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HIGH COURT OF CHHATTISGARH, BILASPUR

Arbitration Appeal No.57 of 2013

(Arising out of order dated 11-3-2013 in M.J.C.No.89/2012 of the learned District Judge, Bilaspur)

Order reserved on: 30-10-2017

Order delivered on: 21-11-2017

M/s Lanco Amarkantak Power Ltd., a Limited Company incorporated under the Companies Act, 1956 having its registered office at Plot No.130, Road No.2, Banjara Hills, Hyderabad

---- Appellant

Versus

South Eastern Coalfields Limited, Through Chairman-cum-Managing Director, S.E.C.L., Seepat Road, Bilaspur (C.G.)

---- Respondent



For Appellant: Mr. Gopal Jain, Senior Advocate with Mr. Ashish Shrivastava, Ms. Chinmayee Chandra, Mr. Vineet Tayal, Mr. Animesh Verma and Mr. Soumya Rai, Advocates.

For Respondent: Mr. Kishore Bhaduri and Mr. Anumeh Shrivastava, Advocates.

Hon'ble Shri Justice Sanjay K. Agrawal

C.A.V. Order

1. Invoking the appellate jurisdiction of this Court under Section 37(1) of the Arbitration and Conciliation Act, 1996 (for the sake of brevity hereinafter called as 'the AC Act'), the appellant herein – Lanco Amarkantak Power Ltd. (LAPL), a company registered under the provisions of the Indian Companies Act, has preferred this arbitration appeal calling in question legality, validity and correctness or otherwise of the impugned order dated 11-3-2013 passed by the District Judge, Bilaspur granting application under

Section 34 (2) of the AC Act in favour of the respondent herein – South Eastern Coalfields Limited (SECL), whereby the learned District Judge has set-aside the arbitral award passed by the arbitral tribunal by majority.

2. Essential facts shorn of all paraphernalia to judge the correctness of the order impugned are as under: -

2.1) The appellant LAPL has established a thermal power plant (Unit 2) at Korba to the capacity of 300 MW and for this purpose, it has obtained necessary statutory clearances like forest and environmental clearance etc. and by memo dated 20-12-2014, Ministry of Coal, Government of India, directed the appellant to enter into fuel supply agreement (FSA) with the respondent (SECL) within one year from the said date. Accordingly, the appellant LANCO entered into FSA with the respondent SECL on 31-12-2015.



2.2) The FSA, so signed by the parties, contained amongst other clauses, a clause under the head “Conditions Precedent” viz., clause 2.3 and other clauses in continuation thereof under the said terms of the FSA, the buyer (LAPL) was required to deposit an EMD / Commitment Advance (clause 2.6) and was also required to obtain financial closure within one year from the date of agreement i.e. the signature date of the agreement. It was further incumbent upon the appellant to inform within a period of seven days to the respondent SECL, the day on which he obtains financial closure (clause 2.4). It was made obligatory

on the part of the respondent (SECL) to invoke bank guarantee against the earnest money / commitment advance in case the appellant fails to obtain financial closure within the period specified in the agreement {clause 2.6(D)}.

2.3) It is the case of the appellant that he had already obtained financial closure as required under the agreement between 9-9-2005 and 20-9-2005 of which he had informed the respondent SECL on 4-2-2006, whereas the respondent SECL finding and holding that the appellant LAPL did not achieve financial closure in accordance with the terms of the FSA, invoked and encashed the bank guarantee furnished by the appellant LAPL after terminating the FSA on 29-2-2008 on the grounds stated therein.



2.4) The dispute of termination of contract and consequent invocation of bank guarantee led to filing of writ petition titled as W.P.No.1514/2008 by the appellant before this Court. Considering the arbitration clause in the FSA, parties were directed to arbitrate the dispute, thereafter, parties appointed three Arbitrators (one presiding arbitrator and two other arbitrators) to resolve the arbitral dispute by constituting arbitral tribunal.

2.5) The arbitral tribunal so constituted, after appreciating the oral and documentary evidence on record, by a majority (2 : 1), passed an award in favour of the appellant LAPL and against the respondent SECL to the effect that the purported termination and consequential invocation of bank guarantee was illegal and

invalid, and directed the respondent SECL to return decretal amount along with interest.

2.6) Feeling aggrieved and dissatisfied with the award, the respondent SECL questioned the award so passed by majority by filing an application under Section 34 (2) of the AC Act before the District Judge, Bilaspur. The learned District Judge by its impugned order granted that application and set aside the award by majority, leading to filing of this arbitration appeal by the appellant LAPL questioning the order of the learned District Judge on the grounds enumerated in the memorandum of appeal filed herein and urged herein before this Court.



3. Mr. Gopal Jain, learned Senior Counsel appearing on behalf of the appellant LAPL, assailing the impugned order would strenuously submit as under: -

    1. The learned District Judge has committed gross jurisdictional error in setting aside the award by majority without stating and invoking the particular ground / sub-clause of Section 34 (2) of the AC Act under which the award can be set aside by interfering with the finding of fact by re-appreciating and reassessing the evidence on record which was impermissible in law.

    2. The learned District Judge has substituted the view taken by the Arbitral Tribunal with his own interpretation of the terms of contract which is impermissible in law apart from being patently illegal.

3. The interpretation so made by the learned District Judge is contrary to the terms of the fuel supply agreement and object and purpose of clauses 2.2 and 2.3 which is to ensure that financing documents are in place so that the appellant (buyer) is able to make payment for the coal supplied and as such, the order impugned passed by the learned District Judge deserves to be set-aside being contrary to facts and law available on record.

4. Mr. Kishore Bhaduri, learned counsel appearing for the respondent (SECL), while replying to the submission so made, would vehemently submit as under:-



1. The appeal preferred under Section 37 (2) of the AC Act against the order of the learned District Judge granting application under Section 34 (2) of the AC Act is not maintainable, as the appeal has been filed under a wrong provision and a wrong ground and as such, liable to be dismissed on this sole ground alone.

2. The Arbitral Tribunal cannot go beyond the terms of contract and it does not have the right to consider the grounds of fairness, reasonableness or equity, but the Tribunal has only to consider the matter on the legal rights of the parties arising out of a valid contract.

