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REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

SPECIAL LEAVE PETITION (C) NOS. 3584-85 OF 2020
(Arising out of SLP(C) D No. 577 of 2020)

PATEL ENGINEERING LTD. ...Petitioner

VERSUS

NORTH EASTERN ELECTRIC POWER CORPORATION LTD. (NEEPCO) ...Respondent

WITH

SPECIAL LEAVE PETITION (C) NOS. 3438-3439 OF 2020
(Arising out of SLP(C) D No. 593 of 2020)

SPECIAL LEAVE PETITION (C) NOS. 3434-3435 OF 2020
(Arising out of SLP(C) D No.595 of 2020)

O R D E R

These special leave petitions arise out of the impugned order dated 10.10.2019 passed by the High Court of Meghalaya at Shillong in and by which the High Court declined to entertain the review petitions filed by the petitioner seeking review of the judgment and order dated 26.02.2019 in Arbitration Appeal Nos.3, 4 and 5 of 2018 on the ground that no ground for review is made out and that there is a delay in filing the application for review.

2. We have heard Mr. Harish Salve and Mr. Neeraj Kishan Kaul, learned Senior counsel appearing on behalf of the petitioner. On behalf of the respondent, we have heard Mr. Tushar Mehta,

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Reason:

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learned Solicitor General and Mr. Huzeffa Ahmadi, learned Senior counsel at some length, even at the time of the admission.

3. The learned sole arbitrator has passed the arbitral award dated 29.03.2016 in respect of Package-I holding as follows:-

> *"Based on my findings above, I have no hesitation in coming to the considered finding that the contract itself provides rate(s) for payment of extra lead in item Nos.2.7 and 3.4 of the BOO for surface and underground structures respectively. Admittedly material had been transported from a lead much longer than that envisaged at the time of award of work in favour of the claimant. It is also an admitted case of the parties that the claimant is entitled to extra payment for the extra lead. The only point at issue is whether Clause 33(ii)(a) or Clause 33(iii) would be applicable for working out the rate payable for transportation. In view of my findings, I have no hesitation in holding that the payment of extra lead is to be determined in accordance with Clause 33(ii)(a) for the item which has deviated being already available in the contract.*
>
> *I, therefore, answer the reference as follows:*
>
> *The rate for extra lead for transportation of sand and boulders from Government approved quarries to the work site for package-I works under KaHEP shall be decided in terms of Clause 33(ii)(a) of Part-III, Volume-I, Conditions of Contract of Book-II of Contract Agreement No.NEEPCO/ED/QP/C&P/R/C/KaHEP/560 of 2004-05 dated 17.12.2004."*

Similar Declaratory Arbitral Awards dated 29.03.2016 were passed by the learned sole arbitrator in respect of the other two Arbitral References in respect of contracts pertaining to Package-II and Package-III of the project.

4. Respondent-North Eastern Electric Power Corporation Ltd. (NEEPCO) filed three applications under Section 34 of the Arbitration and Conciliation Act, 1996 before the Additional Deputy

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Commissioner (Judicial), Shillong challenging the three arbitral awards dated 29.03.2016 in respect of Packages-I, II and III. The Additional Deputy Commissioner (Judicial) vide common judgment dated 27.04.2018 rejected the applications under Section 34 of the Act and upheld all the three arbitral awards. The respondent-NEEPCO filed three appeals under Section 37 of the Act before the High Court in Arbitration Appeal No(s).3, 4 and 5 of 2018. By the common judgment dated 26.02.2019, the High Court allowed the respondent's appeals and set aside the common judgment dated 27.04.2018 passed by the Additional Deputy Commissioner (Judicial).

5. Aggrieved by the common judgment dated 26.02.2019, the petitioner preferred special leave petitions before the Supreme Court in SLP (C) Nos.13629-13631 of 2019. After hearing both the parties, the Supreme Court vide order dated 19.07.2019 dismissed all the three SLPs filed by the petitioner holding that the Court is not inclined to interfere in the matters.

