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* IN THE HIGH COURT OF DELHI AT NEW DELHI

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*Judgment reserved on: 12.05.2026**Judgment pronounced on: 06.07.2026*

+ O.M.P. (COMM) 124/2024 & I.A. 5694/2024 (Stay)

JPC INFRASTRUCTURE AND CONSTRUCTIONS
PRIVATE LIMITEDPetitionerThrough: Ms. Manini Brar and Ms.
Muskaan Chawla, Advocates.

versus

ALSTOM TRANSPORT INDIA LIMITEDRespondent

Through: Mr. Dinesh Pardasani, Mr.
Aishwary Kumar Tiwari, Mr.
Siddharth Chechani and Mr.
Amrit Singh, Advocates.

CORAM:

HON'BLE MR. JUSTICE HARISH VAIDYANATHAN
SHANKAR**J U D G M E N T****HARISH VAIDYANATHAN SHANKAR, J.**

1. The present Petition, filed by **JPC Infrastructure and Constructions Private Limited**¹ under Section 34 of the **Arbitration and Conciliation Act, 1996**², seeks setting aside of the **Arbitral Award dated 15.11.2023**³, passed in favour of **Alstom Transport India Ltd.**⁴ by a **Three-member Arbitral Tribunal**, comprising **Justice D.K. Jain (Retd.)** as the **Presiding Arbitrator**, Justice

¹ Petitioner² A&C Act³ Impugned Award⁴ Respondent



Dipak Misra (Retd.) and Justice J.D. Kapoor (Retd.)⁵, in the matter titled “*JPC Infrastructure & Constructions Pvt. Ltd. And Alstom Transport India Ltd. (Formerly known as Alstom Systems India Pvt. Ltd.)*”.

2. During the course of hearing before this Court, learned counsel appearing on behalf of the Petitioner expressly confined the challenge to the findings returned by the learned Tribunal in respect of Claim Nos. 2, 3, 13 and 16. The findings returned by the learned Tribunal on all other claims and counterclaims were not assailed and have accordingly attained finality.

FACTUAL MATRIX:

3. The present dispute traces its origin to the Eastern Dedicated Freight Corridor Project being executed by the **Dedicated Freight Corridor Corporation of India Limited**⁶, a Government of India undertaking, for development of freight railway infrastructure between Bhaupur and Khurja.

4. Pursuant to a Letter of Acceptance dated 21.07.2015, DFCCIL awarded to the Respondent the principal contract for design, construction, supply, installation, testing and commissioning of 2 x 25 KV AC electrification, signalling, telecommunication and allied works forming part of the said project. The works under the principal contract were divided into various segments or “Slices”, one of which was Slice-103.

5. Even prior to the award of the principal contract, the Respondent had invited quotations from prospective subcontractors

⁵ learned Tribunal

⁶ DFCCIL



for execution of portions of the works contemplated under Slice-103. The Petitioner submitted its commercial proposal on 31.03.2015, which was subsequently revised on 26.11.2015. The said proposal was accepted by the Respondent and culminated in the issuance of a Letter of Acceptance dated 04.12.2015 in favour of the Petitioner. Thereafter, the parties executed a **Back-to-Back Sub-Contract Agreement dated 15.12.2015**⁷.

6. Under the Contract, the Petitioner was entrusted with the execution of civil, electrical and associated works relating to fifty-five structures situated at Daudkhan, Hathras and Khurja. The scope of work broadly included preparation of designs and drawings, geotechnical investigations, topographical surveys, construction of buildings and structures, electrical works and maintenance obligations.

7. The Contract was executed on a lump-sum basis for a consideration of Rs. 34,09,58,091/- and contemplated completion of the works within 675 days reckoned from 03.08.2015, being the commencement date under the principal contract.

8. The Petitioner's case throughout has been that the execution of the Contract was dependent upon the Respondent first making available unhindered and encumbrance-free access to the project sites, furnishing finalized project particulars, identifying locations of structures and enabling the Petitioner to undertake the preliminary investigations and surveys required for preparation of designs. According to the Petitioner, these foundational requirements were not fulfilled in a timely manner, thereby preventing it from effectively carrying out geotechnical investigations, topographical surveys and

⁷ Contract



design activities contemplated under the Contract.

9. The Respondent, on the other hand, maintained that all necessary information and access required for performance of the Contract were duly made available and that the delays and deficiencies in execution were attributable solely to the Petitioner.

10. As the project progressed, disputes arose between the parties regarding responsibility for delays, progress of the works, availability of sites, preparation and approval of drawings, execution of surveys and investigations, entitlement to payments, and the consequences of the Petitioner's alleged non-performance. Extensive correspondence was exchanged between the parties, each attributing responsibility for the delay and disruption of the project to the other.

11. The relationship between the parties deteriorated further when portions of the work originally entrusted to the Petitioner came to be descoped and the Contract ultimately stood terminated by the Respondent.

12. While the Petitioner asserted that the termination and descoping were wrongful and were themselves a consequence of the Respondent's inability to fulfil its reciprocal obligations under the Contract, the Respondent maintained that the same were necessitated by the Petitioner's continuing defaults and inability to execute the works entrusted to it.

13. The disputes between the parties eventually culminated in arbitral proceedings being commenced under Clause 29.3 of the Contract. In accordance with the arbitration agreement, the disputes were referred to arbitration under the **ICC Rules of Arbitration**,



2021⁸ before a three-member Arbitral Tribunal.

14. Before the learned Tribunal, the Petitioner preferred several claims aggregating substantial amounts under diverse heads, including reimbursement of expenditure allegedly incurred towards geotechnical investigations, topographical surveys, consultancy charges, overhead costs, loss of profit and other contractual entitlements. The Respondent contested the claims and, in turn, raised multiple counterclaims arising out of the alleged breaches committed by the Petitioner.

15. In support of its case, the Petitioner relied, *inter alia*, upon a **Letter dated 07.06.2017 addressed by the Respondent to DFCCIL⁹**. The Petitioner contended that the said communication contained admissions by the Respondent itself acknowledging that geotechnical investigations, topographical surveys and other preliminary activities could not commence in the absence of encumbrance-free access to the sites and availability of necessary project particulars.

16. According to the Petitioner, the contents of the Rejected Letter substantiated its defence that the delays and non-performance alleged against it were attributable to circumstances for which the Respondent was responsible.

17. The Respondent objected to the reliance placed upon the said communication on the ground that it formed part of disputes and arbitral proceedings between the Respondent and DFCCIL arising out of the principal contract. It was contended that the document was confidential in nature and could neither be relied upon nor introduced

⁸ ICC Rules

⁹ Rejected Letter



in evidence in the arbitration between the present parties.

18. The learned Tribunal considered the rival contentions concerning the admissibility of the aforesaid communication and, by its findings contained in Paragraphs 16.1 to 16.12 of the Impugned Award, concluded that the document could not be relied upon while adjudicating the disputes between the parties. Proceeding on that basis, the learned Tribunal evaluated the claims on the material otherwise available on record.

19. Upon consideration of the pleadings, documentary evidence, oral testimony and submissions advanced by the parties, the learned Tribunal rendered the Impugned Award dated 15.11.2023. While certain claims of the Petitioner were allowed in part and all counterclaims of the Respondent came to be rejected, the learned Tribunal rejected, *inter alia*, Claim Nos. 2, 3, 13 and 16 relating respectively to geotechnical investigations, topographical surveys, overhead costs and loss of profit. Insofar as Claim Nos. 13 and 16 are concerned, Justice J.D. Kapoor (Retd.) rendered a separate dissenting opinion.

