and Mr. Mukesh Kumar Tiwari, Advs.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
HON'BLE MR. JUSTICE DHARMESH SHARMA

J U D G M E N T

1. The appellant has preferred this appeal under Section 13(1) of the Commercial Courts Act, 2015 ["**CC Act**"], read with Section 37 of the Arbitration and Conciliation Act, 1996 ["**The Act**"], assailing the impugned order dated 03.06.2022 passed by the learned Single Judge in O.M.P.(Comm.) 79/2020 titled "*National Medicinal Plants Board v. Center for Research, Planning & Action"*, whereby the learned Single Judge has set aside the arbitral award dated 11.02.2020.

FACTUAL BACKGROUND:

2. Shorn of unnecessary details, the appellant is engaged in providing services related to data collection, organization, and

analysing. The respondent, established by the Government of India, coordinates activities concerning medicinal plants and supports policies and programs for their trade, export, conservation, and cultivation. The genesis lies in the Government of India amending the Drugs and Cosmetic Rules, 1945 vide a Gazette Notification dated 09.07.2008 that *inter alia* required licensed manufacturers of Ayurveda, Sidha and Unani ["**ASU**"] drugs to maintain records of raw materials used in manufacturing and submit them to the State Drug Licensing Authorities, the respondent or its nominated agencies, in the prescribed format Schedule TA of the Notification.

3. In accordance with the said Notification, the respondent issued a public advertisement dated 15.02.2012, inviting Expression of Interest ["**EOI**"] or Terms of Reference ["**TOR**"] for the engagement of an agency to oversee the maintenance of records pertaining to raw materials utilized by ASU-licensed drug manufacturers. The consultancy's stated objective encompassed the inclusion of approximately 8,000 ASU pharmacies nationwide in the study. The EOI elaborated on various terms and conditions, including the scope of work, tenure, and payment provisions.

4. The respondent, *vide* letter dated 05.12.2012, proposed engaging the appellant at a base price of Rs. 225/- per unit for the scope of work detailed in the EOI, with the consultancy objectives forming part of the agreement. By way of the letter dated 03.07.2013, the respondent outlined a payment plan, quoting an annual consultancy fee of Rs. 22,50,000/- per annum. Subsequently, via letter dated 26.09.2013, the respondent approved the project at the same cost

for the first year and directed the appellant to furnish a bank guarantee of Rs. 2,25,000/-, which was duly complied with and the parties entered into the First Agreement dated 17.08.2013 on 21.10 2013. The First Agreement explicitly stipulated that the former consultant, i.e., M/s Datamation had failed to cover all the pharmacies for the year 2010-2011 and the tenure of the consultancy of the appellant was extendable up to December 2014 based on its performance.

5. The appellant quoted a basic rate of Rs. 225/- per unit per year based on representations by the respondent. It was assured that data collection would be required annually, subject to performance, and initial start-up expenses would be offset by guaranteed annual revenue of Rs. 22,50,000/-. The respondent also undertook to provide a list of 8,000 units with relevant details for immediate commencement of work and emphasized that the data submission by all units was mandatory under a special enactment, with non-compliance leading to fines and other consequences.

6. However, it was later discovered that the respondent had not maintained a list of ASU units, compelling the appellant to expend significant time and resources in compiling a list of approximately 31,000 prospective units identified through directories and internet sources, including traders, marketers, collectors, and users of ASU products. This resulted in an additional financial burden on the appellant. Furthermore, it was observed that the Drugs and Cosmetics Rules, 1945, as amended by the Notification dated 09.07.2008, which formed the basis of the project, excluded the State Licensing Authorities from exercising any jurisdiction in the subject matter of

the said enactment, eliminating the element of compulsion for ASU units to provide data. Consequently, the ASU units showed no willingness to share information on raw material usage, despite multiple meetings held by the Secretary, Ministry of AYUSH, with State Licensing Authorities and the Drug Controller at New Delhi.

7. The appellant has averred that the First Agreement became non-operational as the respondent required all the bills raised by the appellant to be routed through the State Licensing Authorities. The appellant stated that in certain States, multiple licensing authorities existed thus identification of the appropriate authority being left ambiguous. Secondly, the State authorities were not party to the contract, and therefore, neither did they have *locus standi* nor did they have the requisite knowledge about the Project requirements. As a consequence of the above, the State authorities were not in a position to approve the bills.

8. It was thus the case of the appellant that since the commencement of the project, it faced significant challenges, particularly in collecting data for the 8000 ASUs specified in the EOI, which were communicated to and acknowledged by the respondent. In a letter dated 18.12.2014, the appellant detailed these challenges, proposing terminating the project and highlighting that no payment had been made by the respondent despite the appellant incurring substantial expenses.

9. The respondent acknowledged the non-workability of the First Agreement by executing a Second Agreement on 22.07.2015, which was necessitated as most of the 8000 ASU pharmacies identified by

the appellant were either closed, non-operational, or unresponsive. Additionally, routing the bills for the work performed through State Drug Licensing authorities posed challenges, as these authorities were not parties to the contract and lacked *locus standi* and project knowledge. The Second Agreement extended the appellant's consultancy until 31.03.2016, with the possibility of further extension. While it addressed some issues that frustrated the performance of the First Agreement, it failed to account for the scale of the remaining work and the time required for completion.