6. After dismissal of the SLPs, the petitioner filed review petitions before the High Court on the ground that the judgment of the High Court dated 26.02.2019 suffers from error apparent on the face of the record as it had not taken into consideration the amendments

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made to Arbitration and Conciliation Act, 1996 by Amendment Act of 2015. The said review petitions came to be dismissed by the High Court vide the impugned orders.

7. We heard the matter at some length at the time of admission and carefully considered the submissions of the learned counsel appearing for the parties and the judgments relied upon by both the sides and the judgment of the High Court dated 26.02.2019 and other materials on record.

8. Contention of the learned Senior counsel for the petitioner is that dismissal of the earlier SLP vide order dated 19.07.2019 is a non-speaking order and not on merits and hence no objection could be taken for filing of the review petition. Placing reliance upon *Bussa Overseas*[1] and Constitution Bench decisions in *Durga Shankar Mehta*[2], it was submitted that Article 136 of the Constitution confers on the Supreme Court special or residuary powers which are exercisable outside the purview of the ordinary laws in cases where the needs of justice demand interference by the Supreme Court. It was submitted that in paragraph (30) of *Bussa Overseas*[3], the Supreme Court held that though the decision in *Shanker*

1 *Bussa Overseas and Properties Private Limited and Another v. Union of India and Another* **(2016) 4 SCC 696**
2 *Durga Shankar Mehta v. Thakur Raghuraj Singh and Others* **(1955) 1 SCR 267**
3 *Bussa Overseas and Properties Private Limited and Another v. Union of India and Another* **(2016) 4 SCC 696**

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Motiram Nale[4] referred to Order 47 Rule 7 of the Code of Civil Procedure bars an appeal against the order of the court rejecting the review, it is not to be understood that the court has curtailed the plenary jurisdiction under Article 136 of the Constitution by taking recourse to the provisions in the Code of Civil Procedure.

9. Mr. Tushar Mehta, learned Solicitor General also relied upon *Bussa Overseas*[5] and contended that the appeal is not maintainable against the order rejecting the application for review of judgment and such appeal is not against the main judgment. In support of his contention, learned Solicitor General has placed reliance upon paragraph (22), which reads as under:-

> **"22.** Recently in *Sandhya Educational Society vs. Union of India* (2014) 7 SCC 701, the Court referred to the decision in *Vinod Kapoor vs. State of Goa* (2012) 12 SCC 378 and opined thus: (SCC p. 706, para 16)
>
> "*16*. This Court in *Vinod Kapoor* v. *State of Goa* (2012) 12 SCC 378, has categorically observed that once the special leave petition is dismissed as withdrawn without obtaining appropriate permission to file a special leave petition once over again after exhausting the remedy of review petition before the High Court, the same is not maintainable."

10. After considering the Constitution Bench decision in *Durga Shankar Mehta*[6] and number of other judgments, in *Bussa Overseas*[7], the Court held that consistency is the cornerstone of the

4 *Shanker Motiram Nale v. Shiolalsing Gannusing Rajput* **(1994) 2 SCC 753**
5 *Bussa Overseas and Properties Private Limited and Another v. Union of India and Another* **(2016) 4 SCC 696**
6 *Durga Shankar Mehta v. Thakur Raghuraj Singh and Others* **(1955) 1 SCR 267**
7 *Bussa Overseas and Properties Private Limited and Another v. Union of India and Another* **(2016) 4 SCC 696**

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administration of justice and courts have evolved and formulated a principle that if the basic judgment is not assailed and the challenge is only to the order passed in review, the Supreme Court is obliged not to entertain such special leave petitions. In paragraphs (30) and (31) of *Bussa Overseas*[8], the Supreme Court held as under:-