20. In the present proceedings under Section 34 of the A&C Act, the challenge initially laid to several portions of the Impugned Award stands substantially narrowed. As noted earlier, during the course of hearing, learned counsel for the Petitioner confined the challenge exclusively to the findings returned in respect of Claim Nos. 2, 3, 13 and 16 and, more particularly, to the learned Tribunal's decision declining to admit and rely upon the Rejected Letter.

21. According to the Petitioner, the exclusion of the said document vitiated the adjudication of the aforesaid claims. The Respondent,



however, supports the reasoning and conclusions contained in the Impugned Award and submits that no ground for interference within the limited scope of Section 34 of the A&C Act is made out.

22. It is in the aforesaid factual backdrop that the rival submissions fall for consideration.

CONTENTIONS ON BEHALF OF THE PETITIONER:

23. Learned counsel appearing on behalf of the Petitioner would, at the outset, fairly submit that the present challenge is confined to the findings returned by the learned Tribunal in relation to Claim Nos. 2, 3, 13 and 16. According to the learned counsel, the rejection of the aforesaid claims is fundamentally traceable to the learned Tribunal's decision to exclude from consideration a communication dated 07.06.2017, *i.e.*, the Rejected Letter, addressed by the Respondent to DFCCIL.

24. Learned counsel would submit that the Petitioner's case before the learned Tribunal was that various contractual activities, including Geotechnical Investigations and Topographical Surveys, could not be effectively undertaken owing to the non-availability of unhindered and encumbrance-free access to the project site. In support of the said case, reliance would be placed upon the Rejected Letter, wherein the Respondent itself allegedly acknowledged before DFCCIL that the requisite surveys could not commence until free access to the site was made available and that certain essential project particulars had not been furnished.

25. According to the learned counsel for the Petitioner, the contents of the Rejected Letter constituted admissions directly supporting the Petitioner's case that the delays and deficiencies attributed to it were



occasioned by prevailing site conditions and circumstances beyond its control. It would therefore be contended that the document went to the root of the controversy concerning responsibility for delay, performance of contractual obligations and the consequent rejection of the claims in question.

26. Learned counsel would submit that notwithstanding the materiality of the said document, the learned Tribunal declined to admit or rely upon the same on the ground that it formed part of arbitral proceedings between the Respondent and DFCCIL and was therefore protected by the confidentiality obligation embodied in Section 42A of the A&C Act.

27. Assailing the aforesaid approach, learned counsel for the Petitioner would submit that the learned Tribunal committed a manifest error in treating the Rejected Letter as confidential and consequently inadmissible. It would be contended that the document had already formed part of proceedings before this Court and had thereby entered the public domain. According to the learned counsel, once a document ceases to retain its confidential character, the protection contemplated under Section 42A of the A&C Act cannot continue to operate in respect thereof.

28. Learned counsel would submit that the confidentiality contemplated under Section 42A of the A&C Act operates only in relation to material which continues to retain the character of confidentiality. The learned Tribunal, according to the learned counsel, failed to examine whether confidentiality in fact subsisted in relation to the Rejected Letter and instead proceeded on the assumption that confidentiality attached to the document merely



because it originated from another arbitral proceeding.

29. Learned counsel would further contend that the arbitration between the parties was conducted under the **ICC Rules of Arbitration, 2021**¹⁰ and that the learned Tribunal failed to appreciate the contractual framework governing confidentiality between the parties. Particular reliance would be placed upon Article 22(3) of the ICC Rules, which merely empowers an arbitral tribunal, upon request, to issue appropriate directions concerning confidentiality and protection of confidential information.

30. Learned counsel for the Petitioner would contend that Article 22(3) does not impose an absolute prohibition against the use or consideration of documents emanating from arbitral proceedings. The confidentiality regime contemplated under the ICC Rules is discretionary and procedural in nature and cannot be construed as creating a blanket embargo against consideration of otherwise relevant and material evidence.

31. Learned counsel would therefore submit that neither the ICC Rules nor the factual circumstances of the present case justified the learned Tribunal in excluding the Rejected Letter altogether. At the highest, the learned Tribunal could have adopted appropriate safeguards while considering the document. The learned Tribunal, however, erroneously proceeded on the footing that confidentiality itself rendered the document incapable of consideration.

32. Proceeding further, learned counsel would submit that even assuming that the Rejected Letter remained subject to confidentiality obligations, Section 42A of the A&C Act merely imposes an

¹⁰ ICC Rules



obligation of confidentiality and does not prescribe inadmissibility as a consequence of any alleged breach thereof. It would be contended that the provision does not create an exclusionary rule of evidence.

33. Learned counsel would submit that the learned Tribunal effectively read into Section 42A of the A&C Act a consequence which the legislature has consciously not enacted. Learned counsel for the Petitioner would submit that a document otherwise relevant and material does not become inadmissible merely because a confidentiality obligation is asserted in respect thereof.

34. In support of the aforesaid submission, learned counsel would place reliance upon the decision of the Bombay High Court in ***Global Aviation Services Private Limited v. Airport Authority of India***¹¹ to contend that where a statute imposes an obligation but does not prescribe any consequence for non-compliance, a Court or Tribunal cannot create a disqualification or disability not contemplated by the legislative scheme. Particular reliance would be placed upon Paragraph Nos. 115, 118 and 121 thereof.

35. Learned counsel would further place reliance upon paragraphs 84 to 86 of the Constitution Bench decision in ***Interplay Between Arbitration Agreements under Arbitration Act, 1996 and Stamp Act, 1899, In re***¹². It would be submitted that the Supreme Court has held that the operation of a non-obstante clause must be confined to the legislative purpose underlying the provision in which it appears and cannot be extended beyond the field intended by Parliament.

36. According to the learned counsel, the non-obstante clause contained in Section 42A of the A&C Act is intended only to secure

¹¹ 2018 SCC OnLine Bom 233

¹² (2024) 6 SCC 1



confidentiality in arbitral proceedings. The provision cannot be expanded so as to create a substantive rule rendering documents inadmissible in evidence when the statute itself contains no such stipulation.

37. Learned counsel would additionally submit that the learned Tribunal erred in extending the operation of Section 42A of the A&C Act to legal counsels and in concluding that the manner in which the document came into the possession of the Petitioner justified its exclusion from consideration. According to the learned counsel, such consequences do not flow from the text of Section 42A of the A&C Act.

38. Proceeding on the aforesaid basis, learned counsel would submit that the exclusion of the Rejected Letter materially affected the adjudication of Claim Nos. 2 and 3 relating to Geotechnical Investigations and Topographical Surveys. It would be contended that had the contents of the said communication been considered, the learned Tribunal could not have attributed responsibility for failure to undertake the said activities to the Petitioner.

39. Learned counsel would further submit that the findings recorded in relation to Claim Nos. 13 and 16 concerning overhead costs and loss of profit are likewise vitiated. According to the learned counsel, those findings are substantially founded upon conclusions regarding the Petitioner's alleged defaults and breaches, which stand materially undermined by the contents of the Rejected Letter.

40. It would accordingly be contended that exclusion of the Rejected Letter resulted in the learned Tribunal disregarding material evidence having a direct bearing on the disputes between the parties.



The Award, according to the learned counsel, therefore suffers from patent illegality appearing on the face of the Award and is further liable to be interfered with under Section 34 (2A) of the A&C Act.

41. Learned counsel would therefore pray that the impugned Award be set aside insofar as it rejects Claim Nos. 2, 3, 13 and 16.

