

West Bengal Form No. 3701

HIGH COURT FORM NO.(J)2.

HEADING OF SUMMARY JUDGMENT IN ORIGINAL SUIT/CASE

In the Court of- **Judge, Commercial Court at Alipore
For South 24 Parganas, PurbaMedinipore, Paschim
Medinipore&Jhargram.**

Present: Smt. Suparna Ray (JO Code: WB00711)

The 21st day of July, 2026

Misc Case (Arb) 32 of 2023

Renumbered as Misc Arb (Com) 82 of 2023

CNR No: WBSP18-000125-2023

M/S BKD Acharya (JV)

Petitioner

VS.

Union of India

Respondents

In presence of:

- Mr. Sunil Baran Chanda

Ld. Advocate(s) for Petitioner

- Mr. Kailas Tamoli

Ld. Advocate(s) for Respondents

The case was filed on 25.08.2023.

The arguments regarding the instant misc case was held on 25.04.2025, 09.07.2025, 20.08.2025, 26.09.2025 and 15.07.2026.

And having stood for consideration to this day, the Court delivered the following Judgment.

JUDGEMENT

The instant application under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as Act) is filed by the Petitioner, M/S BKD ACHARYA (JV) herein, for setting aside the award dated 01.06.2023 (hereinafter referred to as the “impugned award”) passed by the arbitral tribunal as constituted therein.

1. Petitioner being a Joint Venture Firm represented by its authorized signatory Apurba Ranjan Tripathy entered into a contract being CE/CON/GRC/4/2016 dated 09.02.2016 for execution of work of “Bimalgarh-Dumetra Doubling Work-Execution of earth work in Railway formation in Rock and Very Hard Rock, Construction of Minor Bridges and Other Allied Works between Champajharan and Patasahi Station from Km 434/23 to 435/14 and Km. 442/18 to 443/19 in Chakradharpur Division of South Eastern Railway” to complete the work as stated above within 12 months from the date of issue of the said LOA i.e. on 01.10.2015. It is sufficed to allude that time of the said contract had been extended on various occasions for different reasons. The Petitioner had completed the said work on 30.06.2018. However, instead of repeated reminders from the petitioner, the respondents went on delaying the preparation & passing of the final bill. With regard to delaying the aforesaid final bill and also with some connecting issues, certain disputes arose between the parties concerning this contract and so as to resolve such disputes, the arbitral tribunal was formed.

2. Thereafter, the arbitral tribunal proceeded with the arbitration and passed the impugned award in favour of the Respondents rejecting the claims as prayed for by the Claimant i.e. the Petitioner herein on the ground that arbitral tribunal cannot take into cognizance towards *excepted matter* including heads of claim fashioned by contractor/petitioner in the instant case under the Act by ignoring the terms and conditions of the contract between the parties. Being

aggrieved by the impugned award dated petitioner filed the instant application under Section 34 of Act. Respondents herein contested the said case by filing affidavit in opposition and Petitioner was also given liberty to file affidavit in reply to that effect.

3. On perusal of the case as well as hearing of Ld. Counsels appearing on behalf of both sides, it appears that the petitioner/claimant's main claim was for transportation of cut spoils, which is beyond the working chainage and also demand for payment for construction of trolley refuge under Schedule B instead of Schedule B. However, the arbitral tribunal disallowed the aforesaid claims of the petitioner on the ground of "Excepted Matters" as defined under Clause 63 of the GCC 2014.

4. More particularly, it is to mention that due to the following the points, the petitioner/claimant intended to refer the matter before the arbitral tribunal in context:

- a) Undue delay in preparation, passing & payment of the final bill, release of security deposit.
- b) Claim of interest by the claimant petitioner for the delayed payment under MSMED Act, 2006.
- c) Provision for payment of Trolley Refuge under Schedule B and not under Schedule E.
- d) Allowing payment for transportation of Cut-Spoils beyond the working chainage.

5. The contention of the petitioner/claimant is that at the time of hearing and deciding the points for arbitration, the learned Arbitrators failed to rise beyond their identity and heavily/solely relied upon the submission made by the respondents without applying their judicial mind and therefore, could not evaluate properly the documents and evidence provided by the petitioner and thus, the arbitral findings are based on one sided evidence and impartial in nature.

6. The further contention of the petitioner is that in the present agreement, as per previous arbitration award dated 12.05.2021, the petitioner is to be paid under Schedule B on the basis of the entries made by site engineers in the Measurement Book on 28.04.2022. Neither the petitioner nor the respondent has filed any appeal under Section 34 of the 1996 Act against the said arbitration order of the Sole Arbitrator. Therefore, after passing of the limitation period, the arbitral order of the Sole Arbitrator attends finality and become binding on both the parties. Moreover, the said decided matter was not before the present arbitral tribunal to be interfered with. However, the present arbitral tribunal went beyond the point of reference, provision of the Arbitration and Conciliation Act, 1996 and illegally/arbitrarily declared the arbitral award of the Sole Arbitrator to be null and void, thereby making the arbitral award a clear case of outcome of partition attitude, non-application of judicial mind, beyond and purview & scope of law of the land in force.

