THE HIGH COURT OF SIKKIM: GANGTOK

(Civil Appellate Jurisdiction)

DIVISION BENCH: THE HON'BLE MR. JUSTICE BISWANATH SOMADDER, CHIEF JUSTICE
THE HON'BLE MR. JUSTICE BHASKAR RAJ PRADHAN, JUDGE

ARB. A. No. 9 of 2024

1. State of Sikkim,
   Represented by and through the PCE-cum-Secretary,
   Energy and Power Department,
   Government of Sikkim,
   Gangtok – 737101.

2. Power Department,
   Represented by the Chief Engineer (North),
   Government of Sikkim,
   Gangtok – 737101.

3. Power Department,
   Represented by the Superintending Engineer (North),
   Government of Sikkim,
   Gangtok – 737101. ..... Appellants

versus

Chhabil Dass Agarwal,
S/o Late Deepchand Agarwal,
Resident of 5/1 Sirwani Road,
Singtam,
P.O. and P.S. Singtam – 737134. ..... Respondent

Appeal under Section 37 of the Arbitration & Conciliation Act, 1996.

[*against the impugned judgment dated 30.05.2024 passed by the learned Judge, Commercial Court at Gangtok in Commercial (Arbitration) Case No. 3 of 2022 in State of Sikkim & Ors. vs. Chhabil Dass Agarwal]*

Appearance:

Mr. Zangpo Sherpa, Additional Advocate General with Mr. Mohan Sharma, Advocate and Mr. Sujan Sunwar, Assistant Government Advocate for the Appellants.

Mr. Rohan Batra, Mr. Dhruv Sethi and Mr. Hemlal Manger, Advocates for the Respondent.

J U D G M E N T

Date of Hearing : 13.08.2025, 22.08.2025, 24.09.2025, 16.10.2025 & 06.11.2025
Judgment reserved : 13.11.2025
Judgment pronounced & uploaded: 10.12.2025

Bhaskar Raj Pradhan, J.

This is an appeal under section 37 of the Arbitration and Conciliation Act, 1996 (the Arbitration Act).

2. The facts pertinent for disposal of the present appeal can be briefly summarised as under:

(i) The appellants and Chhabil Dass Agarwal (the respondent) had entered into a contract agreement dated 24.02.2004 for construction of 2x5MVA, 66/11KV substation with LILO from Phodong 66KV S/S and Meyong-C-Power House at Mangan. The work had to be completed within four months but due to several factors, it could be done only on 18.02.2008. The work value was initially for Rs.7,79,33,000. Admittedly, on 28.04.2004 and 09.11.2004 mobilization advances for Rs.1,00,00,000/- and Rs. 94,83,250/- respectively, were paid to the respondent. Although, the work was completed on 18.02.2008, the respondent did not receive full and final payment on the said date. According to the respondent, on 16.02.2006, he

received Rs.2,76,44,048/- for civil works. Thereafter, for electrical works, he received Rs.1,76,00,000/- on 14.10.2011 and Rs.91,00,000/- on 02.11.2011. According to the respondent, on 31.03.2017 he received final payment of Rs.3,77,67,688/- after entering into a revised agreement dated 30.03.2017. The total amount received therefore was Rs.11,15,94,986/-.

(ii) Dissatisfied with the amount of payment received for the contract work, the respondent invoked the arbitration clause, claimed escalation cost and interest on delayed payment. Consequently, the sole Arbitrator was appointed by this Court vide order dated 08.10.2020 in Arb. P. No. 2 of 2020. After completing the proceedings, the impugned award was passed on 08.11.2021 holding that the respondent is entitled to both escalation cost and interest amounting to Rs.5,88,10,934/- along with 10% interest per annum. Aggrieved with the impugned award, the appellant filed an application under section 34 of the Arbitration Act, which was rejected by the learned Commercial Court.