3. The appellant (LAPL) has committed a breach by not fulfilling clause 2.3 of the Fuel Supply Agreement (FSA) as that clause provides sufficient time to the appellant (buyer)

to obtain financial closing within a period of one year from the signature date i.e. the date of execution of contract, as such, the appellant is not obliged to obtain financial closing without entering into a contract, as according to the condition precedent, the appellant was required to inform the seller within a period of seven days from the date of occurrence of financial closing and financial closing has to be by documentation issued by financing parties in definitive form and that too would be operative and effective for the period of contract.



4. Assuming that financial closure was obtained by the appellant prior to execution of contract and that too from 9-9-2005 to 20-9-2005, in that eventuality, the appellant could have resorted to clause 2.5 (B) of the FSA by informing in writing to the seller SECL to waive clause A of the condition precedent i.e. clause 2.3 that it had already achieved that. That was not done, nor the financial closure was obtained by the appellant within a period of one year from the date of execution of contract. Therefore, the learned District Judge is absolutely justified in holding that the appellant is guilty of breach of the terms of the FSA.

5. Since coal is a scarce commodity and is controlled by various control orders, and is a largesse under the domain of the Chhattisgarh, therefore, in view of other relevant factors like production capacity, demand, requirement and

in terms of power purchase agreement, coal is allocated for each buyer who enters into FSA with the seller. It is for the reason that the coal is kept reserved and allocated for a party under FSA for a period of one year a commitment guarantee in terms of EMD is obtained by seller from every buyer and thus, the term of commitment guarantee in form of bank guarantee is incorporated as a condition in the FSA.

6. The appellant even failed to furnish the required bank guarantee as per the terms of contract, instead it had furnished bank guarantee less than the required amount. Since the appellant failed to furnish financial closing within a period of one year from the date of signature, the bank guarantee was invoked as per clause 2.6 (C) of the FSA. The alleged information of financial closure was allegedly given by the buyer to the seller on 4-2-2006 can never be said to be in accordance with the terms of contract, therefore, the respondent was fully justified as per the terms of contract to terminate the contract and to encash the bank guarantee and placed reliance upon the judgments of the Supreme Court in the matters of **Associate Builders v. Delhi Development Authority**[1], **Oil and Natural Gas Corporation Limited v. Western Geco International Limited**[2] and **Satyanarayana**



1 (2015) 3 SCC 49
2 (2014) 9 SCC 263

**Construction Company v. Union of India and others**[3] to buttress his submission.

5. I have heard learned counsel for the parties and considered the rival submissions made herein-above and also gone through the record with utmost circumspection.

6. It is well settled law that scope of interference by a court while hearing and entertaining an application under Section 34 of the AC Act for setting aside the arbitral award is limited to specific grounds enumerated in Section 34 of the AC Act. Least judicial intervention is the basic thread that runs through the scheme of the Act. Section 5 of the AC Act limits the extent of judicial intervention only to the extent provided for in the Act itself. Therefore, the courts while entertaining application under Section 34 of the AC Act have to examine and test the same vis-a-vis the impugned arbitral award on the anvil of the grounds enumerated under the said provision that is Section 34 of the AC Act.



7. At this stage, it is necessary to analyse the scope of judicial interference in an arbitral award.

8. **Russel on Arbitration (21st Edition)**, page 426, held that the tribunal's findings of fact are conclusive. The appeal to the court can only be made on a question of law arising out of an award made in proceeding and observed as under: -

> "The arbitrators are the masters of the facts. On an appeal the Court must decide any question of law arising from an award on the basis of a full and

3 (2011) 15 SCC 101

> unqualified acceptance of the findings of fact of the arbitrators. It is irrelevant whether the Court considers those findings of fact to be right or wrong. It also does not matter how obvious a mistake by the arbitrators on issues of fact might be, or what the scale of the financial consequences of the mistake of fact might be.[4]
>
> The parties will not be allowed to circumvent the rule that the tribunal's findings of fact are conclusive by alleging that they are inconsistent[5], or that they constitute a serious irregularity[6], or an excess of jurisdiction[7], or on the basis that there was insufficient evidence to support the findings in question[8]."

9. D.P. Mohapatra, J, speaking for the Supreme Court in the matter of **Indu Engineering & Textiles Ltd. v. Delhi Development Authority**[9] held as under: -

> "An arbitrator is a Judge appointed by the parties and as such the award passed by him is not to be lightly interfered with."



10. Way back in the year 2006, in the matter of **McDermott International Inc. v. Burn Standard Co. Ltd. and others**[10], the Supreme Court has held that interpretation of a contract is a matter for the arbitrator to determine, even if it gives rise to determination of a question of law and highlighting the supervisory role of court in arbitral process observed as under: -

> "52. The 1996 Act makes provision for the supervisory role of courts, for the review of the

4 Geogas S.A. v. Trammo Gas Ltd (The "Balears") [1993] 1 Lloyd's Rep. 215 at 228, C.A.
5 Moran v. Lloyd's [1983] 1 Lloyd's Rep. 472; Geogas S.A. v. Trammo Gas Ltd (The "Balears") [1993] 1 Lloyd's Rep. 215 at 232, C.A.
6 Moran v. Lloyd's [1983] 1 Lloyd's Rep. 472; K/S A/S Bill Biakh v. Hyundai Corporation [1988] 1 Lloyd's Rep. 187
7 Bank Mellat v. GAA Development and Construction Co. [1988] 2 Lloyd Rep. 44 at 52
8 Geogas S.A. v. Trammo Gas Ltd. (The "Baleares") [1993] 1 Lloyd's Rep. 215 at 232
9 (2001) 5 SCC 691
10 (2006) 11 SCC 181

> arbitral award only to ensure fairness. Intervention of the court is envisaged in few circumstances only, like, in case of fraud or bias by the arbitrators, violation of natural justice, etc. The court cannot correct errors of the arbitrators. It can only quash the award leaving the parties free to begin the arbitration again if it is desired. So, the scheme of the provision aims at keeping the supervisory role of the court at minimum level and this can be justified as parties to the agreement make a conscious decision to exclude the court's jurisdiction by opting for arbitration as they prefer the expediency and finality offered by it."