7. Learned Advocate for the petitioner has also submitted that the learned Arbitral Tribunal failed to appreciate that the scope of work in this contract agreement No. CE/CON/GRC/4/2026 is in between KM434/ 23 to 435/14 and KM 442/18 to 443/19 and the rest portion in between Champajharan and Patasahi stations were within the scope of Agreement No. CE/CON/GRC/7/2016 and mentioning of “between Champajharan & Patasahi Stations” in the name of the work are for landmark purpose only and not for defining the sectional limit. The learned Arbitral Tribunal should have understood and hold that, the rate provided in the agreement includes transportation of cut-spoil of rock & very hard rock (including excavated earth) within the sectional limit i.e. KM 434/23 to 435/14 and KM 442/18 to 443/19 only. Thus, any transportation/carriage of cut spoils of rock & very hard rock (including excavated earth) beyond the sectional limit by the petitioner at the instruction of the site engineers is to be paid

extra. But, the learned Arbitral Tribunal has disallowed the claim and the reasons given are not sound, which is evident from the plain reading of the reasons given in the award. Now, regarding payment of interest on delayed preparation & payment of final bill and release of Security Deposit, it is admitted by the Railways that, there is delay in preparation of final bill and the reasons given by Railway are self contradictory. Moreover, the Security Deposit (including EMD) is yet to be released in favour of the petitioner. The learned Arbitral Tribunal independently should have assessed the reasons of the delay by Railways authorities in preparation & payment of final bill and release of Security Deposit (including EMD) and should have safely come to a conclusion that, the petitioner is entitled to interest.

8. Contrary to the aforesaid submission, respondents' contention is as follows:

9. In the impugned award, the learned Arbitral Tribunal discussed the issue of the petitioner as raised as an extra item under clause 39 of GCC, which is an Excepted matter. But this arbitral tribunal has found in preceding paragraph of the award that the cost of transportation of cut spoil is already included in the items of earth and rock cutting in different accepted schedules. Actually, it's more a case of interpretation and finding meaning of different items of different schedules, particularly that of earth cutting and rock cutting. As per, Clause 3.2.7 of the Instruction to tenderer of the agreement this task is bestowed on the engineer.

10. Leaned Advocate appearing for the respondent has submitted that the learned Arbitral Tribunal after hearing at length and considering the several judgments and expressed their views that since the matter is related to Excepted matters, it is beyond the jurisdiction of this arbitral tribunal and as is evident from above referred case laws, merely because the matter has been referred by GM to this arbitral tribunal, the claim does not become arbitrable. Further, the

matter has already been decided by the Chief Engineer and the claim has been rejected and communicated to the claimant vide the letter dated 29.07.2021 which is final and binding. Hence, the award for this item is NIL, after giving opportunity to both the parties to file the statements of claims, reasons of delay in claims, statements of opposition and replies, perusing all the summary of records, documents, contracts documents and hearing both the parties had passed the impugned award.

11. In the **Associate Builders v. Delhi Development Authority**¹ the following interpretation has been drawn:

Grounds on which arbitral award may be assailed;

Section 34 in conjunction with Section 5 of the Arbitration and Conciliation Act, 1996 (1996 Act) makes it clear that an arbitral award that is governed by Part I of the 1996 Act can be set aside only on the grounds mentioned under Sections 34(2) and (3) and not otherwise. It is important to note that the 1996 Act was enacted to replace the 1940 Arbitration Act in order to provide for an arbitral procedure which is fair, efficient and capable of meeting the needs of arbitration; also to provide that the Tribunal gives reasons for an arbitral award; to ensure that the Tribunal remains within the limits of its jurisdiction; and to minimize the supervisory roles of courts in the arbitral process.

Merits of arbitral award can be assailed only when it is in conflict with “public policy of India”

None of the grounds contained in Section 34(2)(a) of the A&C Act, 1996 deal with the merits of the decision rendered by an arbitral award. It is only when the award is in conflict with the public policy of India as prescribed in Section 34(2)(b)(ii) of the A&C Act, 1996 that the merits of an arbitral award are to be looked into under certain specified circumstances.