SUBMISSIONS ON BEHALF OF THE RESPONDENT:

42. **Per contra**, learned counsel appearing on behalf of the Respondent would submit that the present Petition is entirely misconceived and seeks to challenge a reasoned arbitral award by inviting this Court to undertake a re-appreciation of matters which were fully considered and adjudicated upon by the learned Tribunal.

43. Learned counsel would submit that the challenge raised by the Petitioner proceeds upon an incorrect premise that the learned Tribunal ignored or refused to consider the Rejected Letter. According to the learned counsel, the Award itself demonstrates that the learned Tribunal specifically examined the said document, considered the rival submissions advanced by the parties regarding its provenance, admissibility and confidentiality, and thereafter rendered a reasoned determination declining to rely upon the same.

44. It would therefore be contended that this is not a case where material evidence was overlooked or excluded without consideration. On the contrary, the issue formed the subject matter of detailed adjudication and the learned Tribunal consciously concluded that the document ought not to be relied upon while deciding the disputes between the parties.

45. Learned counsel would further submit that the Rejected Letter admittedly originated from arbitral proceedings between the



Respondent and DFCCIL. The learned Tribunal examined the circumstances in which the document came into the possession of the Petitioner and ultimately concluded that the same formed part of confidential arbitral proceedings governed by the confidentiality obligations applicable thereto.

46. According to the learned counsel, the finding returned by the learned Tribunal on the issue of confidentiality is a finding rendered within its jurisdiction after appreciation of the material placed before it. Merely because another view may also be possible would not furnish a ground for interference under Section 34 of the A&C Act.

47. Learned counsel would further submit that the Petitioner cannot derive any assistance from the fact that the arbitration between the parties was conducted under the ICC Rules. It would be contended that Article 22(3) of the ICC Rules merely enables the arbitral tribunal to adopt measures concerning confidentiality and protection of confidential information. The said provision cannot dilute or override a statutory mandate contained in the A&C Act.

48. According to the learned counsel, once Parliament has enacted Section 42A in the A&C Act and imposed a statutory obligation of confidentiality in relation to arbitral proceedings, the same cannot be curtailed or diluted by reference to institutional rules. It would be contended that institutional rules operate within the framework of the governing statute and cannot prevail over an express legislative command.

49. Responding to the contention that the Rejected Letter had entered the public domain, learned counsel would submit that the learned Tribunal considered and rejected the said contention. It would



be contended that mere production of a document in separate judicial proceedings does not automatically establish loss of confidentiality, particularly when the document originates from arbitral proceedings protected by statutory confidentiality obligations.

50. Learned counsel would further submit that the Petitioner is effectively inviting this Court to re-examine the correctness of the factual conclusions drawn by the learned Tribunal regarding confidentiality, provenance and admissibility of the document. Such an exercise, according to the learned counsel, lies wholly beyond the limited scope of jurisdiction under Section 34 of the A&C Act.

51. Without prejudice to the aforesaid submissions, learned counsel would contend that the entire challenge raised by the Petitioner proceeds on an erroneous assumption that rejection of the Rejected Letter automatically vitiates the findings returned in relation to Claim Nos. 2, 3, 13 and 16.

52. It would be submitted that the learned Tribunal rejected the aforesaid claims on the basis of detailed and independent findings arising from the evidence on record. The Award records separate reasons in relation to each of the claims and does not rest solely upon the exclusion of the Rejected Letter.

53. Learned counsel would submit that significantly, the Petitioner has not assailed the independent findings recorded by the learned Tribunal while rejecting Claim Nos. 2, 3, 13 and 16. No challenge has been mounted to the Tribunal's appreciation of the documentary evidence, findings on proof of expenditure, findings regarding performance of work, findings concerning entitlement to overheads or findings relating to loss of profit.



54. According to the learned counsel, the Petition proceeds entirely on the footing that once the Rejected Letter is taken into account, the conclusions reached by the learned Tribunal must necessarily fail. Such a contention, it would be submitted, overlooks the fact that the Award contains several independent and self-sustaining reasons supporting rejection of the claims.

55. It would therefore be contended that even assuming, without admitting, that the learned Tribunal could have adopted a different view regarding the Rejected Letter, the Petitioner has failed to demonstrate how the independent findings recorded against Claim Nos. 2, 3, 13 and 16 are liable to be interfered with under Section 34 of the A&C Act.

56. Learned counsel would submit that the Petition discloses no patent illegality or violation of the public policy of India. At its highest, the Petitioner seeks substitution of the Tribunal's view with another possible view on a matter squarely falling within the Tribunal's domain. Learned counsel would accordingly pray that the present Petition be dismissed.

ANALYSIS:

57. This Court has heard the learned counsel for the parties at length and, with their able assistance, perused the material available on record and the Judicial precedents relied upon.

58. At the outset, it is apposite to note that this Court is conscious of the limited scope of its jurisdiction while examining an objection petition under Section 34 of the A&C Act. The contours of judicial intervention in such proceedings have been authoritatively delineated and settled by a consistent and evolving line of precedents of the



Hon'ble Supreme Court.

59. In this regard, a three-Judge Bench of the Hon'ble Supreme Court, after an exhaustive consideration of a catena of earlier decisions, in **OPG Power Generation (P) Ltd. v. Enxio Power Cooling Solutions (India) (P) Ltd.**¹³, while dealing with the grounds of conflict with the public policy of India and patent illegality, grounds which have also been urged in the present case, made certain pertinent observations, which are reproduced hereunder:

“Relevant legal principles governing a challenge to an arbitral award

30. Before we delve into the issue/sub-issues culled out above, it would be useful to have a look at the relevant legal principles governing a challenge to an arbitral award. Recourse to a court against an arbitral award may be made through an application for setting aside such award in accordance with sub-sections (2), (2-A) and (3) of Section 34 of the 1996 Act. Sub-section (2) of Section 34 has two clauses, (a) and (b). Clause (a) has five sub-clauses which are not relevant to the issues raised before us. Insofar as clause (b) is concerned, it has two sub-clauses, namely, (i) and (ii). Sub-clause (i) of clause (b) is not relevant to the controversy in hand. Sub-clause (ii) of clause (b) provides that if the Court finds that the arbitral award is in conflict with the public policy of India, it may set aside the award.

Public policy

31. “Public policy” is a concept not statutorily defined, though it has been used in statutes, rules, notification, etc. since long, and is also a part of common law. Section 23 of the Contract Act, 1872 uses the expression by stating that the consideration or object of an agreement is lawful, unless, inter alia, opposed to public policy. That is, a contract which is opposed to public policy is void.

35. In ***Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCC 644***, a three-Judge Bench of this Court observed that the doctrine of public policy is somewhat open—textured and flexible. By citing earlier decisions, it was observed that there are two conflicting positions which are referred to as the “narrow view” and the “broad view”. According to the narrow view, courts cannot create new heads of public policy whereas

¹³ (2025) 2 SCC 417



the broad view countenances judicial law making in these areas. In the field of private international law, it was pointed out, courts refuse to apply a rule of foreign law or recognise a foreign judgment or a foreign arbitral award if it is found that the same is contrary to the public policy of the country in which it is sought to be invoked or enforced. However, it was clarified, a distinction is to be drawn while applying the rule of public policy between a matter governed by domestic law and a matter involving conflict of laws. It was observed that the application of the doctrine of public policy in the field of conflict of laws is more limited than that in the domestic law and the courts are slower to invoke public policy in cases involving a foreign element than when a purely municipal legal issue is involved. It was held that contravention of law alone will not attract the bar of public policy, and something more than contravention of law is required.

37. What is clear from above is that for an award to be against public policy of India a mere infraction of the municipal laws of India is not enough. There must be, inter alia, infraction of fundamental policy of Indian law including a law meant to serve public interest or public good.