11. Thereafter, in the matter of **Fiza Developers and Inter-Trade Private Limited v. AMCI (India) Private Limited and another**[11], the Supreme Court has considered the scope of proceeding under Section 34 of the Arbitration and Conciliation Act, 1996 and held that in arbitral award, interference should be minimal by courts in matters relating to arbitration and observed as under: -



> "17. The scheme and provisions of the Act disclose two significant aspects relating to courts vis-a-vis arbitration. The first is that there should be minimal interference by courts in matters relating to arbitration. Second is the sense of urgency shown with reference to arbitration matters brought to court, requiring promptness in disposal.
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> 18. Section 5 of the Act provides that notwithstanding anything contained in any other law for the time being in force, in matters governed by Part I of the Act, no judicial authority shall intervene except where so provided in the Act.
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> 19. Section 34 of the Act makes it clear that an arbitral award can be set aside on the grounds enumerated in sub-section (2) of Section 34 and on no other ground. Sub-section (3) of Section 34 provides that an application for setting aside may not be made after three months and the maximum delay that can be condoned is only thirty days. In other words, the maximum period for challenging an award is three months plus thirty days, even if there is sufficient cause for condonation of a longer period

11 (2009) 17 SCC 796

delay.

22. The scope of enquiry in a proceeding under Section 34 is restricted to consideration whether any one of the grounds mentioned in sub-section (2) of Section 34 exists for setting aside the award. We may approvingly extract the analysis relating to “grounds of challenge” from *The Law & Practice of Arbitration and Conciliation* by Shri O.P. Malhotra [1st Edn., p. 768, Para (I) 34-14]:

> "Section 5 regulates court intervention in arbitral process. It provides that notwithstanding anything contained in any other law for the time being in force in India, in matters governed by Part I of this Act, the court will not intervene except where so provided in this Part. Pursuant to this policy, Section 34 imposes certain restrictions on the right of the court to set aside an arbitral award. It provides, in all, seven grounds for setting aside an award. In other words, an arbitral award can be set aside only if one or more of these seven grounds exists.
>
> The first five grounds have been set forth in Section 34(2)(a). In order to successfully invoke any of these grounds, a party has to plead and prove the existence of one or more of such grounds. That is to say, the party challenging the award has to discharge the burden of poof by adducing sufficient credible evidence to show the existence of any one of such grounds. The rest two grounds are contained in Section 34(2)(b) which provides that an award may be set aside by the court on its own initiative if the subject-matter of the dispute is not arbitrable or the impugned award is in conflict with the public policy of India."

The grounds for setting aside the award are specific. Therefore, necessarily a petitioner who files an application will have to plead the facts necessary to make out the ingredients of any of the grounds mentioned in sub-section (2) and prove the same. Therefore, the only question that arises in an application under Section 34 of the Act is whether the award requires to be set aside on any of the specified grounds in sub-section (2) thereof. Sub-section (2) also clearly places the burden of proof on the person who makes the application. Therefore, the question arising for adjudication as also the person on whom the burden of proof is placed is statutorily specified.

Therefore, the need for issues is obviated."

12. Thereafter, similarly in the matter of **Kwality Manufacturing Corporation v. Central Warehousing Corporation**[12], the Supreme Court has held that the court considering the application for setting aside the arbitral award under the Arbitration Act, 1940, does not sit in appeal over the findings and decision of the arbitrator, nor can it reassess or reappreciate evidence or examine the sufficiency or otherwise of the evidence and succinctly observed as under: -

> "10. At the outset, it should be noted that the scope of interference by courts in regard to arbitral awards is limited. A court considering an application under Section 30 or 33 of the Act, does not sit in appeal over the findings and decision of the arbitrator. Nor can it reassess or reappreciate evidence or examine the sufficiency or otherwise of the evidence. The award of the arbitrator is final and the only grounds on which it can be challenged are those mentioned in Sections 30 and 33 of the Act. Therefore, on the contentions urged, the only question that arose for consideration before the High Court was, whether there was any error apparent on the face of the award and whether the arbitrator misconducted himself or the proceedings."



13. In the matter of **Steel Authority of India Limited v. Gupta Brother Steel Tubes Limited**[13], the Supreme Court in respect of interpretation of contract by arbitrator held that if the view taken by arbitrator as to meaning of a contractual clause if possible one and not absurd, then irrespective of its correctness or otherwise, it is not open to correction and held as under: -

> "27. Again, the view of the arbitrator that breach due to refusal on the part of SAIL to supply materials in

12 (2009) 5 SCC 142
13 (2009) 10 SCC 63

> July-September, 1988 quarter does not fall within the ambit of relevant terms contained in the compensation clause (Clause 7.2); by no stretch of imagination can be said to be an absurd view. The arbitrator's view about non-applicability of Clause 7.2 for refusal to supply materials in July-September 1988 quarter and delayed supply of materials for October-December 1988 quarter is founded on diverse grounds elaborately discussed in the award. Whether this is or is not a totally correct view is really immaterial but such view is a possible view that flows from reasonable construction of Clause 7.2.
>
> 28. The view of the arbitrator being possible view on construction of Clause 7.2, and having not been found absurd or perverse or unreasonable by any of the three courts, namely, Sub-Judge, District Judge and the High Court, we are afraid, no case for interference is made out in exercise of our jurisdiction under Article 136 of the Constitution. Once the arbitrator has construed Clause 7.2 in a particular manner, and such construction is not absurd and appears to be plausible, it is not open to the courts to interfere with the award of the arbitrator."



14. Similar is the proposition laid down by the Supreme Court in the matter of **Sumitomo Heavy Industries Limited v. Oil and Natural Gas Corporation Limited**[14] relying upon **Gupta Brother Steel Tubes Ltd.'s** case (supra) in which it has been held that if the conclusion of the arbitrator is based on a possible view of the matter, the court is not expected to interfere with the award. Their Lordships of the Supreme Court observed in paragraphs 41 and 42 of **Sumitomo Heavy Industries Limited** (supra) as under: -

> "41. The view canvassed on behalf of the respondent was that Clause 17.3 ought to be read narrowly like an indemnity clause or given a literal interpretation as in the case of an insurance policy. The umpire on the other hand has observed that this clause is couched in wide terms and it was

14 (2010) 11 SCC 296

commercially understandable and sensible, since it was designed to cover a wide and potentially unforeseeable spectrum viz. the likely impact of a possible change in Indian law in future. In the circumstances the approach adopted by the umpire being a plausible interpretation, is not open to interference. The Division Bench was clearly in error when it observed that the view of the umpire on Clause 17.3 is by no stretch of imagination a plausible or a possible view. Perhaps, it can be said to be a situation where two views are possible, out of which the umpire has legitimately taken one. As recently reiterated by this Court in *SAIL v. Gupta Brother Steel Tubes Ltd.*, (2009) 10 SCC 63, if the conclusion of the arbitrator is based on a possible view of the matter, the court is not expected to interfere with the award. The High Court has erred in so interfering.