(iii) The respondent, in their claim before the learned Arbitrator, asserted certain facts which were admitted by the appellant in their statement of defence. The respondent asserted that during the process of execution of the work there was change in specification. The change in alignment

of approach road necessitated increase in protective works and other allied works due to site conditions. There was also increase in number of culverts. To protect private properties during monsoon period and because of the instability of the site, additional walls were also constructed. The respondent had to execute all such works. For all such reasons, the revised estimate for said works increased from original approved cost of Rs.9,18,21,591.79p to Rs.11,19,55,284.10p which fact finds support from office notings of the appellants. Token work order dated 09.05.2007 was also issued to complete the work as per the revised estimate. Revised estimate was prepared in view of the excess work done at site. Ultimately, revised agreement dated 30.03.2017 was also executed for additional civil and electrical works. By the end of October 2005, more than 80% of the civil works were completed which fact has been admitted by the appellants in their office notings dated 26.10.2005. The entire work was completed and the sub-station charged on 18.02.2008. All the additional works were executed which fact the appellants also admitted. That, against the entire works completed on 18.02.2008, the respondent received Rs.1,00,00,000/- and Rs.94,83,250/- as mobilisation advances on 28.04.2004 and 19.11.2004 respectively. On 16.02.2006, an amount of Rs.2,76,44,048/- was received for

civil works. On 14.10.2011 and 02.11.2011, Rs.1,76,00,000/- and Rs.91,00,000/- was received for electrical works. Thereafter, on 31.03.2017, final payment was received of Rs.3,77,67,688/- totalling to Rs.11,15,94,986/-. Although the work was completed on 18.02.2008 that vastly improved the power distribution in North Sikkim and the appellants had been earning revenue in crores upon commissioning of the project completed by the respondent, he was not paid the pending payments for execution of the works. By various letters written from time to time, the respondent had been requesting the appellants to clear his payments but unfortunately after 2011 no payments were released and the respondent had been suffering losses. Several crores were still due and payable by the appellants. Due to non-payment, the respondent's financial and debt burden became precarious and daunting. The respondent was constantly hounded by his lenders and bankers. Instead of releasing payments, the appellants issued a letter dated 20.10.2011 to the Managing Director of the State Bank of Sikkim, stating that the respondent had completed the works and there was an unpaid liability to the tune of 5 crores due to paucity of funds.

(iv) The appellants in their statement of defence replied to the aforesaid assertions of the respondent stated in

paragraphs 1(xii) to 1(xix) of the claim petition by admitting thus, "*12. That the contents of paragraph 1(xii), 1(xiii), 1(xiv), 1(xv), 1(xvi), 1(xvii), 1(xviii) and 1(xix) of the statement of claim are matters of record and are admitted to the extent borne by records and anything contrary thereof the petitioner be put to strict proof thereof.*"

3. The claim of the respondent before the learned Arbitrator totalled to Rs.41,68,54,446.7p as outstanding on 31.10.2020 including escalation and interest on delayed payment. The learned Arbitrator did not grant the respondent the total amount of the claim and awarded only an amount of Rs.5,88,10,934/- which included escalation and interest on delayed payment.

4. The appellants invoked section 34 of the Arbitration Act for setting aside the arbitral award dated 08.11.2021 (the award) on the following grounds:-

(i) that the claim of the respondent was barred by Limitation Act, 1963 and as such, it contravenes the fundamental policy of Indian law.

(ii) that the award is patently illegal as the respondent did not produce any document to prove that:

a) he had borrowed loans for the purpose of executing the contract;
b) as to at what cost the equipment/materials were bought to claim escalation; and
c) he had raised the bills periodically as required under the terms of the contract and that the appellant had failed to pay or clear the said bills.

(iii) that the payment was made to the respondent on the very next day after the revised agreement dated 30.03.2017, and that the revised agreement does not have any provision for escalation and interest.

(iv) that the respondent had received the final payment without any protest or demur and in fact, the respondent, at no point of time, before or on the date of final payment raised any plea of escalation and interest.

5. The learned Commercial Court determined whether the impugned award contravenes the fundamental policy of Indian law or whether it is patently illegal.

6. The learned Commercial Court noted *Explanation 1* to section 34(2)(b)(ii) of the Arbitration Act and held that it clarifies that an award is in conflict with the public policy of India, only if:- (i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or (ii) it is in contravention with the

fundamental policy of Indian law; or (iii) it is in conflict with the most basic notions of morality or justice.

7. The learned Commercial Court also took note of *Explanation 2* to section 34(2)(b)(ii) of the Arbitration Act which provides that the test as to whether there is contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute. Further, section 2A empowers the Court to set aside an award if it is vitiated by patent illegality appearing on the face of the award. It mandates that an award shall however, not be set aside merely on the ground of an erroneous application of the law or by reappreciation of evidence.