10. It appears that in the aforesaid backdrop, considering the various components of work and the objectives achieved, the respondent decided that it would be appropriate that the full budget for each year be released in favour of the appellant. It is the case of the appellant that despite all odds faced by it, the objectives outlined in the TORs were met including the preparation of a detailed directory, along with multiple sub-reports and presentations for meetings, both internal and collaborative, involving Drug Controllers from across the country so much so that these reports were utilized by the respondent in various meetings, including two convened by the Secretary, Ministry of AYUSH. Satisfied with the appellant's work, the respondent extended the project and requested additional data collection for 2013-14 and 2014-15, reflecting confidence in the Appellant's performance. However, conducting the project in two phases increased the appellant's costs, as institutions had to be re-approached to supply additional data, an expense not anticipated at the project's outset.

11. The respondent, through a letter dated 02.03.2016, extended the project tenure until 31.05.2016, directing the appellant to include all schedules received up to 31.03.2016 in the final report. In compliance, the appellant submitted three reports, totalling approximately 400 pages, in May 2016. However, by letter dated 30.06.2016, the respondent requested revisions, altering the scope of work by removing the MIS feature and requiring the inclusion of schedules received after 31.03.2016. Following these directions, the appellant submitted revised reports in 2017 and 2018.

12. It is the case of the appellant that it had been diligently adhering to the terms of the EOI, the Second Agreement, and pursuant to the respondent's communications, submitted its consolidated findings in February 2018 and on 19.01.2018, it raised an invoice of Rs. 12,73,986/- for payment related to 1097 Schedules TA and 2225 ASU units that were non-existent, closed, or relocated. To the appellant's shock, the respondent rejected the claim, stating it was ineligible as the Second Agreement had expired on 31.03.2016. The appellant, having invested significant time and resources, was dismayed by the respondent's claim that the Second Agreement expired on 31.03.2016. This was contradictory, as the respondent continued to request modified reports and received submissions from the appellant between 2016 and 2018 without mentioning the expiration or non-extension of the Agreement.

ARBITRAL PROCEEDINGS:

13. In a nutshell, the appellant *via* letter dated 02.04.2018, demanded payment for two invoices totalling Rs. 16,43,506/-, dated

04.04.2016 and 19.01.2018. Upon the respondent's rejection of these claims without valid justification, the appellant invoked the arbitration clause under Clause (14) of the Second Agreement. The Respondent subsequently appointed the Learned Arbitrator, and the dispute was referred to arbitration vide letter dated 03.10.2018.

14. The learned Arbitrator, after reviewing the parties' submissions and hearing their arguments, determined the respondent's liability on merits and rendered an award of Rs. 47,48,350/- in favour of the appellant on 11.02.2020. The learned Arbitrator held that the respondent failed to provide necessary information regarding the Units covered by M/s Datamation and misrepresented key project details in the EOI leading to frustration of the contract. The learned Arbitrator concluded that the terms of the EOI were impossible to be adhered to due to the respondent's concealment of relevant facts and data. The Award includes a detailed explanation of the reasoning and the calculation of the awarded amount. It would be apposite to reproduce the reasoning and conclusions determined by the learned Arbitrator hereunder: -

> "14. **REASONING AND CONCLUSIONS**
>
> (A) M/s CERPA has informed in writing twenty nine points with regard to the project and its outcome and following issues were raised:
>
> a) CERPA was not paid for 2.5 years from the date of commissioning of the project due to non-workability of the contract dated 11.08.2013.
>
> b) The rate was quoted based on the assumptions that it will get 22.5 lakhs per annum with some additions or deletions of total amount with standard variation of 5-10% either side.
>
> c) List with name/addresses and relevant details for 8000 units will be provided by NMPB and work will be commenced immediately.

d) All the 8000 units will submit required information with reference to the notifications dated 09 July 2008.
e) NMPB misrepresented and misguided the actual manufacturing units of ASU products.
f) Misrepresentation/misguidance created by NMPB, resulted into increase of work load and increase in expenses incurred.
g) This has resulted in actual reduction of the project worth to less than 50% of the actual cost the project, projected.
h) NMPB did not consider the additional work of building up a directory as a part of contract, where as it is an ancillary to the main project contracted.
i) CERPA vide its letter 18.11.2014, 04.12.2014 and 18.12.2014 submitted their experience and informed that they have incurred an expenditure of Rs.88 lakhs till that time and not received any amount from NMPB.
j) After hard work of 3 years it is realized that total number of units functional is only 2887 and not 8000 units CERPA has informed that the unit rate of Rs. 225 is not workable and it should be 750 per schedule as the volume of work is less than 30% of the total volume.
k) On the basis of CERPAS' efforts in making a non-viable project into viable NMPB has extended the project beyond the specified period for another two years i.e. 2013-14 and 2014-15 and extended the contract which is not there in the EOI or in the agreements.
l) Re-contracting is suggested by CERPA under the aegis of the honourable Arbitrator and to extend the project till 31.12.2018 to recover the losses.
m) In the end CERPA has submitted bills on dated 19.01.2018 for Rs. 1273986.00 for consideration.
n) They also submitted a letter of compromising by stating that the issue can be closed by making payments of Rs. 10,00,000 as final payments for closing the project.
o). **Prayer**

To settle the issue by learned Arbitrator to allow payment for each year against the sanctioned budget of Rs. 22.5 lakhs or as appropriate and adequate keeping in view work performance and in the light of cost incurred to the tune of Rs. 88 lakhs up to 18/12/2014 and additional after that or increase the unit rate to Rs. 750/- as requested in the letter prior to engaging into the agreement dated 22/7/2015.