40. In *ONGC Ltd. v. Western Geco International Ltd.*, (2014) 9 SCC 263, paras 35, 38 & 39, which also related to the period prior to the 2015 Amendment of Section 34(2)(b)(ii), a three-Judge Bench of this Court, after considering the decision in *ONGC Ltd. v. Saw Pipes Ltd.*, (2003) 5 SCC 705, without exhaustively enumerating the purport of the expression “fundamental policy of Indian law”, observed that it would include all such fundamental principles as providing a basis for administration of justice and enforcement of law in this country. The Court thereafter illustratively referred to three fundamental juristic principles, namely:

(a) that in every determination that affects the rights of a citizen or leads to any civil consequences, the court or authority or quasi-judicial body must adopt a judicial approach, that is, it must act bona fide and deal with the subject in a fair, reasonable and objective manner and not actuated by any extraneous consideration;

(b) that while determining the rights and obligations of parties the court or Tribunal or authority must act in accordance with the principles of natural justice and must apply its mind to the attendant facts and circumstances while taking a view one way or the other; and

(c) that its decision must not be perverse or so irrational that no reasonable person would have arrived at the same.



41. In *Associate Builders v. DDA*, (2015) 3 SCC 49, a two-Judge Bench of this Court, held that *audialterampartem* principle is undoubtedly a fundamental juristic principle in Indian law and is enshrined in Sections 18 and 34(2)(a)(iii) of the 1996 Act. In addition to the earlier recognised principles forming fundamental policy of Indian law, it was held that disregarding:

(a) orders of superior courts in India; and

(b) the binding effect of the judgment of a superior court would also be regarded as being contrary to the fundamental policy of Indian law.

Further, elaborating upon the third juristic principle (i.e. *qua perversity*), as laid down in *ONGC Ltd. v. Western Geco International Ltd.*, (2014) 9 SCC 263, it was observed that where:

(i) a finding is based on no evidence; or

(ii) an Arbitral Tribunal takes into account something irrelevant to the decision which it arrives at; or

(iii) ignores vital evidence in arriving at its decision, such decision would necessarily be perverse [*Associate Builders case*, (2015) 3 SCC 49, para 31].

To this a caveat was added by observing that when a court applies the “public policy test” to an arbitration award, it does not act as a court of appeal and, consequently, errors of fact cannot be corrected; and a possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. It was also observed that an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on that score. Thus, once it is found that the arbitrator's approach is not arbitrary or capricious, it is to be taken as the last word on facts.

The 2015 Amendment in Sections 34 and 48

42. The aforementioned judicial pronouncements were all prior to the 2015 Amendment. Notably, prior to the 2015 Amendment the expression “in contravention with the fundamental policy of Indian law” was not used by the legislature in either Section 34(2)(b)(ii) or Section 48(2)(b). The pre-amended Section 34(2)(b)(ii) and its Explanation read:

44. By the 2015 Amendment, in place of the old Explanation to Section 34(2)(b)(ii), *Explanations 1 and 2* were added to remove any doubt as to when an arbitral award is in conflict with the public policy of India.

45. At this stage, it would be pertinent to note that we are dealing with a case where the application under Section 34 of



the 1996 Act was filed after the 2015 Amendment, therefore the newly substituted/added Explanations would apply [*SsangyongEngg. & Construction Co. Ltd. v. NHAI*, (2019) 15 SCC 131].

46. The 2015 Amendment adds two Explanations to each of the two sections, namely, Section 34(2)(b)(ii) and Section 48(2)(b), in place of the earlier Explanation. The significance of the newly inserted *Explanation 1* in both the sections is two-fold. First, it does away with the use of words : (a) “without prejudice to the generality of sub-clause (ii)” in the opening part of the pre-amended Explanation to Section 34(2)(b)(ii); and (b) “without prejudice to the generality of clause (b) of this section” in the opening part of the pre-amended Explanation to Section 48(2)(b); secondly, it limits the expanse of public policy of India to the three specified categories by using the words “only if”. Whereas, *Explanation 2* lays down the standard for adjudging whether there is a contravention with the fundamental policy of Indian law by providing that a review on merits of the dispute shall not be done. This limits the scope of the enquiry on an application under either Section 34(2)(b)(ii) or Section 48(2)(b) of the 1996 Act.

47. The 2015 Amendment by inserting sub-section (2-A) in Section 34, carves out an additional ground for annulment of an arbitral award arising out of arbitrations other than international commercial arbitrations. Sub-section (2-A) provides that the Court may also set aside an award if that is vitiated by patent illegality appearing on the face of the award. This power of the Court is, however, circumscribed by the proviso, which states that an award shall not be set aside merely on the ground of an erroneous application of the law or by reappreciation of evidence.

48. *Explanation 1* to Section 34(2)(b)(ii), specifies that an arbitral 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.

49. In the instant case, there is no allegation that the making of the award was induced or affected by fraud or corruption, or was in violation of Section 75 or Section 81. Therefore, we shall confine our exercise in assessing as to whether the arbitral award is in contravention with the fundamental policy of Indian law, and/or whether it conflicts with the most basic notions of morality or justice. Additionally, in the light of the provisions of



sub-section (2-A) of Section 34, we shall examine whether there is any patent illegality on the face of the award.

50. Before undertaking the aforesaid exercise, it would be apposite to consider as to how the expressions:

- (a) “in contravention with the fundamental policy of Indian law”;
- (b) “in conflict with the most basic notions of morality or justice”; and
- (c) “patent illegality” have been construed.

In contravention with the fundamental policy of Indian law

51. As discussed above, till the 2015 Amendment the expression “in contravention with the fundamental policy of Indian law” was not found in the 1996 Act. Yet, in *Renusagar Power Co. Ltd. v. General Electric Co.*, 1994 Supp (1) SCC 644, in the context of enforcement of a foreign award, while construing the phrase “contrary to the public policy”, this Court held that for a foreign award to be contrary to public policy mere contravention of law would not be enough rather it should be contrary to:

- (a) the fundamental policy of Indian law; and/or
- (b) the interest of India; and/or
- (c) justice or morality.

55. The legal position which emerges from the aforesaid discussion is that after “the 2015 Amendments” in Section 34(2)(b)(ii) and Section 48(2)(b) of the 1996 Act, the phrase “in conflict with the public policy of India” must be accorded a restricted meaning in terms of *Explanation 1*. The expression “in contravention with the fundamental policy of Indian law” by use of the word “fundamental” before the phrase “policy of Indian law” makes the expression narrower in its application than the phrase “in contravention with the policy of Indian law”, which means mere contravention of law is not enough to make an award vulnerable. To bring the contravention within the fold of fundamental policy of Indian law, the award must contravene all or any of such fundamental principles that provide a basis for administration of justice and enforcement of law in this country.

56. Without intending to exhaustively enumerate instances of such contravention, by way of illustration, it could be said that:

- (a) violation of the principles of natural justice;
- (b) disregarding orders of superior courts in India or the binding effect of the judgment of a superior court; and
- (c) violating law of India linked to public good or public interest, are considered contravention of the fundamental policy of Indian law.

However, while assessing whether there has been a contravention of the fundamental policy of Indian law, the



extent of judicial scrutiny must not exceed the limit as set out in *Explanation 2* to Section 34(2)(b)(ii).

Patent illegality

65. Sub-section (2-A) of Section 34 of the 1996 Act, which was inserted by the 2015 Amendment, provides that an arbitral award not arising out of international commercial arbitrations, may also be set aside by the Court, if the Court finds that the award is visited by patent illegality appearing on the face of the award. The proviso to sub-section (2-A) states that an award shall not be set aside merely on the ground of an erroneous application of the law or by reappraisal of evidence.