Heads of “PUBLIC POLICY OF INDIA”

I. Fundamental Policy of Indian Law

- i) Compliance with statutes and judicial precedents*
Violation of Indian statutes i.e. the award which is, on the face of its, patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgment /decision is likely to adversely affect the administration of justice and would be regarded as being contrary to the fundamental policy of Indian law. Furthermore, the binding effect of the judgment of a superior court being disregarded would be equally violative of the fundamental policy of Indian law.
- ii) Need for judicial approach:*

¹**Reported in (2015) 3 SCC 14.**

In every determination whether by a court or other authority that effects the rights of a citizen or leads to any civil consequences, the court or authority concerned is bound to adopt what is in legal parlance called a "judicial approach" in the matter. The duty to adopt a judicial approach arises from the very nature of the power exercised by the court or the authority does not have to be separately or additionally enjoined upon the for a concerned. What must be remembered is that the importance of judicial approach in judicial and quasi judicial authority exercising owners that affect the right or obligations of the parties before them shows fidelity to judicial approach, they cannot act in an arbitrary, capricious or whimsical manner. Judicial approach ensures that the authority acts bona fide and deals with the subject in a fair, reasonable and objective manner and that its decision is not actuated by any extraneous consideration. Judicial approach in that sense acts as a check against flaws and faults that can render the decision of a court, tribunal or authority vulnerable to challenge.

(iii) Natural justice compliance

Equally important and indeed fundamental to the policy of Indian law is the principle that a court and so also a quasi judicial authority must, while determining the rights and obligations of parties before it, do so in accordance with the principles of natural justice. Besides the celebrated audi alteram partem rule one of the facts of the principles of natural justice is that the court/authority deciding the matter must apply its mind to the attendant facts and circumstances while taking a view one way or the other. Non-application of mind is a defect that is fatal to any adjudication. Application of mind is best demonstrated by disclosure of the mind and disclosure of mind is best done by recording reasons in support of the decision which the court or authority is taking. The requirement that an adjudicatory authority must apply its must apply its mind is, in that view. So deeply embedded in our jurisprudence that it can be described as a fundamental policy of Indian law. The audi alteram partem principle which undoubtedly is a fundamental juristic principle in Indian law is also contained in Sections 18 and 34(2)(a)(ii) of the Arbitration and Conciliation Act.

(iv) Wednesbury reasonableness

No less important is the principle now recognized as a salutary juristic fundamental in administrative law that a decision which is perverse or so irrational that no reasonable person would have arrived at the same will not be sustained in a court of law. perversity or irrationality of decisions is tested on the touchstone Wednesbury principle of reasonableness. Decisions that fall short of the standards of reasonableness are upon to

challenge in a court of law often in writ jurisdiction of the superior courts but no less in statutory process wherever the same are available.

The juristic principle of Wednesbury reasonableness is that a decision which is perverse or so irrational that no reasonable person would have arrived at the same is important and requires some degree of explanation.

II. Interest of India

The next ground on which an award may be set aside is that it is contrary to the interest of India. Obviously, this concerns itself with India as a member of the world community in its relations with foreign power.

III. Justice or Morality

The third ground of public policy is, if an award is against justice or morality. These are two different concepts in law.

(i) Justice

An award can be said to be against justice only when it shocks the conscience of the court. An illustration of this can be given. A claimant is content with restricting his claim, say to Rs. 30 lakhs in statement of claim before the arbitrator and at no point does he seek to claim anything more. The arbitral award ultimately awards him Rs. 45 lakhs without any acceptable reason or justification. Obviously, this would shock the conscience of the court and the arbitral award would be liable to be set aside on the ground that it is contrary to "justice".

(ii) Morality

The other ground is of "morality". Just as the expression "public policy" also occurs in Section 23 of the Contract Act, 1872 so does the expression "morality". The Supreme Court has confined morality to sexual morality so far as Section 23 of the Contract Act, 1872 is concerned, which in the context of an arbitral award would mean the enforcement of an award say for specific performance of a contract involving prostitution. "Morality" would, if it is to go beyond sexual morality necessarily cover such agreements as are not illegal but would not be enforced given the prevailing mores of the day. However, interference on this ground would also be only if something shocks the court's conscience.

IV. Patent Illegality

The fourth head of public policy, namely, is patent illegality. It must be remembered that under the Explanation to Section 34(2)(b)(ii) of the 1996 Act, 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.

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.

In the 1996 Act, the principle stands as the “patent illegality” principle which, in turn, contains three sub heads:

- i) *Contravention of A&C Act, 1996:*
A contravention of the Arbitration Act itself would be regarded as a patent illegality-for example if an arbitrator gives no reasons for an award in contravention of Section 31(3) of the 1996 Act, such award will be liable to be set aside.
- ii) *Contravention of terms of the contracts:*
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. Thus, the third sub-head of patent illegality is really a contravention of Section 28(3) of the Arbitration Act. This 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 terms 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.