(B) **Accordingly the sole arbitrator gave the award as follows:**

NMPB so far has processed and considered payments of 12,075 schedules till March 2016 against minimum assured 30,000 schedules as per terms and conditions of the EOI. It is ordered to

> pay amount remaining 17.925 schedules as per the approved slab rates on yearly basis as per the letter dated A-11019/53/2011-NMPD (FTS), dated 26/0/2013."

PROCEEDINGS BEFORE THE LEARNED SINGLE JUDGE:

15. Being aggrieved by the Award, the respondent preferred a petition under Section 34 of the Act, seeking to set aside the Award, alleging it was patently illegal, contained errors apparent on the face of the record, violated substantive Indian law and principles of natural justice, and contradicted the express provisions of the Contract. The respondent contended that the learned Arbitrator failed to consider its submissions adequately.

16. Suffice it to state that the respondent argued before the Learned Single Judge that the Arbitral Tribunal, while allowing the appellant's claims, failed to consider the respondent's submissions, misinterpreted the contract terms, and issued an Award of Rs. 47,48,350/- without a speaking order. Conversely, the appellant, relying on a series of judgments, contending that the powers of a court under Section 34 of the Act are narrow and limited. The appellant avers that since the Award was supported by cogent reasoning, it did not warrant interference. The impugned order was passed and the Arbitral Award was set aside. The operative portion of the impugned judgment/order dated 03.06.2022 of the learned Single Judge is reproduced below: -

> "29. The award shows that the Arbitrator had highlighted the failures and limitations experienced by the respondent while working on the project, who had alleged that the petitioner failed to resolve / clarify the issues raised at the time of finalization of agreement which resulted into delay for more than one year; petitioner had no authority / jurisdiction over the State Drug Licencing Authority and it failed to provide the list / addresses of

8000 ASU Licence Manufacturing Units; for 03 years documentation as per the EOI and agreement, projected budget was Rs. 67.50 lakhs, while the respondent already incurred an expenditure of Rs. 88.00 lakhs, which included posting of registered letters to more than 10000 units, salaries to the staff, rent, hiring of experts etc; it had informed the petitioner that it would not be feasible for it to work in the light of reduced work load to less than 40% and requested it to increase the rate to Rs. 750/- per unit and fix the terminal date as 31.03.2015 with marginal extension of time by not including new schedules into data sheet as on 28.02.2015 but it is equally settled law that the Arbitrator and the parties are bound by the terms of the agreement / contract, which clearly provided that the payment was to be made as per clause 9 & 10 of the agreement. As evident from the record, the petitioner had made the payment on the commutative performance on the approved rates against the bills / invoices raised by the respondent from time to time.

30. In the impugned award, the Arbitrator has discussed the stand of the respondent to the various issues and the cause of dispute, which finds mention that the respondent had submitted invoice vide letter dated 02.04.2018 requesting the petitioner to release payments in respect of two invoices dated 04.04.2016 and 19.01.2018 for Rs. 3,69,520/- and Rs. 12,73,986/- respectively; the petitioner had agreed to release the pending payment of Rs. 3,69,520/- against the invoice raised for the period from February 2016 to March 2016 subject to the acceptance of the final report and Directory, it had however refused to consider the payments of Rs. 12,73,986/- alleging that the schedules were received after 31.03.2018 i.e. closure of contract.

31. Question now arises, when the dispute was over the payment of Rs. 12,73,986/- against the schedules received after 31.03.2018, then on what basis, the Arbitrator made the calculations as seen in Para 15. He took the number of schedules as 6000 for all the years i.e. 2010-11 to 2014-15 without verifying the schedules / work executed by the respondent. In para 14 (B) of the award, he has observed that the petitioner has so far processed / considered the payment for 12075 schedules till March 2016 against minimum assured schedules as per the terms & conditions of EOI. He accordingly directed to pay the amount for the remaining 17925 schedules as per the approved slab rates on yearly basis. The agreement entered by the parties nowhere provided the minimum assured 30000 schedules. In the impugned award, the Arbitrator did not assign any cogent reason for making this assessment/ calculation, which is against the consonance of Section 34 of the Act being perverse and arbitrary. It is patently illegal

going to the root of the matter. It has been held in the case of *Associate Builders Vs. Delhi Development Authority, (2015) 3 SCC 49* that the award can be set aside if it is so unfair and unreasonable that it shocks the conscience of the Court. Such award is opposed to the public policy and is required to be adjudged void.