66. In *ONGC Ltd. v. Saw Pipes Ltd.*, (2003) 5 SCC 705, while dealing with the phrase “public policy of India” as used in Section 34, this Court took the view that the concept of public policy connotes some matter which concerns public good and public interest. If the award, on the face of it, patently violates statutory provisions, it cannot be said to be in public interest. Thus, an award could also be set aside if it is patently illegal. It was, however, clarified that illegality must go to the root of the matter and if the illegality is of trivial nature, it cannot be held that award is against public policy.

67. In *Associate Builders v. DDA*, (2015) 3 SCC 49, this Court held that an award would be patently illegal, if it is contrary to:

- (a) substantive provisions of law of India;
- (b) provisions of the 1996 Act; and
- (c) terms of the contract [See also three-Judge Bench decision of this Court in *State of Chhattisgarh v. SAL Udyog (P) Ltd.*, (2022) 2 SCC 275].

The Court clarified that if an award is contrary to the substantive provisions of law of India, in effect, it is in contravention of Section 28(1)(a) of the 1996 Act. Similarly, violating terms of the contract, in effect, is in contravention of Section 28(3) of the 1996 Act.

68. In *SsangyongEngg. & Construction Co. Ltd. v. NHAI*, (2019) 15 SCC 131 this Court specifically dealt with the 2015 Amendment which inserted sub-section (2-A) in Section 34 of the 1996 Act. It was held that “patent illegality appearing on the face of the award” refers to such illegality as goes to the root of matter, but which does not amount to mere erroneous application of law. It was also clarified that what is not subsumed within “the fundamental policy of Indian law”, namely, the contravention of a statute not linked to “public policy” or “public interest”, cannot be brought in by the backdoor when it comes to setting aside an award on the ground of patent illegality [See *SsangyongEngg. & Construction Co. Ltd. v. NHAI*, (2019) 15 SCC 131]. Further, it was observed,



reappreciation of evidence is not permissible under this category of challenge to an arbitral award [See *SsangyongEngg. & Construction Co. Ltd. v. NHAI*, (2019) 15 SCC 131].

Perversity as a ground of challenge

69. Perversity as a ground for setting aside an arbitral award was recognised in *ONGC Ltd. v. Western Geco International Ltd.*, (2014) 9 SCC 263. Therein it was observed that an arbitral decision must not be perverse or so irrational that no reasonable person would have arrived at the same. It was observed that if an award is perverse, it would be against the public policy of India.

70. In *Associate Builders v. DDA*, (2015) 3 SCC 49 certain tests were laid down to determine whether a decision of an Arbitral Tribunal could be considered perverse. In this context, it was observed that where:

- (i) a finding is based on no evidence; or
- (ii) an Arbitral Tribunal takes into account something irrelevant to the decision which it arrives at; or
- (iii) ignores vital evidence in arriving at its decision, such decision would necessarily be perverse.

However, by way of a note of caution, it was observed that when a court applies these tests it does not act as a court of appeal and, consequently, errors of fact cannot be corrected. Though, a possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon. It was also observed that an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on that score.

71. In *SsangyongEngg. & Construction Co. Ltd. v. NHAI*, (2019) 15 SCC 131, which dealt with the legal position post the 2015 Amendment in Section 34 of the 1996 Act, it was observed that a decision which is perverse, while no longer being a ground for challenge under “public policy of India”, would certainly amount to a patent illegality appearing on the face of the award. It was pointed out that an award based on no evidence, or which ignores vital evidence, would be perverse and thus patently illegal. It was also observed that a finding based on documents taken behind the back of the parties by the arbitrator would also qualify as a decision based on no evidence inasmuch as such decision is not based on evidence led by the parties, and therefore, would also have to be characterised as perverse [See *SsangyongEngg. & Construction Co. Ltd. v. NHAI*, (2019) 15 SCC 131].

72. The tests laid down in *Associate Builders v. DDA*, (2015) 3 SCC 49 to determine perversity were followed in *SsangyongEngg. & Construction Co. Ltd. v. NHAI*, (2019) 15 SCC 131 and later approved by a three-Judge Bench of this



Court in ***Patel Engg. Ltd. v. North Eastern Electric Power Corpn. Ltd.***, (2020) 7 SCC 167.

73. In a recent three-Judge Bench decision of this Court in ***DMRC Ltd. v. Delhi Airport Metro Express (P) Ltd.***, (2024) 6 SCC 357, the ground of patent illegality/perversity was delineated in the following terms: (SCC p. 376, para 39)

“39. In essence, the ground of patent illegality is available for setting aside a domestic award, if the decision of the arbitrator is found to be perverse, or so irrational that no reasonable person would have arrived at it; or the construction of the contract is such that no fair or reasonable person would take; or, that the view of the arbitrator is not even a possible view. A finding based on no evidence at all or an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside under the head of “patent illegality”. An award without reasons would suffer from patent illegality. The arbitrator commits a patent illegality by deciding a matter not within its jurisdiction or violating a fundamental principle of natural justice.”

Scope of interference with an arbitral award

74. The aforesaid judicial precedents make it clear that while exercising power under Section 34 of the 1996 Act the Court does not sit in appeal over the arbitral award. Interference with an arbitral award is only on limited grounds as set out in Section 34 of the 1996 Act. A possible view by the arbitrator on facts is to be respected as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon. It is only when an arbitral award could be categorised as perverse, that on an error of fact an arbitral award may be set aside. Further, a mere erroneous application of the law or wrong appreciation of evidence by itself is not a ground to set aside an award as is clear from the provisions of sub-section (2-A) of Section 34 of the 1996 Act.

75. In ***Dyna Technologies (P) Ltd. v. Crompton Greaves Ltd.***, (2019) 20 SCC 1, paras 27-43, a three-Judge Bench of this Court held that courts need to be cognizant of the fact that arbitral awards are not to be interfered with in a casual and cavalier manner, unless the court concludes that the perversity of the award goes to the root of the matter and there is no possibility of an alternative interpretation that may sustain the arbitral award. It was observed that jurisdiction under Section 34 cannot be equated with the normal appellate jurisdiction. Rather, the approach ought to be to respect the finality of the arbitral award as well as party's autonomy to get their dispute adjudicated by an alternative forum as provided under the law.



Scope of interference with the interpretation/construction of a contract accorded in an arbitral award

84. An Arbitral Tribunal must decide in accordance with the terms of the contract. In a case where an Arbitral Tribunal passes an award against the terms of the contract, the award would be patently illegal. However, an Arbitral Tribunal has jurisdiction to interpret a contract having regard to terms and conditions of the contract, conduct of the parties including correspondences exchanged, circumstances of the case and pleadings of the parties. If the conclusion of the arbitrator is based on a possible view of the matter, the Court should not interfere [See: *SAIL v. Gupta Brother Steel Tubes Ltd.*, (2009) 10 SCC 63; *Pure Helium India (P) Ltd. v. ONGC*, (2003) 8 SCC 593; *McDermott International Inc. v. Burn Standard Co. Ltd.*, (2006) 11 SCC 181; *MMTC Ltd. v. Vedanta Ltd.*, (2019) 4 SCC 163]. But where, on a full reading of the contract, the view of the Arbitral Tribunal on the terms of a contract is not a possible view, the award would be considered perverse and as such amenable to interference [*South East Asia Marine Engg. & Constructions Ltd. v. Oil India Ltd.*, (2020) 5 SCC 164].