> **"30.** The decisions pertaining to maintainability of special leave petition or for that matter appeal have to be seemly understood. Though in the decision in *Shanker Motiram Nale Shiolalsing Gannusing Rajput* (1994) 2 SCC 753, the two-Judge Bench referred to Order 47 Rule 7 of the Code of Civil Procedure that bars an appeal against the order of the court rejecting the review, it is not to be understood that the Court has curtailed the plenary jurisdiction under Article 136 of the Constitution by taking recourse to the provisions in the Code of Civil Procedure. It has to be understood that the Court has evolved and formulated a principle that if the basic judgment is not assailed and the challenge is only to the order passed in review, this Court is obliged not to entertain such special leave petition. The said principle has gained the authoritative status and has been treated as a precedential principle for more than two decades and we are disposed to think that there is hardly any necessity not to be guided by the said precedent.
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> **31.** In this context, we may profitably reproduce a passage from *State of A.P.* v. *A.P. Jaiswal* (2001) 1 SCC 748, wherein a three-Judge Bench has observed thus: (SCC p. 761, para 24)
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> > "*24*. Consistency is the cornerstone of the administration of justice. It is consistency which creates confidence in the system and this consistency can never be achieved without respect to the rule of finality. It is with a view to achieve consistency in judicial pronouncements, the courts have evolved the rule of precedents, principle of stare decisis, etc. These rules and principle are based on public policy…." (emphasis supplied)

8 *Bussa Overseas and Properties Private Limited and Another v. Union of India and Another* **(2016) 4 SCC 696**

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The Supreme Court held that the decision rendered in *Thungabhadra Industries Ltd.*[9] is not correct.

11. It was submitted by the learned Solicitor General and learned Senior counsel appearing on behalf of the respondent that the earlier SLP was heard at length and thereafter, the SLP came to be dismissed as there was no ground to interfere in the matters. After dismissal of the SLP and without seeking for liberty, the petitioner thereafter filed the review petition.

12. In our considered view, it is not necessary to go into the question of maintainability of these SLPs preferred against the order rejecting the review, after the challenge to the main judgment had been rejected in the earlier SLPs. As noted earlier, in this case, the judgment of the High Court under Section 37 of the Act was challenged before the Supreme Court and the SLPs were dismissed by the Supreme Court after hearing the Senior Counsel for the parties vide order dated 19.07.2019. Be it noted when the earlier SLPs were dismissed, no liberty was taken to file the review before the High Court. Be that as it may, we are not inclined to go into this aspect any further.

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9 *Thungabhadra Industries Ltd. v. Government of Andhra Pradesh Represented by the Deputy Commissioner of Commercial Taxes, Anantapur* **(1964) 5 SCR 174**

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13. On behalf of the petitioner, Mr. Harish Salve and Mr. Neeraj Kishan Kaul, learned Senior counsel mainly contended that in the judgment of the High Court dated 26.02.2019, the High Court erroneously applied the provisions as applicable prior to the Amendment Act, 2015 and the judgment of the High Court suffers from error apparent on the face of the record since the High Court relied upon the decision in *Saw Pipes Ltd.*[10] and *Western Geco International Limited*[11], which are no longer good law after the Amendment Act, 2015 brought into effect from 23.10.2015. It is submitted that the judgment of the High Court dated 26.02.2019 suffers from error apparent on the face of the record and therefore, the petitioner is justified in seeking the review of the judgment dated 26.02.2019 and the High Court was not right in rejecting the review petition. In support of the contention of the petitioners, reliance was placed upon *HRD Corporation*[12] and *Ssangyong Engineering and Construction Company Limited*[13].

14. Mr. Tushar Mehta, learned Solicitor General and Mr. Huzeffa Ahmadi, learned Senior counsel have submitted that at the time when the earlier SLP(C) Nos.13629-13631 of 2019 were heard,

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10 *Oil & Natural Gas Corporation Ltd. v. Saw Pipes Ltd.* **(2003) 5 SCC 705**

11 *Oil & Natural Gas Corporation Ltd. v. Western Geco International Limited* **(2014) 9 SCC 263**

12 *HRD Corporation (Marcus Oil and Chemical Division) v. GAIL (India) Limted* **(2018) 12 SCC 471**

13 *Ssangyong Engineering and Construction Company Limited v. National Highways Authority of India (NHAI)* **(2019) 15 SCC 131, Para No.19**

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they were heard at length and all the arguments including the effect of the amendment to Section 34 was also raised and only thereafter, the earlier SLPs came to be dismissed. It was submitted that though the dismissal of order dated 19.07.2019 is a non-speaking order, the petitioner had raised all contentious points, now urged, and faced an order of dismissal, and the petitioner cannot be allowed to reagitate the matter by filing a review petition.