32. **It may be true that the petitioner did not take any administrative / legal action against the respondent nor imposed any fine despite, when it did not fulfill the contract, rather, made the payments; ideally, the project should have been closed and fresh bid should have been called for the future work, and it extended the period of data collection of another two years i.e. 2013-14 & 2014-15 by granting extension upto 31.03.2016 by entering into fresh agreement on 22.07.2015 but it was for the petitioner to decide whether to close the contract or extend the contract or enter into fresh agreement and no interference is called for.**

33. **On perusal, I find that in the impugned award, the Arbitrator has discussed the doctrine of frustration under Section 56 of the Indian Contract Act. In the instant case, both the parties were at fault. This might have been the reason for the petitioner not claiming any compensation. The agreements were signed by the parties on mutually agreed terms after assessing the scope of work without any compulsion. The petitioner had extended the time period. After the first contract, the parties had entered into another contract. There is nothing on record to show that the respondent was forced to sign the contract as alleged. I am not in agreement with the contention of the petitioner that there was no performance on the part of the respondent or the purpose of the study got frustrated. Had it been so, what made the petitioner extend the contract or enter into another contract with the respondent.**

34. **To sum up,** on a careful consideration on the touchstone of the provisions under Section 34 of the Act, I am of the opinion that the Arbitrator exceeded his jurisdiction. He went beyond the terms & conditions of the contract and passed the award without giving any cogent reason, which is against the fundamental policy of India. I am in agreement with the contention of the petitioner that the Arbitrator erroneously awarded the amount on presumption / assumptions.

35. Admittedly, the award has been passed by an expert being a Medical Superintendent but no expertise was required for passing this award. It was mainly based on the contract.

36. As regards the contention that the contract was closed retrospectively, record reveals that in the meeting held on 14.05.2015, the respondent was granted time upto 31.03.2016

> There is nothing on record to indicate that the contract was closed retrospectively. Since, in the instant case, there was no extension of contract, the contract was treated as closed on 31.03.2016.
>
> 37. In the light of what has been stated above, I am of the view that the award passed by the Arbitrator is perverse and patently illegal being in contravention of the principles of natural justice and settled principles of law as provided under Section 34 of the Act.
>
> 38. The impugned award dated 20.11.2019 is therefore set aside under Section 34 (2) (a) (iii) and Section 34 (2A) of the Act being vitiated by patent illegality appearing on the face of the award, as elicited in details herein above. The petition is accordingly allowed. The parties are left to bear their own costs."

SUBMISSIONS ADVANCED AT THE BAR:

17. Learned counsel for the appellant has mainly urged that the arbitral award has been rendered by a mutually appointed expert arbitrator with specialized knowledge in the field of medicine and the subject project, which is well-reasoned and based on the material evidence on record. It was urged that the arbitrator's expertise and impartiality, coupled with the procedural agreement between the parties, mandated deference to the Award, which the Learned Single Judge failed to observe. Furthermore, the Learned Single Judge erroneously concluded that the Award was patently illegal, overlooking the detailed reasoning provided by the arbitrator and disregarding the settled legal principle that an arbitral award issued by an expert in the field is not to be scrutinized as strictly as a decision by a legally trained adjudicator. Consequently, it is submitted that the Impugned Order setting aside the Arbitral Award is erroneous, unsustainable in law and liable to be set aside.

18. Learned counsel for the appellant has placed reliance on the decision rendered by the Apex Court in **Hindustan Construction**

Company Ltd. v. National Highways Authority of India[1] and which underscores the limited scope of judicial interference under Section 34 of the Act. The Apex Court emphasized that an award rendered by a technically expert arbitrator, relying on its specialized knowledge and experience in the subject matter, should not be lightly interfered with by appellate courts. Contrary to this well-settled principle, the learned Single Judge, in paragraph (35) of the impugned judgment, disregarded the expertise of the Arbitrator by stating, "*Admittedly, the award has been passed by an expert being a Medical Superintendent, but no expertise was required for passing this award*." Such an observation undermines the arbitrator's specialized role and the parties' mutual agreement to appoint an expert arbitrator.

ANALYSIS AND DECISION:

19. We have given my thoughtful consideration to the submissions advanced by the learned counsel for the parties at the bar and we have also perused the relevant record of the case.

20. First things first, it would be apposite to refer to the provisions of Section 34 & 37 of the Act, which provisions read as under:

> "**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 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

[1] (2024) 2 SCC 613

(*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 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.

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.

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

Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by reappreciation of evidence.

(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 arbitral tribunal will eliminate the grounds for setting aside the arbitral award.
> **37. Appealable orders**.—(1) (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:—
> ((*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."
>
> [**Bold Emphasis Supplied]**

21. On a careful perusal of Section 34 of the Act, it is clear that an arbitral award can only be set aside by moving an application on grounds mentioned under sub-section (2) and sub-section (3) of Section 34 of the Act. An award can be interfered with where it is in conflict with the public policy of India, i.e., if the award is induced or affected by fraud or corruption or is in contravention of the fundamental policy of Indian law, or if it is in conflict with basic notions of morality and justice.

22. A plain reading of Section 34 reveals that the scope of interference by the Court with the arbitral award under Section 34 is very limited, and the Court is not supposed to travel beyond the aforesaid scope to determine whether the award is good or bad. Even an award that may not be reasonable or is non-speaking to some extent cannot ordinarily be interfered with by the Courts. It is also well settled that even if two views are possible, there is no scope for the Court to reappraise the evidence and take a different view from that taken by the arbitrator.

23. It is also a well settled proposition in law that the jurisdiction of the Court under Section 34 of the Act is neither in the nature of an appellate remedy or akin to the power of revision. It is also well ordained in law that an award cannot be challenged on merits except on the limited grounds that have been spelt out in sub-sections (2), (2-A) and (3) of Section 34 of the Act, by way of filing an appropriate application.