Whether unexpressed term can be read into a contract as an implied condition

85. Ordinarily, terms of the contract are to be understood in the way the parties wanted and intended them to be. In agreements of arbitration, where party autonomy is the *grund norm*, how the parties worked out the agreement, is one of the indicators to decipher the intention, apart from the plain or grammatical meaning of the expressions used [*BALCO v. Kaiser Aluminium Technical Services Inc.*, (2016) 4 SCC 126].

86. However, reading an unexpressed term in an agreement would be justified on the basis that such a term was always and obviously intended by the parties thereto. An unexpressed term can be implied if, and only if, the court finds that the parties must have intended that term to form part of their contract. It is not enough for the court to find that such a term would have been adopted by the parties as reasonable men if it had been suggested to them. Rather, it must have been a term that went without saying, a term necessary to give business efficacy to the contract, a term which, although tacit, forms part of the contract [*Adani Power (Mundra) Ltd. v. Gujarat ERC*, (2019) 19 SCC 9].

87. But before an implied condition, not expressly found in the contract, is read into a contract, by invoking the business efficacy doctrine, it must satisfy the following five conditions:
(a) it must be reasonable and equitable;



(b) it must be necessary to give business efficacy to the contract, that is, a term will not be implied if the contract is effective without it;

(c) it must be obvious that “it goes without saying”;

(d) it must be capable of clear expression;

(e) it must not contradict any terms of the contract [Nabha Power Ltd. v. Punjab SPCL, (2018) 11 SCC 508, followed in Adani Power case, (2019) 19 SCC 9].

(emphasis supplied)

60. In the present case, learned counsel for the Petitioner has expressly confined the challenge to Claim Nos. 2, 3, 13 and 16. A careful reading of the pleadings, written submissions and oral arguments advanced before this Court demonstrates that the challenge to all four claims ultimately rests upon a single foundational grievance, *namely*, that the learned Tribunal erred in declining to rely upon the Rejected Letter addressed by the Respondent to DFCCIL and that such exclusion materially affected the adjudication of the aforesaid claims.

61. The first aspect which this Court deems apposite to note is that this is not a case where the learned Tribunal overlooked, ignored or failed to notice the said communication. On the contrary, the Impugned Award contains a separate and detailed discussion regarding the provenance, admissibility and permissible use of the said document. The issue was specifically raised before the learned Tribunal and was adjudicated upon after considering the rival submissions advanced by the parties.

62. The Impugned Award records that the learned Tribunal examined the competing explanations regarding the manner in which the Petitioner came into possession of the document and also considered the implications of Section 42A of the A&C Act.



63. The learned Tribunal, after an exhaustive discussion and analysis, ultimately concluded that the communication formed part of arbitral proceedings between DFCCIL and the Respondent and that the circumstances indicated that the document had come into the hands of the Petitioner through access obtained in relation to those proceedings. The learned Tribunal therefore held that admitting and relying upon the said communication would be inconsistent with the confidentiality obligations governing the arbitral process under Section 42A of the A&C Act.

64. The relevant findings and discussion of the learned Tribunal, with regard to the aforesaid discussion, may be reproduced for the sake of clarity. The same reads as follows:

“16.7. In the light of the said statutory provision, the Tribunal has no hesitation in holding that the letter dated 07.06.2017 which was produced by the Respondent in arbitration with the Employer cannot be introduced in these proceedings in breach of confidentiality of the proceedings in that arbitration.

16.8. Now comes the question as to whether the Claimant got the copy of letter dated 7.6.2017 from officials of the Respondent and not from its Counsel and, if so, whether the provisions of Section 42-A of the 1996 Act are not attracted.

16.9. It needs to be appreciated that while denying that the letter was made available by the Counsel, the Claimant came up with specific plea that it was provided to it by the employees of the Respondent in one of the meetings. However, neither in pleadings nor in evidence there was reference as to when that meeting was held and what was the context. In the absence of these details the bald plea of the Claimant cannot be accepted. Even otherwise it is a matter of fact that the Sub-Contract was terminated on 28.01.2017. The Jetter in question was written on 07.06.2017. There is nothing on record to show that after 28.4.2017, specifically after 7.6.2017 any meeting between the Claimant and the Respondent was held. Therefore, the Tribunal is not convinced that the letter was provided to the Claimant by the employees of the Respondent.

16.10. The plea of the Respondent, on the other hand, viz. that the Claimant got access to the letter through the office of the Counsel is highly probable. It is a matter of fact that in the dispute between the Respondent and the Employer, [in (OMP) (COMM) 375/2017)],



the same Counsel who is representing the Claimant in these proceedings, had appeared before the Hon'ble High Court of Delhi for the Employer. There is no denial that the same Counsel was representing the Employer in the Arbitration proceedings. In that capacity he/his office must have had access to the letter which, in all likelihood, was made available to the Claimant. This being so, breach of confidentiality occurred Admitting the letter in evidence in such a situation will not be legal and proper.

16.11. While holding so, the Tribunal is conscious of the fact that Section 42A of the 1996 Act takes in its fold the arbitrator, the arbitration institute and the parties. This, however, does not mean that the Counsel and their office are immune. There is no gainsaying that the lawyer is an agent of the party and hence what a party is prohibited from, cannot be done through the Counsel. Therefore, even if the Counsel are not specifically mentioned in Section 42A of the 1996 Act, they being agents of the parties are equally bound to follow the mandate of law in the same manner as the parties are.

16.12. As a consequence of the foregoing discussion, the objection as to admission of the letter dated 07.06.2017 is sustained.”

65. The controversy before this Court therefore narrows down to a singular question as to whether the learned Tribunal committed any jurisdictional, legal or patent error in declining to rely upon the Rejected Letter.

66. The Petitioner has contended that Section 42A merely imposes a duty of confidentiality and does not prescribe exclusion of evidence as a consequence of breach. This Court is unable to accept the aforesaid submission.

67. Before adverting to the discussion on this aspect, this Court deems it apposite to take note of Section 42A of the A&C Act, which reads as follows:

“42A. Confidentiality of information. - Notwithstanding anything contained by any other law for the time being in force, the arbitrator, the arbitral institution and the parties to the arbitration agreement shall maintain confidentiality of all arbitral proceedings except award where its disclosure is necessary for the purpose of implementation and enforcement of award.”



68. On a bare perusal of Section 42A of the A&C Act, it may be noted that it begins with a non-obstante clause and provides that “*notwithstanding anything contained in any other law for the time being in force,.....*”. Therefore, the legislative object underlying the provision is manifest. Confidentiality constitutes one of the fundamental features of the arbitral process and the provision seeks to preserve the integrity of that process by ensuring that materials forming part of arbitral proceedings are not freely disseminated or utilised outside the proceedings for which they were produced.

69. In the considered opinion of this Court, the submission advanced on behalf of the Petitioner proceeds on an unduly narrow construction of Section 42A of the A&C Act. It is true that the provision does not expressly employ the expression “*inadmissibility*”. However, the provision cannot be interpreted in a manner that renders the statutory protection of confidentiality illusory. The interpretation of a statutory provision must further the object sought to be achieved by the legislature and not defeat it.

70. Section 42A of the A&C Act was introduced to statutorily recognise and preserve one of the defining attributes of arbitration, namely, confidentiality. The legislative intent is to ensure that pleadings, documents, evidence and materials forming part of arbitral proceedings are not freely disseminated or utilised outside the arbitral process except to the limited extent contemplated by law. If the interpretation canvassed by the Petitioner were to be accepted, a party would be free to procure documents originating from a separate arbitration and deploy them in collateral proceedings on the ground that Section 42A of the A&C Act merely creates an obligation but



carries no practical consequence. Such a construction would substantially erode the protection intended by Parliament and reduce the statutory mandate to a mere formality devoid of effective content.