15. In *Board of Control for Cricket in India*[14], the Supreme Court held that the Amendment Act, 2015 would apply to Section 34 petitions that are made after 23.10.2015 (the day on which the Amendment Act came into force). In the present case, admittedly, after the arbitral awards are dated 29.03.2016, the applications under Section 34 of the Act were filed before the Judicial Commissioner, Shillong as per the decision in *Board of Control for Cricket in India*[15], the provisions of the Amendment Act would apply.

16. Patent illegality as a ground for setting aside a domestic award was first expounded in the judgment of *Saw Pipes Ltd.*[16] where this Court was dealing with a domestic award. This Court gave a wider interpretation to the 'public policy of India' in Section

14 *Board of Control for Cricket in India v. Kochi Cricket Private Limited and Others* **(2018) 6 SCC 287**
15 *Board of Control for Cricket in India v. Kochi Cricket Private Limited and Others* **(2018) 6 SCC 287**
16 *Oil & Natural Gas Corporation Ltd. v. Saw Pipes Ltd.* **(2003) 5 SCC 705**

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34(2)(b)(ii) in Part I of the 1996 Act. The Court held that an award would be "patently illegal", if it is contrary to the substantive provisions of law; or, provisions of the 1996 Act; or, terms of the contract.

17. In the subsequent judgment of *Associate Builders*[17], this Court discussed the ground of patent illegality as a ground under public policy for setting aside a domestic award. The relevant extract of the judgment in *Associate Builders* case (supra) reads as follows:-

> "40. **Patent Illegality**
>
> We now come to the fourth head of public policy namely, patent illegality. It must be remembered that under the explanation to Section 34(2)(b), an award is said to be in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption. This ground is perhaps the earliest ground on which courts in England set aside awards under English law. Added to this ground (in 1802) is the ground that an arbitral award would be set aside if there were an error of law by the arbitrator…."
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> "42. In the 1996 Act, this principle is substituted by the 'patent illegality' principle which, in turn, contains three sub heads-
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> 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 a 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 in India,-
> >
> > > (a) in an arbitration other than an international commercial arbitration, the arbitral tribunal shall decide the dispute submitted to arbitration in accordance with the substantive law for the time being in force in India;
>
> 42.2 (b) a contravention of the Arbitration Act itself would be regarded as a patent illegality-for example if an arbitrator gives no

17 *Associate Builders v. Delhi Development Authority* **(2015) 3 SCC 49**, paras 40 to 45.

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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 sub-head 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.-

(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." (emphasis supplied)

18. The Law Commission in its 246th Report[18] recommended the insertion of the ground of 'patent illegality' for setting aside a domestic award by the insertion of clause (2A) in Section 34 of the Act. The relevant extract from the Report of the Law Commission is extracted herein below:-

"It is for this reason that the Commission has recommended the addition of section 34 (2A) to deal with purely domestic awards, which may also be set aside by the Court if the Court finds that such award is vitiated by "patent illegality appearing on the face of the award." In order to provide a balance and to avoid excessive intervention, it is clarified in the proposed proviso to the proposed section 34 (2A) that such "an award shall not be set aside merely on the ground of an erroneous application of the law or by reappreciating evidence." The Commission believes that this will go a long way to assuage the fears of the judiciary as well as the other users of arbitration law who expect, and given the circumstances prevalent in our country, legitimately so, greater redress against purely domestic awards. This would also do away with the unintended consequences of the decision of the Supreme Court in ONGC v. Saw Pipes Ltd, (2003) 5 SCC 705, which, although in the

18 Available at : http://lawcommissionofindia.nic.in/reports/Report246.pdf

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> context of a purely domestic award, had the unfortunate effect of being extended to apply equally to both awards arising out of international commercial arbitrations as well as foreign awards, given the statutory language of the Act. …" (emphasis supplied)

To give effect to the said recommendation, it was suggested that:

> "(iii) After the Explanation in sub-section (2), insert sub-section '(2A) An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the Court if the Court finds that the award is vitiated by patent illegality appearing on the face of the award. Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by re-appreciating evidence.'
>
> [NOTE: The proposed S.34(2A) provides an additional, albeit carefully limited, ground for setting aside an award arising out of a domestic arbitration (and not an international commercial arbitration). The scope of review is based on the patent illegality standard set out by the Supreme Court in ONGC Ltd. v. Saw Pipes Ltd., (2003) 5 SCC 705. The proviso creates exceptions for erroneous application of the law and re-appreciation of evidence, which cannot be the basis for setting aside awards.]" (emphasis supplied)

19. Pursuant to the recommendations of the Law Commission, the 1996 Act was amended by Act 3 of 2016, which came into force w.e.f. 23.10.2015. The ground of "patent illegality" for setting aside a domestic award has been given statutory force in Section 34(2A) of the 1996 Act. The ground of "patent illegality" cannot be invoked in international commercial arbitrations seated in India. Even in the case of a foreign award under the New York Convention, the ground of "patent illegality" cannot be raised as a ground to resist enforcement, since this ground is absent in Section 48 of the 1996

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Act. The newly inserted sub-section (2A) in Section 34, reads as follows:-

> "(2A) An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the Court, if the Court finds that the award is vitiated by patent illegality appearing on the face of the award :
>
> Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by reappreciation of evidence."

20. In *Ssangyong Engineering and Construction Company Limited*[19], this Court was considering a challenge to an award passed in an international commercial arbitration, between the Appellant – company a foreign entity registered under the laws of Korea, and the Respondent, a Government of India undertaking. In paragraph (19) of the judgment, this Court noted that the expansive interpretation given to "public policy of India" in the *Saw Pipes* (supra) and *Western Geco International Limited*[20] cases, which had been done away with, and a new ground of "patent illegality" was introduced which would apply to applications under Section 34 made on or after 23.10.2015. In paragraphs (36) and (37) of the judgment, this Court held that insofar as domestic awards are concerned, the additional ground of patent illegality was now available under sub-section (2A) to Section 34. However, re-

19 *Ssangyong Engineering and Construction Company Limited v. National Highways Authority of India (NHAI)* **(2019) 15 SCC 131**

20 *Oil & Natural Gas Corporation Ltd. v. Western Geco International Limited* **(2014) 9 SCC 263**

WWW.LIVELAW.IN

appreciation of evidence was not permitted under the ground of "patent illegality" appearing on the face of the award.

21. In paragraphs (39) and (40) of *Ssangyong Engineering* (supra), the Court reiterated paragraphs (42.2) and (42.3) of *Associate Builders* (supra) wherein, it was held that the construction of the terms of a contract is primarily for an arbitrator to decide, unless the arbitrator construes a contract in a manner which no fair minded or reasonable person would take i.e. if the view taken by the arbitrator is not even a possible view to take. In paragraphs (39) and (40), the Supreme Court held as under:-

> "**39**. To elucidate, para 42.1 of *Associate Builders v. Delhi Development Authority* (2015) 3 SCC 49, namely, a mere contravention of the substantive law of India, by itself, is no longer a ground available to set aside an arbitral award. Para 42.2 of *Associate Builders v. Delhi Development Authority* (2015) 3 SCC 49, however, would remain, for if an arbitrator gives no reasons for an award and contravenes Section 31(3) of the 1996 Act, that would certainly amount to a patent illegality on the face of the award.
>
> **40**. The change made in Section 28(3) by the Amendment Act really follows what is stated in paras 42.3 to 45 in *Associate Builders v. Delhi Development Authority* (2015) 3 SCC 49**,** namely, that the construction of the terms of a contract is primarily for an arbitrator to decide, unless the arbitrator construes the contract in a manner that no fair-minded or reasonable person would; in short, that the arbitrator's view is not even a possible view to take. Also, if the arbitrator wanders outside the contract and deals with matters not allotted to him, he commits an error of jurisdiction. This ground of challenge will now fall within the new ground added under Section 34(2-A)." (emphasis supplied)

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22. The present case arises out of a domestic award between two Indian entities. The ground of patent illegality is a ground available under the statute for setting aside a domestic award, if the decision of the arbitrator is found to be perverse, or, so irrational that no reasonable person would have arrived at the same; or, the construction of the contract is such that no fair or reasonable person would take; or, that the view of the arbitrator is not even a possible view.