42. Can the findings and the award in the present case be described as perverse? This Court has already laid down as to which finding would be called perverse. It is a finding which is not only against the weight of evidence but altogether against the evidence. This Court has held in *Triveni Rubber & Plastics v. CCE*[15] that a perverse finding is one which is based on no evidence or one that no reasonable person would have arrived at. Unless it is found that some relevant evidence has not been considered or that certain inadmissible material has been taken into consideration the finding cannot be said to be perverse. The legal position in this behalf has been recently reiterated in *Arulvelu v. State*[16].”



15. In the matter of **P.R. Shah, Shares and Stock Brokers Private Limited v. B.H.H. Securities Private Limited and others**[17], the Supreme Court has held that while considering application under Section 34 of the Arbitration and Conciliation Act, 1996, court cannot sit in appeal over award by reassessing or reappreciating evidence and observed as under: -

“21. A court does not sit in appeal over the award of

15 1994 Supp (3) SCC 665 : AIR 1994 SC 1341
16 (2009) 10 SCC 206 : (2010) 1 SCC (Cri) 288
17 (2012) 1 SCC 594

an Arbitral Tribunal by reassessing or reappreciating the evidence. An award can be challenged only under the grounds mentioned in Section 34(2) of the Act. The Arbitral Tribunal has examined the facts and held that both the second respondent and the appellant are liable. The case as put forward by the first respondent has been accepted. Even the minority view was that the second respondent was liable as claimed by the first respondent, but the appellant was not liable only on the ground that the arbitrators appointed by the Stock Exchange under Bye-law 248, in a claim against a non-member, had no jurisdiction to decide a claim against another member. The finding of the majority is that the appellant did the transaction in the name of second respondent and is therefore, liable along with the second respondent. Therefore, in the absence of any ground under Section 34(2) of the Act, it is not possible to re-examine the facts to find out whether a different decision can be arrived at."



16. In the matter of **Rashtriya Ispat Nigam Limited v. Dewan Chand Ram Saran**[18] relying upon **Gupta Brother Steel Tubes Ltd.'s** case (supra) and **Sumitomo Heavy Industries Limited** (supra), Their Lordships of the Supreme Court have held that if view taken by arbitrator is possible one, it cannot be subjected to judicial review even if contract is capable of two interpretations and observed as under: -

"43. In any case, assuming that Clause 9.3 was capable of two interpretations, the view taken by the arbitrator was clearly a possible if not a plausible one. It is not possible to say that the arbitrator had travelled outside his jurisdiction, or that the view taken by him was against the terms of contract. That being the position, the High Court had no reason to interfere with the award and substitute its view in place of the interpretation accepted by the arbitrator.

44. The legal position in this behalf has been summarised in para 18 of the judgment of this Court in *SAIL v. Gupta Brother Steel Tubes Ltd*., (2009) 10 SCC 63, and which has been referred to above.

18 (2012) 5 SCC 306

> Similar view has been taken later in *Sumitomo Heavy Industries Ltd. v. ONGC Ltd*., (2010) 11 SC 296, to which one of us (Gokhale J.) was a party. The observations in paragraph 43 thereof are instructive in this behalf."

17. In the matter of **MSK Projects India (JV) Limited v. State of Rajasthan and another**[19], the Supreme Court has held that an error in the construction of the contract cannot be held to be without jurisdiction and condensely observed as under: -

> "17. If the arbitrator commits an error in the construction of the contract, that is an error within his jurisdiction. But if he wanders outside the contract and deals with matters not allotted to him, he commits a jurisdictional error. Extrinsic evidence is admissible in such cases because the dispute is not something which arises under or in relation to the contract or dependent on the construction of the contract or to be determined within the award. The ambiguity of the award can, in such cases, be resolved by admitting extrinsic evidence. The rationale of this rule is that the nature of the dispute is something which has to be determined outside and independent of what appears in the award. Such a jurisdictional error needs to be proved by evidence extrinsic to the award. (See Gobardhan Das v. Lachhmi Ram[20], *Thawardas Pherumal v. Union of India*[21], *Union of India v. Kishorilal Gupta & Bros*.[22], *Alopi Parshad & Sons.* Ltd. v. Union of India[23], *Jivarajbhai Ujamshi Sheth v. Chintamanrao Balaji*[24] and *Renusagar Power Co. Ltd. v. General Electric Co.*[25])"

18. Recently, in **Associate Builders** (supra), the Supreme Court has taken note of **MSK Projects India (JV) Limited** (supra) and other earlier decisions and held that merits of arbitral award can be assailed only when it is in conflict with public policy of India

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19 (2011) 10 SCC 573
20 AIR 1954 SC 689
21 AIR 1955 SC 468
22 AIR 1959 SC 1362
23 AIR 1960 SC 588
24 AIR 1965 SC 214
25 (1984) 4 SCC 679 : AIR 1985 SC 1156

and the award can be set aside only on the grounds mentioned in Section 34(2) of the Arbitration and Conciliation Act, 1996, and not otherwise.

19. In the matter of **Swan Gold Mining Limited v. Hindustan Copper Limited**[26], the Supreme Court has held that the court dealing with Section 34 (2) of the Arbitration and Conciliation Act, 1996 cannot interfere with the finding of facts recorded by the arbitrator and cannot re-appreciate the evidence and observed as under: -

> "11. Section 34 of the Arbitration and Conciliation Act, 1996 corresponds to Section 30 of the Arbitration Act, 1940 making a provision for setting aside the arbitral award. In terms of sub-section (2) of Section 34 of the Act, an arbitral award may be set aside only if one of the conditions specified therein is satisfied. The arbitrator's decision is generally considered binding between the parties and therefore, the power of the court to set aside the award would be exercised only in cases where the court finds that the arbitral award is on the fact of it erroneous or patently illegal or in contravention of the provisions of the Act. It is a well-settled proposition that the court shall not ordinarily substitute its interpretation for that of the arbitrator. Similarly, when the parties have arrived at a concluded contract and acted on the basis of those terms and conditions of the contract then substituting new terms in the contract by the arbitrator or by the court would be erroneous or illegal.
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> 12. It is equally well settled that the arbitrator appointed by the parties is the final judge of the facts. The finding of facts recorded by him cannot be interfered with on the ground that the terms of the contract were not correctly interpreted by him."