71. The question before the learned Tribunal was therefore not whether Section 42A of the A&C Act expressly creates a rule of inadmissibility in every case. The real issue was whether a document found to have originated from confidential arbitral proceedings and procured in circumstances inconsistent with the confidentiality obligation recognised under Section 42A of the A&C Act could legitimately be relied upon in a separate arbitration.

72. In the considered view of this Court, the answer returned by the learned Tribunal accords with both the language and the underlying purpose of the provision. The learned Tribunal was justified in holding that permitting reliance upon such material would undermine the very confidentiality regime which Section 42A of the A&C Act seeks to protect. To hold otherwise would substantially undermine the confidentiality obligation recognised under Section 42A of the A&C Act and render the statutory protection susceptible to circumvention.

73. Even assuming that Section 42A of the A&C Act does not, by itself, create a rigid rule of inadmissibility, the learned Tribunal was not divested of its authority to regulate the evidentiary record before it. The Tribunal was entitled to examine the provenance of the document, the circumstances in which it came into the possession of the Petitioner and the implications of permitting reliance upon material originating from a separate confidential arbitral proceeding. The decision to decline reliance on the document was therefore an exercise of evidentiary discretion and cannot, in the facts of the



present case, be characterised as a jurisdictional error, patent illegality or perversity.

74. This Court also finds no merit in the submission that the communication dated 07.06.2017 was required to be considered merely because it was allegedly material to the Petitioner's case. Relevance of a document and its permissible use are distinct considerations. A party cannot claim an unrestricted right to rely upon a document solely on the ground that it may support its case, irrespective of the circumstances in which such document was obtained or the legal obligations governing its disclosure. The learned Tribunal was therefore justified in first examining the permissibility of reliance upon the document before considering its evidentiary value.

75. In this regard, learned counsel for the Petitioner has also sought to derive support from the decision of the Bombay High Court in ***Global Aviation Services Private Limited (supra)***, particularly Paragraph Nos. 115, 118 and 121 thereof, to contend that where a statute does not prescribe any consequence for breach of an obligation, a Court or Tribunal ought not to create one by judicial interpretation. There can be no quarrel with the said proposition. The aforesaid paragraphs, being Paragraph Nos. 115, 118 and 121, are reproduced herein below for ready reference:

“115. The said provision also is silent on the issue i.e. if there are office objections raised by the office of this Court and if the petitioner is required to make any changes in the petition in the format or in the contents of the petition for the purposes of removal of such objections raised by the office, whether the petitioner is required to issue a fresh notice along with the papers with the corrections in the petition or not. Section 34(6) provides that such petition has to be disposed of within one year from the date on which the notice referred to in sub section 5 of section 34 is served upon the other party. If after giving the notice on the first day itself upon the receipt of the signed copy of the award from the arbitral



tribunal, if the petitioner issues such notice as referred to in sub section 5 of section 34 and does not file the petition for the next three months or even within 30 days after expiry of three months and if filed within the time prescribed under section 34(3), the petition remains in the office objections for another six months, an application filed under section 34(1) obviously cannot be disposed of within a period of one year from the date on which a notice referred to in sub section 5 of section 34 is served upon the other party. No consequence is provided in section 34(6) also if the arbitration petition is not disposed of by the Court within one year from the date of service of notice under section 34(5) of the Amendment Act. For this reason also, I am of the view that the provisions of section 34(5) and 34(6) cannot be construed as mandatory but has to be construed as directory. In my view, the requirement of the notice under section 34(5) of the Amendment Act is procedural in nature and not a substantive provision. The compliance of such procedural provision without providing any consequences in case of defiance thereof thus cannot be construed as mandatory and has to be construed as directory. Even if a notice is not given prior to the date of filing of the petition, the right of challenging an award vested in section 34 of the Arbitration & Conciliation Act, 1996 cannot be taken away.

118. In my view, Mr. Mehta, learned senior counsel and Mr. Jain, learned counsel have rightly contended that issuance of such notice under section 34(5) is a requirement however, not mandatory. The discretionary power is given to the Courts to look into the facts in each case and decide if the same has to be made mandatory or not. If the provision of section 34(5) is construed as mandatory, it would take away the discretionary powers from the Court. Any strict interpretation of such procedural provision will cause inconvenience to the parties and would result in lengthening the procedure and defeating the entire purpose of the Act itself. High Court (Original Side) Rules already provides sufficient protection to the other party for issuance of a notice before the matter is heard by the Court with a view to obviate any delay in the matter.

121. In my view since there is no consequence provided in section 34(5) as well as section 34(6) for non-compliance of the requirement mentioned therein, the Court has to balance the situation and exercise its discretionary power to permit the petitioner to issue notice along with papers and proceedings upon the other party even after the petition is filed to avoid any delay in disposal of such application. In my view section 34(5) cannot be equated with section 80 of the Code of Civil Procedure, 1908. In view of the fact that now by virtue of the amendment to section 36, merely upon filing of the arbitration application for challenging an



award under section 34, there is no automatic stay, the petitioner who challenges the arbitral award by filing an application under section 34 would not wait and would not cause any delay by not issuing notice upon the other party to obviate any situation of execution of award under the provisions of the Code of Civil Procedure, 1908. For this reason also, I am of the view that the requirement under section 34(5) has to be construed as directory and nor mandatory.”

76. However, the reliance placed upon the aforesaid decision is misplaced. The controversy before the Bombay High Court concerned the interpretation of Section 34(5) of the A&C Act and whether the requirement of prior notice before institution of a petition under Section 34 was mandatory or merely directory. The Court was therefore examining whether non-compliance with a procedural statutory requirement carried the consequence of invalidating the proceedings, despite the statute itself being silent in that regard.

77. The issue before the learned Tribunal in the present case stood on an entirely different footing. The Tribunal was not concerned with imposing any statutory consequence for breach of Section 42A of the A&C Act, nor did it proceed on the basis that Section 42A itself creates a rule rendering every document obtained in breach of confidentiality inadmissible in evidence. The learned Tribunal merely examined the circumstances in which the document dated 07.06.2017 came into the possession of the Petitioner and, having concluded that its disclosure would constitute a breach of confidentiality arising from separate arbitral proceedings, declined to place reliance upon it.

78. The decision, therefore, was rooted in the Tribunal’s assessment of the provenance and evidentiary propriety of the document and not in the creation of a statutory disqualification not contemplated by Section 42A of the A&C Act.



79. Equally unpersuasive is the reliance placed upon *Interplay Between Arbitration Agreements under Arbitration Act, 1996 and Stamp Act, 1899 (supra)*. The observations of the said Judgment, relied upon by the Petitioner, were rendered in the context of determining the legal effect of a non-obstante clause and the extent to which one statutory regime excludes or overrides another. The controversy therein concerned the interpretive operation of competing statutory provisions and not the admissibility of evidence allegedly sourced in breach of arbitral confidentiality. The paragraphs relied upon, being Paragraph Nos. 84 to 86, are reproduced herein under for ready reference:

“84. Although a non obstante clause must be allowed to operate with full vigour, its effect is limited to the extent intended by the legislature. In **Icici Bank Ltd. v. Sidco Leathers Ltd., (2006) 10 SCC 452** a two-Judge Bench of this Court held that a non obstante clause must be interpreted by confining it to the legislative policy. Thus, even if a non obstante clause has wide amplitude, the extent of its impact has to be measured in view of the legislative intention and legislative policy. [**JIK Industries Ltd.v. Amarlal V. Jumani, (2012) 3 SCC 255**] In view of this settled legal position, the issue that arises for our consideration is the scope of the non obstante clause contained in Section 5 of the Arbitration Act.