24. There is no gainsaying that the impugned arbitral award has been set aside by the learned Single Judge in terms of the explanation clause to sub-section (2-A). The view taken by the arbitrator is normally acceptable and ought to be allowed to prevail. Insofar as Section 37 of the Act is concerned, it provides for a forum of appeal against the order setting aside or refusing to set aside an arbitral award under Section 34 of the Act. There is no gainsaying that the scope of appeal is naturally akin to and limited to the grounds enumerated in Section 34 of the Act.

25. Avoiding a long academic discussion, the Supreme Court in the case of **MMTC Ltd. v. Vedanta Ltd.**[2], outrightly rejected the plea that the appellate court would be competent to arrive at a different conclusion based on the evaluation of evidence placed on the record. It was held that 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. Further, in the case of **NHAI v. M. Hakeem**[3], the Supreme Court held that there is no power vested with the Court under Section 34 of the Act to modify an award. It was emphasized that including the power to modify an award in Section 34 of the Act would cross the *Lakshman Rekha* and result in doing what, according to the justice of the case, ought not to be done. It was held that the Parliament very clearly intended that no power of modification of an award should be recognised to exist in Section 34 of the Act.

26. That being the scope and ambit of the powers of this Court, we may further briefly elaborate on how the expression "the public policy of India" contained in Section 34(2)(*b*)(*ii*) of the Act is to be construed. The Supreme Court in the case of **ONGC Ltd. v. Saw Pipes Ltd.**[4] had explained that expression as under:

> *"*31. Therefore, in our view, the phrase "public policy of India" used in Section 34 in context is required to be given a wider meaning. It can be stated that the concept of public policy connotes some matter which concerns public good and the public interest. What is for public good or in public interest or what would be injurious or harmful to the public good or public interest has varied

[2] (2019) 4 SCC 163
[3] (2021) 9 SCC 1
[4] (2003) 5 SCC 705

> from time to time**. However, the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice.** Hence, in our view in addition to narrower meaning given to the term "public policy" in *Renu Sagar case* [*Renu agar Power Co. Ltd.* v. *General Electric Co.*, 1994 Supp (1) SCC 644] it is required to be held that the award could be set aside if it is patently illegal. The result would be — award could be set aside if it is contrary to:
>
> (*a*) fundamental policy of Indian law; or
>
> (*b*) the interest of India; or
>
> (*c*) justice or morality; or
>
> (*d*) in addition, if it is patently illegal. [**EMPHASIS SUPPLIED]**

27. Again, avoiding a long academic discussion, the said expression came to be discussed in a recent decision of the Supreme Court in **S.V. Samudram v. State of Karnataka**[5], approving its earlier decision in **Associate Builders v. DDA**[6] (two-Judge Bench), wherein it was held that an award can be said to be against the public policy of India, *inter alia*, in the following circumstances:

> "42.1. When an award is, on its face, in patent violation of a statutory provision.
>
> 42.2. When the arbitrator/Arbitral Tribunal has failed to adopt a judicial approach in deciding the dispute.
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> 42.3. When an award is in violation of the principles of natural justice.
>
> 42.4. When an award is unreasonable or perverse.
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> 42.5. When an award is patently illegal, which would include an award in patent contravention of any substantive law of India or in patent breach of the 1996 Act.
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> 42.6. When an award is contrary to the interest of India, or against justice or morality, in the sense that it shocks the conscience of the Court."

[5] (2024) 3 SCC 623
[6] (2015) 3 SCC 49

28. Coming to the main issue as to what constitutes a patent illegality, the Supreme Court in the case of **Delhi Airport Metro Express (P) Ltd. v. DMRC**[7], held as under**:**

> **"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 categorized 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".

29. At this juncture, it is pertinent to mention that in the case of ***Delhi Airport Metro Express (P) Ltd. (supra)***, the Supreme Court addressed the issue wherein the expert members of the Arbitral Tribunal had concluded that the defects were not cured by the DMRC, a view later interfered with by the High Court in an application under section 34 of the Act. The Supreme Court held *that the members of the Arbitral Tribunal, nominated in accordance with the agreed*

[7] **(2022) 1 SCC 131**

procedure between the parties, are engineers, and their award is not meant to be scrutinized in the same manner as one prepared by legally trained minds. It was further held that, in any event, it cannot be said that the view of the Tribunal was perverse. The Supreme Court set aside the High Court's decision that the Tribunal's award on the legality of the termination notice was vitiated by the vice of perversity.