20. Last of all, very recently, in the matter of **Centrotrade Minerals and Metal Inc. v. Hindustan Copper Limited**[27], a three-judges

26 (2015) 5 SCC 739
27 (2017) 2 SCC 228

Bench of the Supreme Court has taken note of the earlier decisions and also followed the decision in **Associate Builders** (supra) with approval by holding as under: -

> "45. In our country, the case law on the subject has recently been exhaustively discussed and stated in Associate Builders v. DDA, (2015) 3 SCC 49, and it is not necessary to revisit this. Briefly, it has been held that an award could be set aside if it is contrary to:
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> (a) fundamental policy of Indian law; or
>
> (b) the interest of India; or
>
> (c) justice or morality, or
>
> (d) if it is patently illegal."



21. The conspectus of the above-noted judgments rendered by Their Lordships of the Supreme Court would show that if the arbitrator commits an error in the construction of contract by taking a possible or plausible view, that is an error within the jurisdiction and such error in construction cannot be said to be without jurisdiction. Only where the arbitrator wanders outside the contract, he commits jurisdictional error. Likewise, the court will not sit as court of appeal over the findings of arbitral tribunal, nor it can reassess or re-appreciate the evidence to substitute his view to that of the arbitral tribunal.

22. Taking note of the scope of judicial interference in arbitral award would bring me to the merits of the matter. At this stage, it would be appropriate to notice the purported grounds for termination and consequential invocation of bank guarantee as provided in the respondent's (SECL) letter dated 29-2-2008, which are as

under: -

1. The appellant – LAPL breached the contract inasmuch as the contract required the appellant to notify SECL of the financial closing one week after it occurred and that contract further required the appellant to achieve financial closure within one year of the signature date, whereas the appellant notified the SECL on 4-2-2006 that it had achieved financial closure on 20-9-2005 prior to the signature date and this information was suppressed by the appellant (LAPL) at the time of signing of the FSA.

2. Contrary to the FSA, the appellant LAPL failed to indicate the four months' window within 30 days of financial closure since the appellant achieved financial closure on 20-9-2005 and thus, it is suppressed.

3. The appellant – LAPL had obtained all necessary permissions as required by the FSA prior to entering into the FSA, which was not disclosed at the time of entering into the FSA, thereby prejudicing the interest of the SECL.

4. The appellant – LAPL failed to submit bank guarantee / commitment advance within one year from the signature date in terms of clause 2.6(B) and thereby breached the FSA.

23. It would be apposite to notice the findings of the majority view of the arbitral tribunal in the arbitral award before proceeding

further with the matter. The arbitral tribunal has discussed and dealt with all the above four grounds mentioned in the letter of termination for terminating the FSA and for invoking the bank guarantees, and found all the four grounds to be merit-less and baseless by finding inter alia that, : -

1. The appellant M/s Lanco Amarkantak Power Ltd. has achieved financial closure much earlier to the date of agreement i.e. 9-9-2005/20-9-2005 and there is no violation of clause 2.4 of the FSA at the highest, as the said clause specifies the outer limit within which the buyer (LAPL) must achieve financial closure.

2. The three conditions precedent as incorporated in clause 2.3 of the FSA are, first condition being financial closure, second condition being obtaining of necessary sanction / approval including environmental clearance in respect of project, and third condition being that both the parties should have jointly approached the Government of India for notification under Clause 14 of the Colliery Control Order, 1945 as set out therein. It was held that financial closure was obtained much prior to the date of agreement and environmental clearance etc., was also obtained much prior to that i.e. 19-11-2004 and condition No.3 with regard to approaching Government of India for notification under Clause 14 of the Colliery Control Order, 1945 could not be achieved as the Essential Commodities Act was amended,

after signing of agreement, on 24-12-2006 and coal was removed from the ambit of the Essential Commodities Act, as such no notification was required. Though the appellant requested by letter dated 11-6-2007 asking for waiver of third condition, it was not done, as the four months' window has to be calculated mandatorily from the effective date, since effective date was not reached and no four months' window, therefore, could have been intimated. There is no violation of clause 4.3 of the FSA and termination of contract on the ground of failure of the claimant to indicate the four months' window within 30 days of financial closing, is not a valid ground for termination.



3. The effective date was not reached by the parties as per clause 2.3 of the FSA and effective date is described in the contract. Whether the effective date had arrived or not is entirely a matter of interpreting the provision relating to effective date as set out in the contract and admission, if any, in W.P.No.1514/2008 stating that effective date under the contract shall mean 31st December, 2005, cannot be accepted.

24. The learned District Judge in an application under Section 34 (2) of the Arbitration and Conciliation Act, 1996, interfered with the aforesaid findings and award by its impugned order by framing and answering following two questions while adjudicating the application under Section 34 (2).

1. Whether the respondent claimant's intimation of financial closure dated 9-9-2005 to the appellant was sufficient intimation in terms of contract? If so

2. Whether the termination of agreement dated 31-12-2005 by the appellant was legal?

25. The learned District Judge in its order reached to a conclusion that clause 2.4 of the FSA was breached by the appellant, as financial closure was reached prior to the date of execution of FSA and the effective date was admitted by the appellant in the writ petition filed before this Court and therefore 31-12-2005 would the effective date and the arbitral tribunal has travelled beyond the terms of contract, as the three conditions precedent mentioned in the FSA were not fulfilled by the appellant (LAPL) and thereby allowed the application under Section 34 (2) of the AC Act setting aside the arbitral award.



26. This would bring me to the question whether the learned District Judge is justified in interfering with the arbitral award by majority while considering the application under Section 34 (2) of the Act of 1996.

27. In order to judge the correctness of the plea raised at the Bar that the learned District Judge has proceeded erroneously and illegally to examine the correctness of the findings of facts of the Arbitral Tribunal and has further substituted the findings with his own findings and also committed gross and patent legal error by replacing and substituting the interpretation of the clauses of the

contract as made in the arbitral award with his own interpretation, it would be appropriate to notice the relevant clauses of the FSA.

I. **"Definitions:**

.....