23. In the present case, the High Court has referred to the judgment in *Associated Builders* (supra) at length in paragraph (42) of its judgment dated 26.02.2019 and arrived at the correct conclusion that an arbitral award can be set aside under Section 34 if it is patently illegal or perverse. This finding of the High Court is in conformity with paragraph (40) of the judgment of this Court in *Ssangyong Engineering* (supra).

24. In the present case, the High Court in paragraph (51) has held that no reasonable person could have arrived at a different conclusion while interpreting Clauses 2.7 and 3.4 of the BoQ and Clauses 32(ii)(a) and 33(iii) of the Conditions of Contract. Any other interpretation of the above clauses would definitely be irrational and in defiance of all logic. The relevant extract reads:-

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> "**51**. …Clause 33(iii) specifically provides that "if the rates for such items of work cannot be determined in the manner as specified in Clause 33(ii), the rates for such items to be executed shall be determined by the Engineer-in-Charge on the basis of actual and analysed cost taking the following into consideration the rates for such items of works as are required to be executed due to deviations as stated in sub-clause shall be payable in the manner as stated hereunder…..". We are of the firm view that this is the only possible interpretation of Clauses 2.7 and 3.4 of the BoQ and Clauses 32(ii)(a) and 33(iii) of the Conditions of Contract. No reasonable person would arrive at a different conclusion while interpreting Clauses 2.7 and 3.4 of the BoQ and Clauses 32(ii)(a) and 33(iii) of the Conditions of Contract. Any other interpretation of the above clauses would definitely be irrational and defiance of all logic." (emphasis supplied)

25. The High Court in paragraph (52) came to the finding that the findings in the award suffer from the vice of irrationality and perversity, and held as follows:-

> "**52**. The Arbitral Awards and the findings of the learned Arbitrator suffer from the vice of perversity. The learned Arbitrator has taken into account various factors irrelevant in coming to the decision and has ignored vital clauses of the tender documents like Clause 2 and various Sub-clauses i.e. Sub-clauses 2.1 to 2.8.7 under Clause 2 and Clause 3 and various Sub-Clauses i.e. Sub-clauses 3.1 to 3.7 under Clause 3 of the BoQ, Clause 2 and various Sub-clauses i.e. Sub-clause 2.1 to 2.17.7 under Clause 2 and Clause 3 and various Sub-clauses i.e. Sub-clause 3.1 to 3.10.5 under Clause 3 of "Particular Technical Specifications", Vol. 2, Part II. The learned Arbitrator has taken into consideration an irrelevant fact that while making provisional payment, the initial lead of 3.0 km has been deducted and that this shows that Clause 2.7 and 3.4 of the BoQ are applicable. The provisional payment was an interim arrangement and was preceded by meetings dated 07.12.2012 and 08.12.2012 wherein it was specifically agreed between the parties that HoP, NEEPCO would take steps for referring the dispute to arbitration and that till the arbitral award, the payment would be made as per the prevailing provisional rate without any escalation and that final rate payable for transportation of sand and boulder shall be done on implementation of the arbitral award. As such the fact that provisional payment was made by deducting initial lead of 3.0 km was an irrelevant fact for deciding the issue. The findings of the learned Arbitrator having been arrived at by taking into account irrelevant factors and by ignoring vital clauses, the same suffers

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from vice of irrationality and perversity. It must be borne in mind that the Arbitral Awards in question are Declaratory Arbitral Awards and involved interpretation of Clauses 2.7 and 3.4 of the BoQ and Clauses 32(ii)(a) and 33(iii) of the Conditions of Contract and the learned arbitrator was required to interpret the same in accordance with the established rules of interpretation. The findings of the learned Additional Deputy Commissioner (Judicial), Shillong while upholding the arbitral awards of the learned Arbitrator also suffer from the similar vice. We are, therefore, of the considered view that that the common order dated 27.04.2018 passed by the learned Additional Deputy Commissioner (Judicial), Shillong in Arbitration Case No. 5 (T) 2016, Arbitration Case No. 6 (T) 2016 and Arbitration Case No. 7 (T) 2016 as well as the 3 (three) Arbitral Awards dated 29.03.2016 passed by the learned Arbitrator warrant interference in these appeals under Sec. 37 of the Arbitration and Conciliation Act, 1996.