30. In another case the Supreme Court in the context of an arbitral award passed by expert personnel as arbitrators in the case of **Hindustan Construction Co. Ltd. v. NHAI**[8]**,** held that:

> **"**24. It is quite evident that in most cases, the view of DRPs and tribunals, and in two cases, majority awards of tribunals, favoured the arguments of contractors, that composite embankment construction took place, as a result of which measurement was to be done in a composite, or unified manner. Dissenting or minority views, wherever expressed, were premised on separate measurements. This opinion was of technical experts constituted as arbitrators, who were versed in contractual interpretation of the type of work involved; they also had first-hand experience as engineers who supervised such contracts. When the predominant view of these experts pointed to one direction i.e. a composite measurement, the question is what really is the role of the court under Section 34 of the Act.
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> 25. This Court in *Voestalpine Schienen GmbH* v. *DMRC* [*Voestalpine Schienen GmbH* v. *DMRC*, (2017) 4 SCC 665: (2017) 2 SCC (Civ) 607] commenting on the value of having expert personnel as arbitrators, emphasised that "*technical aspects of the dispute are suitably resolved by utilising their expertise when they act as arbitrators*". Such an approach was commended also in *Delhi Airport Metro Express (P) Ltd.* v. *DMRC* [*Delhi Airport Metro Express (P) Ltd.* v. *DMRC*, (2022) 1 SCC 131 : (2022) 1 SCC (Civ) 330] wherein this Court held that : (*Delhi Airport Metro Express case* [*Delhi Airport Metro Express (P) Ltd.* v. *DMRC*, (2022) 1 SCC 131 : (2022) 1 SCC (Civ) 330] , SCC p. 155, para 41)

[8] (2024) 2 SCC 613

> "*41*. … The members of the Arbitral Tribunal, nominated in accordance with the agreed procedure between the parties, are engineers and their award is not meant to be scrutinised in the same manner as one prepared by legally trained minds. In any event, it cannot be said that the view of the Tribunal is perverse. Therefore, we do not concur with the High Court's opinion [*DMRC* v. *Delhi Airport Metro Express (P) Ltd.*, 2019 SCC OnLine Del 6562] that the award of the Tribunal on the legality of the termination notice is vitiated due to the vice of perversity."

26. The prevailing view about the standard of scrutiny — *not judicial review*, of an award, by persons of the disputants' choice being that of their decisions to stand — and not interfered with, (save a small area where it is established that such a view is premised on patent illegality or their interpretation of the facts or terms, *perverse*, as to qualify for interference, courts have to necessarily choose the path of *least interference, except when absolutely necessary*). By training, inclination and experience, Judges tend to adopt a corrective lens; usually, commended for appellate review. However, that lens is unavailable when exercising jurisdiction under Section 34 of the Act. Courts *cannot, through process of primary contract interpretation*, thus, *create pathways to the kind of review which is forbidden under Section 34*. So viewed, the Division Bench's approach, of appellate review, twice removed, so to say (under Section 37), and conclusions drawn by it, resulted in displacing the majority view of the tribunal, and in many cases, the unanimous view, of other tribunals, *and substitution of another view*. As long as the view adopted by the majority was plausible — and this Court finds no reason to hold otherwise (because concededly the work was completed and the finished embankment was made of composite, *compacted* matter, comprising both soil and fly ash), such a substitution was impermissible.

27. For a long time, it is the settled jurisprudence of the courts in the country that awards which contain reasons, especially when they interpret contractual terms, ought not to be interfered with, lightly. The proposition was placed in *State of U.P.* v. *Allied Constructions* [*State of U.P.* v. *Allied Constructions*, (2003) 7 SCC 396] : (SCC p. 398, para 4)

> "*4*. … It was within his jurisdiction to interpret Clause 47 of the Agreement having regard to the fact-situation obtaining therein. It is submitted that an award made by an arbitrator may be wrong either on law or on fact and error of law on the face of it could not nullify an award. The

> award is a speaking one. The arbitrator has assigned sufficient and cogent reasons in support thereof. Interpretation of a contract, it is trite, is a matter for the arbitrator to determine (see *Sudarsan Trading Co.* v. *State of Kerala* [*Sudarsan Trading Co.* v. *State of Kerala*, (1989) 2 SCC 38]). Section 30 of the Arbitration Act, 1940 providing for setting aside an award is restrictive in its operation. Unless one or the other condition contained in Section 30 is satisfied, an award cannot be set aside. The arbitrator is a Judge chosen by the parties and his decision is final. The Court is precluded from reappraising the evidence. Even in a case where the award contains reasons, the interference therewith would still be not available within the jurisdiction of the Court unless, of course, the reasons are totally perverse or the judgment is based on a wrong proposition of law."

28. This enunciation has been endorsed in several cases (Ref. *McDermott International Inc.* v. *Burn Standard Co. Ltd.* [*McDermott International Inc.* v. *Burn Standard Co. Ltd.*, (2006) 11 SCC 181]). In *MSK Projects (I) (JV) Ltd.*v. *State of Rajasthan* [*MSK Projects (I) (JV) Ltd.* v. *State of Rajasthan*, (2011) 10 SCC 573 : (2012) 3 SCC (Civ) 818] it was held that an error in interpretation of a contract by an arbitrator is "*an error within his jurisdiction*". The position was spelt out even more clearly in *Associate Builders* [*Associate Builders* v. *DDA*, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , where the Court said that : (*Associate Builders case* [*Associate Builders* v. *DDA*, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , SCC p. 81, para 42)

> "*42. … 42.3. …* **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**." **{Bold portions emphasized}**

31. In view of the aforesaid proposition of law, reverting to the instant matter, we are unable to persuade ourselves to agree with the decision rendered by the learned Single Judge that the impugned arbitral award suffered from any 'patent illegality'. A careful perusal

of the impugned arbitral award dated 11.02.2020 would show that the arbitration was conducted by the Medical Superintendent of the CGHS[9] Ayurvedic Hospital, appointed in terms of the contract between the parties. The Arbitral Tribunal, after considering the respective contentions of parties, found that in the first place the respondent was clearly at fault. This was because, under the terms of agreement dated 17.08.2013 and entered into on 21.10.2013, the work order was issued on 05.12.2013, just 25 days prior to the expiry of the project during its extendable period and without adhering to the terms and conditions laid down in the EOI.