**"Commitment Advance"** means the payment by the Buyer to the Seller calculated and paid in accordance with the terms of Clause 2.6(B). Two months coal value (One year after signature date).

"**Conditions Precedent**" means all the conditions precedent to this Agreement as set out in Clause 2.3.

.....

"**Earnest Money**" means the payment by the Buyer to the Seller calculated and paid in accordance with terms of Clause 2.6(A), one months coal value (before/on signature date).

"**Effective Date**" means the date on which the Agreement becomes, effective in accordance with the terms of Clause 2.2, i.e., the date on which all the Conditions Precedent have been met or, waived.

.....

"**Financial Closing**" means the signing of all Financing documents and the fulfillment of all conditions precedent to the initial availability of Funds thereunder.

"**Financing Documents**" means the definitive, executed documentation pursuant to which the financing Parties collectively or severally commit the funds necessary to construct and operate the Plant.

**2.2. Term**

This Agreement, unless terminated earlier in accordance with terms hereof, shall continue to remain in force for a period of 10 years, subject to review after 5 years and extendable by 5 more years after expiry of initial term, effective from the date (the "Effective Date") on which all the

Conditions Precedent have either been satisfied or being capable of waiver, waived by the Party for whose benefit the condition was imposed, and a joint notice in this regard confirming the satisfaction of all the Conditions Precedent has been signed by the Seller and the Buyer.

**2.3 Conditions Precedent**

The obligations of the Parties under this Agreement (other than those set out in Clause 2.3, Clause 2.4, Clause 2.5, Clause 2.6, Clause 2.7 and Clause 13.2 and those obligations specifically provided to take place before satisfaction of the Conditions Precedent) are subject to the satisfaction in full of the following Conditions Precedent within one year of the Signature Date (or such other extended period as may be agreed in writing in accordance with the terms of this Agreement).



A. Financial Closing of the Plant shall have occurred; and

B. The Buyer shall have obtained all necessary requisite sanctions approvals, licenses, consents including environmental clearance in respect of the Plant from the lawful authority(s); and

C. The Seller and the Buyer shall have jointly approached the Government of India and the Government of India shall have issued a notification pursuant to Section 14 of the Colliery Control Order, 2000, as continuing in force under the Essential Commodities Act, 1955, that this Agreement is exempt from the operation of such Order; and

**2.4 Notification of Financial Closing**

Subject to the other provisions of this Clause 2, the Buyer shall have achieve Financial Closing within one year from the Signature Date. The Buyer shall notify the Seller of the date on which Financial Closing takes place within one week after it occurs.

**2.5 Provisions relating to Conditions Precedent**

**(A) Compliance of Conditions Precedent**

Both Parties will take all such steps as may be

reasonably required and will make diligent efforts to procure the satisfaction in full of the Conditions Precedent.

**(B) Waiver of Conditions Precedent**

Any condition precedent may, at any time, be waived in writing by the Party other than the Party which was liable to satisfy such condition provided that the Condition Precedent specified in Clause 2.3(A) can only be waived by agreement in writing between the Seller and the Buyer.

.....

**2.6 The Earnest Money and Commitment Advance**

(A) On or before the Signature Date but prior to the signing of the Agreement, the Buyer has furnished a Bank Guarantee for Rs.5,87,50,000/- (Rs. Five Crores Eighty Seven lakhs fifty thousand only) to the Seller as the Earnest Money [amount equal to the value of the Base Price as applicable on the date of such payment, of the Contract Quantity of Coal for the Plant based on a full operating year of 12 months, divided by twelve (12)], the receipt whereof the Seller hereby acknowledges.



(B) Not later than one year from the Signature Date the Buyer shall furnish a Bank Guarantee towards a commitment advance (the “Commitment Advance”) to the Seller equivalent to the value of the Base Price (as applicable on the date of such payment) of the Contract Quantity of Coal for the Plant (based on a full operating year of 12 months) divided by six (6).

.....

(D) The Bank Guarantee towards the Earnest Money and the Commitment Advance shall be invoked by the seller if the Buyer fails to indicate in writing to the Seller within 30 (thirty) days of Financial Closing, the Four Month Window in terms of Clause 4.3(B).

(E) In the event Bank Guarantee towards Earnest money has been invoked by the Seller in accordance with this Agreement, the Seller shall be entitled to terminate this Agreement by giving 10 days notice to Buyer and upon such termination

neither Party shall have any liability other than those specified under relevant Clauses regarding forfeiture of Earnest Money; provided however that if the Bank Guarantee towards Commitment Advance is furnished by the Buyer within 10 days of the said notice, the Agreement shall not be liable to be terminated on the ground of non-payment of Commitment Advance.

.....

**4.3 First Delivery Date**

(A) It is agreed that the First Delivery Date shall lie within a four months period "Four Month Window", the beginning of which shall not be earlier than 26 months from the Effective Date nor later than 36 months from the Effective Date.

(B) Within 30 (thirty) days of the Financial Closing, the Buyer shall indicate the Four Month Window which shall fall within the earliest and last days as specified in Sub clause (A) above provided, however, if the Buyer fails to indicate the Four Month Window, the Bank Guarantees towards Earnest Money and Commitment Advance shall be invoked by the Seller and agreement terminated without any reference or notice to the buyer.

....."



28. (1) This would bring me to the facts of the case in hand. By memo dated 9-9-2005, the appellant (LAPL) informed the respondent (SECL) that the appellant Company has obtained all statutory clearances and has also achieved the financial closure and requested for confirmation of the date for signing of the FSA. The memo dated 9-9-2005 states as under: -

"Ref: LAPPL/SECL/602/1947 September 9, 2005

Shri Arun Sinha,
General Manager (S & M),
South Eastern Coalfields Limited,
P.O. SECL, Seepat Road,
BILASPUR (C.G.) 495 006.

Tel: 07752-240584, 240432
Fax: 07752-242058

Dear Sir,

Sub:- Lanco Amarkantak Thermal Power Station at Korba District, Chhattisgarh – Fuel Supply Agreement – Reg.

You may be kindly aware that the first unit of Lanco Amarkantak Power Private Limited (LANCO) with a configuration of 300 MW has been accorded all statutory clearances and we are happy to inform that the Financial Closure was achieved for the first 300 MW unit (disbursement is yet to take place).