53. There are additional reasons for interfering with order dated 27.04.2018 passed by the learned Additional Deputy Commissioner (Judicial), Shillong and the Arbitral Awards dated 29.03.2016 passed by the learned Arbitrator. As the learned counsel for the appellant has submitted, the potential effect of the Arbitral Award on public exchequer is that the appellant, which is a public sector undertaking, will have to pay a sum of about Rs. 3.56 Lakh for every truckload of 10 cubic metre of sand or boulder (travelling for 100 km) and the total potential effect would be about Rs. 1,000 Crore. We are of the considered view that payment of Rs. 3.56 Lakh per truck (10 Cubic Metre) of sand or boulder (100 km distance) is definitely a case of unjust enrichment which is contrary to the Fundamental Policy of Indian Law. Unjust enrichment being contrary to the Fundamental Policy of Indian Law is a ground for interference with an Arbitral Award under Sec. 34(2) of the Act. The Bombay High Court in Angerlehner Structural and Civil Engineering co. v. Municipal Corporation of Greater Mumbai has recognized unjust enrichment of a party at the cost of public exchequer as being against the fundamental policy of Indian law. The Bombay High Court has held:

> "If the argument of the Contractors is accepted, it lead to them blatantly enriching themselves over and above what they are entitled. Such completely unjust enrichment, that too at the cost of public funds, is abhorrent under the fundamental policy of Indian Law. The award in AJECT, which permits such blatant enrichment is therefore is also vitiated on the ground that it is against the fundamental policy of Indian Law."

We are also of the considered view that the Arbitral Award which would potentially result in unjust enrichment of the respondent to the extent of about Rs. 1,000 Crores is against the fundamental policy of Indian law and, therefore, warrant interference on this count as well.

WWW.LIVELAW.IN

> Though this court is not sitting in appeal over the award of the arbitral tribunal, the presence of grounds under Section 34[2] of the Act and the satisfaction arrived at by this Court in this regard, warrants interference more so, as the Arbitral Awards in question are Declaratory Arbitral Awards and involved interpretation of Clauses 2.7 and 3.4 of the BoQ and Clauses 32(ii)(a) and 33(iii) of the Conditions of Contract and the learned arbitrator was required to interpret the same in accordance with the established rules of interpretation and in line with the fundamental policy of Indian law." (emphasis supplied)

26. Even though the High Court in paragraph (44) of the judgment referred to various judgments, including *Western Geco* (supra) [which is now no longer good law], the case has been decided on the ground that the arbitral award is a perverse award and on a holistic reading of all the terms and conditions of the contract, the view taken by the arbitrator is not even a possible view. The High Court has rightly followed the test set out in paragraph (42.3) of *Associate Builders* (supra), which was reiterated in paragraph (40) of the *Ssangyong Engineering* judgment (supra).

27. In our view, while dealing with the appeal under Section 37 of the Act, the High Court has considered the matter at length, and held that while interpreting the terms of the contract, no reasonable person could have arrived at a different conclusion and that the awards passed by the arbitrator suffer from the vice of irrationality and perversity.

WWW.LIVELAW.IN

28. The learned Solicitor General Mr. Tushar Mehta and Mr. H. Ahmadi, Senior Advocate for the respondent, submitted that all these contentions were raised in the earlier round when challenge to the substantive Judgment dated 26.02.2019 was made. The said challenge was repelled by this Court *vide* Order dated 19.07.2019 by dismissal of the earlier SLPs. It is now not open to re-open the matter by filing a review petition on the same grounds, which have been rightly dismissed by the High Court. The Petitioner has failed to make out any error on the face of the judgment dated 26.02.2019. The High Court by the impugned order dated 10.10.2019 rightly dismissed the review petitions and we do not find any ground warranting interference with the impugned order.

29. In the result, all the special leave petitions are dismissed with no order as to costs.

.....J.
[R. BANUMATHI]

.....J.
[INDU MALHOTRA]

.....J.
[ANIRUDDHA BOSE]

New Delhi;
May 22, 2020.