85. In **Morgan Securities & Credit (P) Ltd. v. Modi Rubber Ltd., (2006) 12 SCC 642**, the issue before the two-Judge Bench was whether the provisions of the Arbitration Act would prevail over the provisions of the Sick Industrial Companies (Special Provisions) Act, 1985 (SICA). While noting the non obstante clause contained in Section 5 of the Arbitration Act, this Court held that the non obstante clause has “limited application aiming at the extent of judicial intervention”. It was held that the Arbitration Act would not prevail over SICA since the latter enactment seeks to “achieve a higher goal”. In other words, the scope of the non obstante clause is limited to prohibiting the intervention of judicial authorities, unless it has been expressly provided for under Part I of the Arbitration Act.

86. Similar to Article 5 of the Model Law, Section 5 uses the expression “in matters governed by this Part”. The use of this expression circumscribes the scope of judicial intervention to



matters expressly governed by Part I of the Arbitration Act. The matters governed by Part I inter alia include:

86.1. Section 8 which mandates judicial authorities to refer parties to arbitration when prima facie there is a valid arbitration agreement;

86.2. Section 9 which allows Courts to issue interim measures on an application made by a party to an arbitration agreement;

86.3. Section 11 which empowers the Supreme Court or the High Courts to appoint arbitrators on an application made by parties to an arbitration agreement;

86.4. Section 27 which allows the Arbitral Tribunal to request the Court for assistance in taking evidence; and

86.5. Section 34 which empowers the Court to set aside an arbitral award on the basis of the limited grounds mentioned therein.”

80. Far from assisting the Petitioner, the observations in *Interplay Between Arbitration Agreements under Arbitration Act, 1996 and Stamp Act, 1899* (*supra*) reinforce the principle that a non-obstante clause must be construed in a manner that advances the legislative purpose underlying the provision in which it occurs. As already noted hereinabove, the legislative purpose underlying Section 42A of the A&C Act is preservation of arbitral confidentiality. The interpretation canvassed by the Petitioner would substantially diminish the efficacy of that protection. The reliance placed upon the aforesaid Judgment is therefore misconceived.

81. Further, equally unpersuasive is the submission founded upon the premise that since the present Arbitral proceeding was governed by the ICC Rules, under which the rule of confidentiality is discretionary, the strict rules of confidentiality as envisaged under Section 42A of the A&C Act shall be inapplicable.

82. This Court is of the considered view that even though the arbitration may have been conducted under the ICC Rules, however the seat of arbitration being in India, the arbitral proceedings remained subject to the mandatory provisions of the A&C Act. The rules of



institutionalised arbitral proceedings derive their efficacy from party autonomy, but operate subject to the governing law.

83. A statutory mandate enacted by Parliament therefore cannot be diluted, displaced or overridden by institutional rules framed by an arbitral institution. Consequently, the learned Tribunal was fully justified in treating Section 42A of the A&C Act as controlling and binding irrespective of any interpretation sought to be placed upon the ICC Rules.

84. There is yet another reason why the Petitioner cannot succeed.

85. A substantial part of the challenge now advanced before this Court proceeds upon factual assertions regarding the manner in which the document allegedly entered the public domain and the legal consequences flowing therefrom. The Respondent has specifically contended that several of these contentions were never urged before the learned Tribunal.

86. A Section 34 proceeding cannot be converted into a forum for reconstructing the arbitral case on an altogether different factual foundation. A party which had the opportunity to place a contention before the Tribunal but failed to do so cannot be permitted to invite a Court exercising jurisdiction under Section 34 to set aside an award on the basis of a case never presented before the arbitral forum.

87. Now advertent to the next submission advanced on behalf of the Petitioner that the Rejected Letter had already entered the public domain because it formed part of proceedings before this Court. In the considered opinion, this submission is equally liable to be rejected.

88. Merely because a document forms part of judicial proceedings does not automatically result in the document losing every attribute of



confidentiality. Whether a document can be said to have entered the public domain is a question dependent upon the circumstances in which access thereto is obtained and the legal regime governing such access. The learned Tribunal was not presented with any material conclusively establishing that the confidentiality attaching to the document had ceased to exist. On the contrary, the Tribunal returned a factual finding that the explanation furnished by the Petitioner regarding the source of the document was not worthy of acceptance and accepted the Respondent's version regarding its provenance.

89. Such findings are findings of fact based upon appreciation of the material before the Tribunal. No perversity has been demonstrated in the said findings. This Court therefore finds no reason to interfere with the same.

90. Ultimately, what emerges from the record is that the learned Tribunal was alive to the controversy surrounding the Rejected Letter, considered the rival submissions advanced by the parties, examined the circumstances in which the document came into the possession of the Petitioner, analysed the effect of Section 42A of the A&C Act and thereafter arrived at a reasoned conclusion that the document ought not to be relied upon. The decision was thus neither rendered without consideration of the issue nor founded upon an omission to notice relevant material.

91. It is also significant that the Petitioner has not independently assailed the merits of the findings returned by the learned Tribunal in relation to Claim Nos. 2, 3, 13 and 16. The challenge is founded entirely upon the exclusion of the communication dated 07.06.2017. Consequently, once this Court finds no infirmity in the learned



Tribunal's approach towards the said document, the very foundation of the challenge to the rejection of the aforesaid claims necessarily falls. In the absence of any independent challenge to the merits of the findings recorded on the said claims, this Court is not called upon to examine the correctness thereof.

92. Having considered the scheme, object and purpose of Section 42A of the A&C Act, this Court is of the considered opinion that the interpretation adopted by the learned Tribunal accords with the legislative intent underlying the provision. The challenge mounted by the Petitioner proceeds upon an interpretation which, if accepted, would substantially dilute the statutory protection of confidentiality recognised by Parliament. The Court therefore finds no error in the legal approach adopted by the learned Tribunal while declining to rely upon the said communication.

93. This Court is also unable to discern any conflict with the public policy of India or any contravention of the fundamental policy of Indian law within the meaning of Section 34(2)(b)(ii) of the A&C Act. The challenge mounted by the Petitioner essentially invites this Court to undertake a re-examination of the correctness of the learned Tribunal's evidentiary determination. Such an exercise would fall outside the permissible confines of judicial review under Section 34 of the A&C Act.

94. Likewise, no patent illegality appearing on the face of the Award within the meaning of Section 34(2A) of the A&C Act has been demonstrated. The Impugned Award neither disregards any binding statutory provision nor adopts an interpretation contrary to the scheme, object or purpose of the A&C Act. The challenge, in



substance, seeks reconsideration of a reasoned determination rendered by the learned Tribunal on the admissibility and use of material arising from separate arbitral proceedings, which falls beyond the permissible scope of interference under Section 34 of the A&C Act.

95. In view of the aforesaid discussion, this Court is of the considered opinion that the Petitioner has failed to establish any ground falling within the limited parameters of interference available under Section 34 of the A&C Act. The Impugned Award reflects due consideration of the pleadings, evidence and submissions advanced before the learned Tribunal and does not suffer from any infirmity warranting interference by this Court.

DECISION:

96. Accordingly, the present Petition is dismissed, and consequently, the Impugned Award shall remain undisturbed.

97. The present Petition, along with pending Application(s), if any, stands disposed of in aforesaid terms.

98. There shall be no Order as to the costs.

HARISH VAIDYANATHAN SHANKAR, J.

JULY 06, 2026|DJ