Caution in applying all the above Heads/Sub-heads of Public Policy Test:

It must clearly be understood that when a court is applying the “public policy” test to an arbitration award, it does not act a court of appeal and consequently errors of fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. Thus an award based on little evidence o on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score. Once it is found that the arbitrators approach is not arbitrator or capricious, then he is the last word on facts.

8. In the instant case, the learned Arbitral Tribunal considered the claims of the petitioner/claimant and held that since the matter in related to “Excepted Matters”, it is beyond the jurisdiction of this arbitral tribunal. On delineation of the impugned award, it is found that the learned Arbitral Tribunal in paragraph no. 4.5.3.3.0 extensively examined the claim of the petitioner/claimant as Excepted Matters and while do so, the learned Arbitral Tribunal took the cognizance of the

various judgments of the Hon'ble Supreme Court, viz, ***Sri Harsha Construction vs. UOI, UOI vs. M/s. J. Sons Engineering, M/s. Prabartak Commercial Corporation Ltd. vs. The Chief Administrator Dandakaranya Project & Anr, General Manager, Northern Railway and Anr. vs. Savesh Chopra*** etc.

9. Now, it is found from the Clause 3.2.7 of the Instruction to tenderers is reproduced as follows:

"All measurements, methods of measurements, meaning and item of specifications and interpretation of Special conditions of their made by the Engineer on behalf of the Railway shall be final and binding on the contractor and shall be considered as "Excepted matters" in terms of condition No. 63 of GCC."

10. In the case of *Harsha Construction (supra)*, the Hon'ble Supreme Court held that *"As could be seen from Clause 63 of the GCC, the claims in Clause 39 of the GCC are the claims among various claims made in the clauses of the agreement. When such claims are agreed to be "Excepted Items", and as such they shall not come within the four corners of arbitrable items"*.

11. In the case of *General Manager, Northern Railway and Anr (supra)*, the Hon'ble Supreme Court of India held that *"To sum up, our conclusion are: (i) while deciding a petition under Section 20 of the Arbitration Act, 1940, the Court is obliged to examine whether a difference which is sought to be referred to arbitration is one to which the arbitration agreement applies. If it is a matter excepted from the arbitration agreement, the Court shall be justified in withholding the reference, (ii) to be an excepted matter it is not necessary that a departmental or 'in-house' remedy for settlement of claim must be provided by the contract. Merely for the absence of provision for in-house settlement of the claim, the claim does not cease to be an excepted matter, (iii) an issue*

as to arbitrability of claim is available for determination at all the three stages - while making reference to arbitration, in the course of arbitral proceedings and while making the award a rule of the Court.”

12. From the above, it is noteworthy to state that if the claims of the petitioner/claimant are to be fall within the ambit of Excepted Matters, then the same verily outs the jurisdiction of the learned Arbitral Tribunal. And, in the award impugned, the learned Arbitral Tribunal after delving into the disputes referred to it and further considering all the legal aspects thereto, held that the claims raised by the petitioner before the learned Arbitral Tribunal are fall within the category of “Excepted Matters”.

13. It is now pertinent to mention that the 1996 Act was enacted to provide for an arbitral procedure, which is fair, efficient and capable of meeting the needs of arbitration, to provide that the Arbitral Tribunal remains within the limits of its jurisdiction and to minimize the supervisory role of the courts. The learned Arbitral Tribunal is the master of facts and the limit to interfere to an arbitral award is bound by the Section 34 itself as well as buttressed by the several judgments of the Hon’ble Apex Court. The grounds for interference to an arbitral award is very limited.

14. Now, keeping in mind the arguments advanced by the Ld. Advocates of both sides as well as after perusing the award impugned, this Court is of the view that there is no patent illegality in the award which goes to the root of the award. The interpretation of the terms of the contract is done by the learned Arbitral Tribunal is reasonable. There is no unfairness. This court is not a court of appeal. The learned Arbitral Tribunal has assigned reasons in support of the award. The reasons are not perverse and as such, there is no conflict with the public policy of India.

15. Therefore, considering all, this Court is of the view that there is no infirmity in the Award which calls for any interference. Hence, the instant application for setting aside of the impugned arbitral award passed by the learned Arbitral Tribunal Arbitrator is liable to be dismissed.

16. The instant Misc. Case (Arbitration) is thus, accordingly **disposed off**. There is no order as to costs.

Parties are to act on the basis of the downloaded copy of this Order/Judgment.

Dictated and corrected by me

Sd/-

Judge, Commercial Court at Alipore,
For South 24 Parganas, Purba Midnapore,
Paschim Midnapore & Jhargram

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