32. In other words, although the EOI extension beyond March 2013 was subject to performance based quarterly reviews, the same could not be exercised because of an unviable EOI. It was determined that, as per the agreement dated 17.08.2013, the validity of the contract was for a period of one year, i.e., October 2014, and extendable up to December 2014, contingent on performance reviews conducted quarterly,) as per the terms and conditions outlined in the NMPB[10] letter dated 26.09.2013. Although this contradicted the EOI specified tenure period, the work was performed by the appellant. It was observed by the Arbitral Tribunal that the appellant submitted its first bill dated 30.09.2014 for Rs. 6,25,452/- and till 18.12.2014 the appellant received 3457 schedule T-1 for 2010-11, 2011-12, 2012-13 and 2013-14 from 1257 ASU manufacturing units.

[9] Central Government Health Scheme
[10] National Medicinal Plants Board

33. The crux of the matter is that despite there being no official communication from NMPB stating their intention to extend the period of the contract beyond 31.03.2014 or providing for grace period till the end of December, 2014, the benefit of the work performed by the appellant was taken by the respondent. The position came to be expressed in the letter to the NMPB dated 18.12.2014 wherein *inter alia* it was pointed out that for three years of documentation as per the EOI and agreement as against projected budget of Rs. 67.50 lacs, the appellant had already incurred expenditure of Rs. 88 lacs, which were intimated to the NMPB through its letter.

34. At the cost of repetition, the benefit of the work performed by the appellant was evidently taken by the NMPB for its official businesses. As a matter of fact, it was observed that NMPB had not taken any administrative or illegal action against the appellant and had also paid Rs. 10,76,325/- to the appellant on 31.03.2015 without adhering to the procedure laid down in the agreement.

35. Consequently, the Arbitral Tribunal, presided over by an experienced Medical Officer-cum-Administrator, found, based on the evidence, that by 30.04.2015, the appellant had received 4,498 schedules from 1,601 manufacturing units. Furthermore, 17 Drug Controllers had shared the contract details of ASU manufacturers. It was clearly established that the appellant was compelled to continue with the project despite numerous irregularities and delays on the part of the respondent. Accordingly, the Arbitral Tribunal determined the respondent's liability based on the merits, noting the following effect:

"**13. Determination of the liability of the Respondent based on merit:**

NMPB has not provided information to CERPA regarding how many firms were covered by M/s Datamation during the year 2010-11 and how many were not covered as per the EOI and signed agreements. Data available suggests that not even one single schedule was provided by DATAMATION to CERPA through NMPB as per EOI. NMPB has not provided real inputs in the EOI thus misrepresented and misguided the bidder ie. CERPA. NMPB did not consider the additional work of building up a director as a part of contract, where as it is an ancillary to the main project contracted. It has put conditions in the EOI which are frustrating and an act impossible in itself is void. This is the reason NMPB has not penalised the consultant CERPA rather in appreciation it has not only extended the project duration but also increased the period of data collection for 2 more years. This is in violation of EOI, Signed agreement and GFR rules 160 (x) and (xii). NMPB has also not taken care of the GFR Rules 167, 170. Rather the consultant M/s CERA has helped, full filed and delivered result in accordance with the Rule 170 to NMPB.

CERPA was not only given time during the first agreement period (to collect schedules till Dec.2013 related to the financial year 2012-13 meant for upto 31-3-2013) but also granted time period upto March 2014 for furnishing the data base of information and submission of reports and also considered the payments after completion of the validity. NMPB has extended the project beyond March 2014 and granted time period upto March 2016 and also desired to collect data for two more years ie. 2013-14 and 2014-15 by CERPA. This action has forced CREPA to do all the exercise what it has done till 2014 as one more time repeat. This has led to additional expenditure to CREPA by way of contacting the firms, writing letters to firms and posting letters to firms. The evidence was provided to the arbitrator in the form of bundles of speed post receipts posted during December 2015 and January 2016. The opportunistic cost incurred for this work by CREPA is much more than the price per unit offered by the NMPB. CERPA was of the opinion that like in first phase the second phase work will also be considered and payments will be made accordingly. But unfortunately NMPB has decided other wise and terminated the contract on 31-3-2016 retrospectively on 19-2-2018 almost after the expiry of 2 years short of 22 days.

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contract on 31-3-2016 retrospectively on 19-2-2018 almost after the expiry of 2 years short of 22 days.

NMPB has the right being the payee to the project to extend the validity period at the existing terms and conditions, cancel the contract or terminate the proceedings but will do as per the EOI or signed agreement. With this authority NMPB has decided that no further extension for the contract to be given to CERPA and the same has communicated on 14th December 2016 and accordingly processing of any schedule TA after 31st March 2016 are not admissible to be paid. This is contrary to the agreement signed on 21/10/2013 where it has given considerable time and permission to collect the schedules and to process the same, but still NMPB has the prerogative to take decision as it wishes, but while taking the decision only one condition cannot be picked and applied which suits to them it has to consider other conditions laid down in the agreements, which are applied to either party since it is written and signed agreement on non Judicial stamp paper.