8. The learned Commercial Court opined that the standard of public policy laid down in ***Renusagar Power Co. Ltd. vs. General Electric Co***.[1] has now been incorporated in *Explanation 1* to section 34(2)(b)(ii) of the Arbitration Act concerning contravention with the fundamental policy of Indian law. It also held that the concept of patent illegality was read into section 34 by the case of ***Oil & Natural Gas***

[1] 1994 Supp (1) SCC 644

Corporation Ltd.[2], according to which, a patently illegal award cannot be enforced and must be set aside.

9. The learned Commercial Court was of the view that in ***Associate Builders vs. Delhi Development Authority***[3], the principle of patent illegality was explained by the Hon'ble Supreme Court of India at paragraph 42 under three sub-heads: (a) contravention of the substantive law of India which would result in the death knell of an arbitral award. Such illegality must go to the root of the matter and cannot be of a trivial nature; (b) contravention of the Arbitration Act itself would be regarded as a patent illegality, for example, if an arbitrator gives no reason for an award; and (c) contravention of section 28(3) of the Arbitration Act which mandates that arbitral tribunal to decide in accordance to the terms of the contract and to take into account trade usages applicable to the transaction.

10. The learned Commercial Court also took note of the judgment of the Hon'ble Supreme Court in ***Delhi Airport Metro Express Pvt. Ltd. vs. Delhi Metro Rail Corporation Ltd***.[4] in which patent illegality was explained.

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[2] (2003) 5 SCC 705
[3] (2015) 3 SCC 49
[4] (2022) 1 SCC 131

11. After a clear understanding of the concepts of contravention of the fundamental policy of Indian law and patent illegality, the learned Commercial Court examined the impugned award as to whether it was in violation thereof. It was noticed that the learned Arbitrator had framed three issues, *viz.*, (i) Whether the respondent was entitled to escalation and labour charges?; (ii) Whether the respondent was entitled to interest?; and (iii) Whether the claim of the respondent was barred by limitation?

12. The learned Commercial Court noted that the learned Arbitrator had interpreted section 18 of the Arbitration Act in a liberal manner by holding that the provision does not require any particular form of acknowledgement and it is sufficient if there is an admission of one's liability. The number of official notings, correspondence and certificates of the appellant's department was taken into account to conclude that the acknowledgment of the liability to pay dues of the respondent began from 24.06.2008 and continued till 2017 when the petitioner actually made the payment to the respondent. The learned Commercial Court noted that the impugned award refers to several notings from 2014 to 2017 and letter dated 30.10.2011 issued to the Managing

Director, State Bank of Sikkim, by the Secretary of the Power Department requesting for release of the funds in favour of the respondent. The learned Commercial Court perused the relevant notings recorded in the concerned files that admit the liability of the Power Department to clear the dues of the respondent for the contract work. The learned Commercial Court noted that the learned Arbitrator had examined the judgment of ***J.C. Budhraja vs. Chairman, Orissa Mining Corporation Ltd. & Another***[5] and distinguished it. The learned Arbitrator had relied upon the judgment in ***Asset Reconstruction Company (India) Ltd. vs. Bishal Jaiswal & Another***[6], in which it was held by the Hon'ble Supreme Court that even acknowledgement made in financial statements and entries in books of accounts amount to acknowledgement of liability. The learned Commercial Court therefore opined that the respondent could definitely take it as acknowledgment of the monies payable by the appellant. Accordingly, the learned Arbitrator correctly decided issue no.3 of limitation.

13. With reference to issues no.1 and 2 relating to entitlement of escalation charges and accrual of interest, the learned Commercial Court held that the learned Arbitrator

[5] (2008) 2 SCC 444
[6] (2021) SCC OnLine SC 321

had analyzed the nature of work involved and arrived at a conclusion that even in the absence of escalation clause in the contract, such costs could be considered. It was held that the learned Arbitrator had kept in mind increase in rates of material required to be procured by the respondents for performance of the contract. The learned Commercial Court did not go into reappreciation of documentary evidence relying upon the judgment of ***Ssangyong Engineering and Construction Company Ltd. vs. National Highways Authority of India (NHAI)***[7], which held that reappreciation of evidence cannot be permitted under the ground of patent illegality appearing on the face of the order.