Long term coal linkage of 1.5 MT per annum has been accorded by SLC of Ministry of Coal (MoC) for 300 MW unit of the first phase of our project on 20.12.2004. This linkage has been accorded from the Korba Coalfields of South Eastern Coalfields Ltd (SECL) and we have been constantly interacting with SECL since then for entering into a Fuel Supply Agreement (FSA).



Here, we would like to inform you that number of rounds of discussions took place between SECL & LANCO officials on various clauses of Model FSA and the corrected draft FSA was prepared and submitted by LANCO to SECL as early as November 2004. Subsequently, SECL has prepared final draft FSA with certain changes and was ready to sign on clearance from SECL's board.

Here, we may be allowed to inform your good-selves that substantial progress was achieved in Phase # 1 of the Project and major activities viz., Procurement of land, Signing of the Contract with EPC, Environmental and statutory clearance required etc. have been completed and ready to start the site construction activities upon disbursement of funds from financial institutions.

Also, we would like to convey that we could achieve Financial Closure of our first unit only with our undertaking and confirming to the Financial Institutions to conclude signing of the FSA. Hence, the Financial Institutions are not willing to disburse margin till the signing of FSA.

In view of the above and to start project construction activities in time, to achieve target date of completion as committed by us to Ministry of Power and OEA, may

we request SECL to kindly consider our request and confirm the date for the signing of the FSA since this is an essential requirement for the Project as the loan disbursement will take place only post FSA. Hence we request your kind help and support to achieve the milestone of the Project.

Thanking you Sir,

With best regards,

(K. RAJA GOPAL
Director (Projects)
raj@lancogroup.com"

(2) Thereafter, the appellant's lender – Power Finance Corporation Ltd. issued its confirmation notice dated 16-9-2005 as under: -



"No.02:13/CH:LAPPL/L0101001/Vol.II 16.09.05

LENDERS CONFIRMATION NOTICE

Shri T.V. Krishna
Chief Executive Officer
Lanco Amarkantak Power Private Limited
Lanco House, 141, Avenue # 8, Banjara Hills
Hyderabad – 500 034

Ladies and Gentlemen,

This notice is issued pursuant to Clause 2.2.1C (f) of the Facility Agreements in connection with the Notice of the Borrower dated 14/09/2005.

1. We hereby state that as of the date thereof, we have not received an Unsatisfied CP Notice from any of the Senior Rupee Debt A Lenders and Senior Rupee Debt B Lenders in accordance with the Facility Agreements.

2. Based on the information and certificates supplied to us by the Borrower by way of Notice of Drawal or otherwise, we also confirm that the conditions precedent to Drawdown in Article of the Common Senior Rupee Debt A and Senior Debt B agreements have been satisfied.

3. Pursuant to Clause 2.2.1 of the Facility Agreements, Drawdown can be made in terms of the Notice of Drawal of the Borrower dated 14/09/2005. The disbursement shall be made by Senior Rupee Debt A Lenders and Senior Rupee Debt B Lenders on 20th Sept. 2005.

For and on behalf of Power Finance Corporation Limited as Lenders Agent.

By:

Name : A.K. Agarwal

Designation : GM (EA-IPP) & NE (LAPPL)"

(3) Fuel Supply Agreement was signed on 31-12-2015.

(4) Finally, on 4-2-2006, the appellant (LAPL) notified the financial closing on 20-9-2005 as under: -



"LAPPL:SECL:06:2801 February 4, 2006

Shri M.K. Thapar,
Chairman-cum-Managing Director
South Eastern Coalfields Limited,
Seepat Road,
BILASPUR
Chhattisgarh

Dear Sir,

Sub: Notification of Financial Closing – Reg.

Ref: CSA dated 31.12.2005

With reference to the above, in compliance with Clause 2.4 of the CSA, we would like to inform you that for the first 300 MW unit we have achieved Financial Closure on 20.09.2005.

Thanking you,

Yours truly,
For LANCO Amarkantak Power Private Limited

K. Raja Gopal
Director & CEO"

29. Thus, from the above narration of facts, it is quite vivid that financial closure has been achieved much prior to the date of agreement on 9th September, 2005 by the appellant and duly intimated and finance document was completed on 4th August, 2005 and the respondent was informed about this achievement of financial closure on 4th February, 2006 and at the most, clause 2.4 specifies the outer limit within which the buyer must achieve financial closure which the appellant had achieved much prior to execution of agreement. The finding to this aspect recorded by the Arbitral Tribunal has been interfered with by the learned District Judge only on the ground that this has been objected by the other side and that since financial closure was achieved much prior to the signature date, this provision has been breached by the appellant. The FSA defines "financial closing" as the signing of all financing documents and the fulfillment of all conditions precedent to the initial availability of funds thereunder. It is quite vivid that actual disbursement is not required for financial closing but availability of funds is required. The appellant has already informed the SECL on 9-9-2005 that the lenders had already committed to the funds and all that remained was FSA to be signed and thereafter, since the financial institutions were willing to disburse the funds even prior to the signing of the FSA on 20-9-2005, the appellant informed the respondent about the same on 4-2-2006.

30. Thus, the Arbitral Tribunal has taken a plausible view of the

matter that it specifies the outer limit within which the appellant would achieve financial closure which the appellant has achieved much prior to the execution of the FSA and the said finding is a result of interpretation of clause 2.4 of the FSA by the learned Arbitral Tribunal.

31. The Supreme Court in **MSK Projects India (JV) Limited** (supra) held that if the arbitrator commits an error in the construction of the contract, that is an error within his jurisdiction and such an error in construction cannot be said to be without jurisdiction, it is an error outside the contract and only when Arbitral Tribunal travels beyond the contract, he commits jurisdictional error.



32. Therefore, the District Judge has committed apparently a legal error in substituting his own view in place of interpretation of clauses of the contract as made in the arbitral award by the arbitral tribunal with his own interpretation without holding that or finding that the interpretation of the contract made by the arbitral tribunal is not a plausible view or possible view and it travels beyond the terms of the contract.