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In the agreement of EOI under clause 10 Terms and Conditions sub clause (v) the agency has to ensure 500 pharmacy schedules per month which is equal to 5x12x500-30,000 schedules for 5 years. If the agency fails to do this job there is penalty of Rs. 200 per month per pharmacy. In other words NMPB ensures payment for minimum 30,000 schedules at the end of the contract whether it is there or not and accordingly the budgetary provisions are provided in the contract. This clause is like the penalty clause between the buyer and builder in case of a project where a house is to be constructed. For delay in payments buyer will pay the penalty and for delay in delivery time the contractor will pay the penalty as per the terms and conditions of the agreement. In the instant case it is ensuring the number of schedules or units between the parties is one of the core terms and conditions of the agreement. The total process of working on this project is deviated from the core terms and conditions signed between the parties."

36. The Arbitrator finally accorded the following reasoning and conclusions:

"14. <u>REASONING AND CONCLUSIONS:</u>

(A) M/s CERPA has informed in writing twenty nine points with regard to the project and its outcome and following issues were raised:

a) CERPA was not paid for 2.5 years from the date of commissioning of the project due to non workability of the contract dated 17.08.2013.
b) The rate was quoted based on the assumptions that it will get 22.5 lakhs per annum with some additions or deletions of total amount with standard variation of 5-10% either side.
c) List with name/addresses and relevant details for 8000 units will be provided by NMPB and work will be commenced immediately.
d) All the 8000 units will submit required information with reference to the notifications dated 09 July 2008.
e) NMPB misrepresented and misguided the actual manufacturing units of ASU products.
f) Misrepresentation/ misguidance created by NMPB, resulted into increase of work load and increase in expenses incurred.
g) This has resulted in actual reduction of the project worth to less than 50% of the actual cost the project, projected.
h) NMPB did not consider the additional work of building up a directory as a part of contract, where as it is an ancillary to the main project contracted.
i) CERPA vide its letter 18.11.2014, 04.12.2014 and 18.12.2014 submitted their experience and informed that they have incurred an expenditure of Rs.88 lakhs till that time and not received any amount from NMPB.
j) After hard work of 3 years it is realized that total number of units functional is only 2887 and not 8000 units CERPA has informed that the unit rate of Rs. 225 is not workable and it should be 750 per schedule as the volume of work is less than 30% of the total volume.
k) On the basis of CERPAS efforts in making a non-viable project into viable NMPB has extended the project beyond the specified period for another two-years i.e. 2013-14 and 2014-15 and extended the contract which is not there in the EOI or in the agreements.
l) Re-contracting is suggested by CERPA under the aegis of the honourable Arbitrator and to extend the project till 31.12.2018 to recover the losses.
m) In the end CERPA has submitted bills on dated 19.01.2018 for Rs. 1273986.00 for consideration.
n) They also submitted a letter of compromising by stating that the issue can be Closed by making payments of Rs. 10,00,000 as final payments for closing the project."

37. A careful review of the aforenoted observations reveals that the Arbitral Tribunal, appointed pursuant to Clause (14)of the agreement dated 22.07.2015, meticulously examined the entire record. The Tribunal, comprising of an expert in the field found that despite shortcomings on both parties and delays in completion of the contract work beyond the period specified in the EOI, the appellant had performed the requisite work. Based on the EOI/TOR for the years 2010-11, 2011-12, 2012-13, 2013-14, and 2014-15, the Tribunal determined that the appellant was entitled to receive ₹51,00,000/-. After deducting the excess amount paid (₹6,74,375/-), the final payable amount was calculated to be ₹47,48,350/-.

38. In essence, the Arbitral Tribunal provided plausible reasons for allowing the appellant's claim. Although an alternative view could be formed based on the evidence, particularly considering that the agreement was not explicitly extended beyond December 2014, the Tribunal's decision was implicitly grounded on the principle of "unjust enrichment", the Tribunal held that the work executed by the appellant, despite certain delays, fulfilled the respondent's requirements. To disregard this opinion and arrive at a different conclusion, as done by the learned Single Judge of this Court, would be equivalent to sitting in appeal over the Arbitral Tribunal's decision, which is not permissible. It cannot be said that the Arbitral Tribunal's decision was contrary to public policy or detrimental to the administration of justice.

39. In light of the foregoing discussion, we find that the impugned award passed by the expert Arbitral Tribunal did not suffer from the vice of patent illegality or unconscionability. Therefore, the impugned Judgment dated 03.06.2022, passed by the learned Single Judge of this Court, is flawed and cannot be sustained in law.

40. Accordingly, the impugned judgment dated 03.06.2022, passed by the learned Single Judge in OMP (COMM) 79/2020, is hereby set aside. Consequently, the award passed by the Arbitral Tribunal on11.02.2020 is upheld and affirmed to be sustainable and executable in law.

41. The present appeal under Section 37 of the Act is accordingly allowed, and the appellant is held entitled to the reliefs as granted to it by the Arbitral Tribunal.

42. In the peculiar facts and circumstances of the case, the parties are left to bear their own costs.

YASHWANT VARMA, J.

DHARMESH SHARMA, J.

JANUARY08, 2025
Sadiq