14. The learned Commercial Court opined that the interpretation of terms of a contract is within the ambit of the arbitration jurisdiction and if it is done so in a reasonable manner, the findings of the arbitrator cannot be termed as patently illegal. In the considered opinion of the learned Commercial Court, the learned Arbitrator had construed the contract document in a sensible way and it would be an error to interfere under such circumstances. To hold so, the learned Commercial Court relied upon ***NTPC Ltd.***

[7] (2019) 15 SCC 131

vs. Deconar Services Pvt. Ltd.[8], wherein it was held that a challenger to the arbitral award must show that the award of the arbitrator suffered from perversity or an error of law or that the arbitrator has otherwise misconducted himself. Merely showing that there is another reasonable interpretation or possible view based on material on record, is insufficient to allow for interference by the Court. The learned Commercial Court also referred to the judgment of the Division Bench of this Court in ***Sikkim Power Development Corporation Ltd. vs. M/s Amalgamated Transpower (India) Ltd***.[9]. In that case, it was held that in an application under section 34, the Court is not expected to act as an appellate Court and reappreciate the evidence and the scope of interference will be limited to the grounds provided under section 34 of the Arbitration Act. Resultantly, the learned Commercial Court declined to interfere with the award on the grounds canvassed before it.

15. Dissatisfied with the impugned judgment dated 30.05.2024, the appellants have now sought to invoke section 37 of the Arbitration Act.

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[8] (2021) 19 SCC 694
[9] 2023:HCS:57-DB

16. We notice that the judgment in ***Delhi Airport Metro Express Private Limited*** (supra) referred to by the learned Commercial Court was interfered with in a curative petition in the matter of ***Delhi Metro Rail Corporation Limited vs. Delhi Airport Metro Express Private Limited***[10]. In that case, it was held that: 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 reason would suffer from patent illegality. The arbitrator commits a patent illegality by deciding a matter within his jurisdiction or violating a fundamental principle of natural justice.

17. In the said judgment, the Supreme Court also held that a judgment setting aside or refusing to set aside an arbitral award under section 34 is appealable in the exercise

[10] (2024) 6 SCC 357

of jurisdiction of the Court under section 37 of the Arbitration Act. That, the Supreme Court had clarified in a line of precedents that the jurisdiction under section 37 of the Arbitration Act is akin to the jurisdiction of the Court under section 34 and restricted to the same grounds of challenge as section 34.

18. In ***Sikkim Power Development Corporation Ltd.*** (supra), this Court has examined the scope of section 37 and held:

> *"**Scope of section 37 of the Arbitration & Conciliation Act, 1996***
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> ***11.(i)** We shall now examine the jurisdiction and scope of section 37 of the Arbitration Act. In **Punjab State Civil Supplies Corporation Ltd. and Another vs. Ramesh Kumar and Company and Others**[11], the Hon'ble Supreme Court held that the jurisdiction in a first appeal arising out of a decree in a civil suit is distinct from the jurisdiction of the High Court under section 37 of the Arbitration Act arising from the disposal of a petition challenging an arbitral award under section 34. It was held that the High Court was required to determine as to whether the District Judge had acted contrary to the provisions of section 34 of the Arbitration Act in rejecting the challenge to the arbitral award.*
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> *11.(ii) In **Haryana Tourism Ltd. vs. Kandhari Beverages Ltd.**[12], the Hon'ble Supreme Court held that the award can be set aside under section 34/37 of the Arbitration Act, if the award is found to be contrary to (a) fundamental policy of Indian law; or (b) the interest of India; or (c) justice or morality; or (d) if it is patently illegal. It also held that the High Court while deciding an appeal under section 37 cannot enter into the merits of the claim.*

[11] 2021 SCC OnLine SC 1056
[12] (2022) 3 SCC 237

> *11.(iii) In **Dr. A. Parthasarathy and Others vs. E. Springs Avenues Pvt. Ltd. and others**[13], the Hon'ble Supreme Court reiterated that under section 37 of the Arbitration Act, the C ourt cannot remand the matter to arbitrator for fresh decision unless it is consented by both the parties following the law laid down in **Kinnari Mullick vs. Ghanshyam Das Damani**[14] and **I-Pay Clearing Services Pvt. Ltd. vs. ICICI Bank Ltd**.[15] It held that only two options are available to the Court considering the appeal under section 37 of the Arbitration Act. The High Court may either relegate the parties for fresh arbitration or to consider the appeal on merits on the basis of the material available on record within the scope and ambit of the jurisdiction under section 37 of the Arbitration Act."*