33. The next ground on which the learned District Judge has interfered with the award is the effective date has been admitted by the appellant in the writ petition filed before this Court in which the arbitration agreement is also an issue. The effective date is defined as the date on which the agreement becomes effective in accordance with the terms of clause 2.2, i.e. the date on which all the conditions precedent have been met or, waived. The

learned arbitral tribunal has dealt with the issue of effective date in para 32 of the award qua the alleged admission made by the appellant in W.P.No.1514/2008 and clearly held that the appellant has pleaded that the effective date under clause 2.3 had not arrived. Effective date is described in the contract, and whether the effective date had arrived or not is entirely a matter of interpreting the provision relating to effective date as set out in the contract and therefore such an effective date cannot be taken as 31st December, 2005 and effective date had not reached in the instant case. Even otherwise, the respondent SECL has filed its statement of defence in arbitration proceeding and it was inter alia stated by the SECL as under: -



> "10. EFFECTIVE DATE OF AGREEMENT
>
> .....
>
> No joint notice has been signed under clause 2.2 and the Agreement has not been effective till date.
>
> .....
>
> In any case, joint notice after meeting the conditions precedent or their waiver was mandatory to determine the effective date as per definition clause. Even the request for waiver of 2.3(C) was made by the Claimant only after the termination notice had already been served on them."
>
> "11. Para 8 Date of first delivery by respondent under the agreement
>
> .....
>
> Further, since the effective date of the agreement is yet to be determined through a joint notice by the parties, as mandatory under 2.2....."

34. Thus, it is the own case of the SECL that no effective date has been arrived into as such there could not have been any failure

on the part of the appellant since effective date was yet to be determined and the Four Months' Window could not be indicated unless and until the effective date is determined.

35. Thus, the learned District Judge is unjustified in interfering with the finding of fact arrived at by the learned Tribunal after appreciating the material available on record which is not permissible in view of the decision rendered by this Court in the aforesaid judgment (supra).

36. The learned District Judge has also interfered with the award on the ground that the appellant has breached clause 2.3 of the said agreement. There were three conditions which were to be satisfied. First condition is financial closure and second condition is obtaining necessary sanctions, approvals etc., including environmental clearance. These two conditions have already been satisfied much prior to the signature date (execution of the FSA) and the third condition of jointly approaching the Government of India for notification under Clause 14 of the Colliery Control Order, 1945 could not be achieved as the Essential Commodities Act was amended after signing of the said agreement on 24-12-2006 and coal was removed from the ambit of the Act and no notification was required, as such, the third condition was not waived by the respondent SECL, though requested by the appellant LAPL, as a result of which effective date was not reached and no Four Months' Window was intimated but ultimately, on 8-1-2008, the

appellant indicated to the respondent the Four Months' Window from 1-4-2008 to 31-7-2008, and as such, there is no violation of clauses 2.3 and 4.3 of the agreement. This finding of the learned arbitral tribunal is a finding of fact based on material available on record and this could not have been interfered with by the learned District Judge by substituting its own view and by holding that clauses 2.3 and 4.3 were violated which is beyond the scope of application under Section 34 (2) of the Arbitration and Conciliation Act, 1996. In substance, the learned District Judge has entered into merits of the award by misdirecting himself without following and appreciating the fact that the arbitral award can be challenged only on the grounds enumerated under Section 34 (2) of the AC Act and merits of the award can be assailed only when it is in conflict with the public policy of India under Section 34(2)(b)(ii) of the AC Act and it cannot re-appreciate and reassess the evidence to interfere with the finding of fact reached by the arbitral tribunal.



37. This would bring me to the plea raised by learned counsel for the respondent that in the memorandum of appeal, the appeal is said to have been preferred under Section 37 (2) of the Arbitration and Conciliation Act, 1996 which is not maintainable as application under Section 34 (2) has been rejected and appeal would be maintainable under Section 37(1)(b) of the Act. It is well settled principle of law that mentioning of a wrong provision or non-mentioning of any provision of law would, by

itself, be not sufficient to take away the jurisdiction of a court if it is otherwise vested in it in law. While exercising its power, the court will merely consider whether it has the source to exercise such power or not. (See for support **J. Kumaradasan Nair v. IRIC Sohan**[28] and **P.K. Palanisamy v. N. Arumugham and another**[29].) Therefore, this appeal preferred against the granting of application under Section 34 (2), appeal would be maintainable under Section 37(1)(b) and merely quoting of wrong provision by the appellant as Section 37(2) would not denude this court to exercise the power of appeal which this Court has under Section 37(1)(b) of the AC Act. Accordingly, this objection raised about the maintainability of appeal is hereby overruled.



38. To be fair with Mr. Bhaduri, learned counsel for the respondent, it would be appropriate to consider the judgments relied upon by him. **Associate Builders** (supra) has already been referred herein-above. Reliance on para 31 is not helpful to the respondent SECL, as the finding recorded and interpretation of contractual clause is neither perverse nor irrational as held herein-above. Likewise, reliance placed on **Oil and Natural Gas Corporation Limited** (supra) referring para 40 of that judgment is also not helpful to the respondent (SECL), as the award passed by the learned arbitral tribunal is neither perverse nor illogical as held herein-above. Likewise, **Satyanarayana**

28 (2009) 12 SCC 175
29 (2009) 9 SCC 173

**Construction Company** (supra) is clearly distinguishable to the facts of the present case, as the arbitral award by majority is neither in excess of the jurisdiction of the arbitral tribunal nor the tribunal has rewritten the terms of the contract as held herein-above.

39. As a fallout and consequence of aforesaid discussion, the order passed by the learned District Judge granting application under Section 34(2) of the AC Act deserves to be and is accordingly set aside. The award by majority as passed by the arbitral tribunal dated 13-4-2012 is hereby restored. The respondent is directed to return the decretal amount of ₹ 22,95,00,000/- along with interest and ₹ 39,00,297/- along with interest so specified and cost to the appellant (LAPL), forthwith.

40. The appeal is allowed to the extent sketched herein-above leaving the parties to bear their own cost(s).

Sd/-
(Sanjay K. Agrawal)
Judge

Soma

HIGH COURT OF CHHATTISGARH, BILASPUR

Arbitration Appeal No.57 of 2013

M/s Lanco Amarkantak Power Ltd.

Versus

South Eastern Coalfields Limited

Head Note

Arbitral award can be interfered with only on the grounds enumerated under Section 34 (2) of the Arbitration and Conciliation Act, 1996.

शीर्ष टिप्पण

माध्यस्थम पंचाट में हस्तक्षेप केवल माध्यस्थम् तथा सुलह अधिनियम, 1966 की धारा 34 (2) में सम्मिलित आधारों पर ही किया जा सकता है।