19. The learned Additional Advocate General representing the appellant relied upon paragraph 12 of ***Pam Developments Private Limited vs. State of West Bengal & Another***[16], in which it was held:

> *"**12.** This submission is persuasive, but the contract clauses speak for themselves. In fact, the High Court did what the arbitrator should have done. Examine what the contract provides. This is not even a matter of interpretation. It is the duty of every Arbitral Tribunal and court alike and without exception, for contract is the foundation of the legal relationship. Having considered the above referred clauses in the contract the High Court came to the conclusion that awarding any amount towards idle, machinery, etc. is prohibited under the "Special Terms and Conditions" of the contract. The arbitrator did not even refer to the contractual provisions and the District Court dismissed the objections under Section 34 with a standard phrase as extracted hereinabove. The High Court exercising jurisdiction under Section 37 did its duty and we are of the opinion that the conclusions of the High Court are correct and cannot be interfered with."*

20. The learned Additional Advocate General referred to 'clause 4(h)' under the head "General Terms & Conditions

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[13] (2022) SCC Online SC 719
[14] (2018) 11 SCC 328
[15] (2022) SCC OnLine SC 4
[16] (2024) 10 SCC 715

of Erection, Testing & Commissioning" and sub-head "General Terms & Conditions" which reads, "*h. The contract price as indicated in the Price Schedule shall remain firm during the tenure of the entire execution period of the work. No escalation on whatsoever ground shall be admissible*." The contract ageement dated 24.02.2004 defines the word "contract" to include the tender documents as well. The learned Additional Advocate General therefore submitted that 'clause 4h' prohibited escalation cost.

21. The learned Counsel for the respondent submitted that an award cannot be set aside based on contentions which were not urged before the learned Arbitrator. That, the Court under section 37 of the Arbitration Act cannot reinterpret the terms of the contract on the ground that the learned Arbitrator or the learned Commercial Court failed to give effect to all its clauses. He relied upon the judgments of the Supreme Court in ***State of Rajasthan & Another vs. Nav Bharat Construction Co.***[17], ***Konkan Railway Corporation vs. Chenab Bridge Project Undertaking***[18]; ***MMTC Limited vs. Vedanta Limited***[19], to buttress his submissions.

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[17] (2002) 1 SCC 659
[18] (2023) 9 SCC 85
[19] (2019) 4 SCC 163

22. The new plea relying upon 'clause 4h' above by the learned Aditional Advocate General for the first time before this Court is a plea contrary to their own stand before the learned Arbitrator as well as the learned Commercial Court. We are of the view that the award cannot be set aside on such a plea.

23. Even otherwise, we notice that the learned Arbitrator has proceeded on the basis that there was no escalation clause in the contract as admitted by both the appellants as well as the respondent before him. The learned Commercial Court has accepted the interpretation of the learned Arbitrator. Therefore, there is no room for revisiting the impugned judgment on the ground of wrong interpretation of the contract.

24. However, we are of the opinion that even if we accept the plea of the learned Additional Advocate General, it does not affect the inevitable outcome of the case. Clause 'h' quoted above would only mean that the contract price as indicated in the price schedule shall remain firm during the four months execution period of the work as time was the essence of the contract. What was further agreed upon, therefore, was that no escalation on whatsoever ground shall

be admissible if the work was completed within four months firmed up as the execution period. The facts, however, reflected something else. The learned Arbitrator agreed with the respondent that it was because of the appellants that the work could not be completed within the four months execution period. The learned Arbitrator came to a finding that the delays caused by the appellants led to the completion of the work only on 18.02.2008. The learned Arbitrator held that once it is found that there was delay in the execution of the contract due to the conduct of the appellants, they would be liable for the consequences of the delay, namely increase in prices. It was further held that in fact, the claim for escalation was not outside of the purview of the contract and arose as an incidence of the contract. The view taken by the learned Arbitartor is both legal and logical. It is not faulted by perversity or patent illegality. It would have been completely illogical to bind the respondent to the prices agreed in the year 2004 as the work was completed in the year 2008 due to the faults of the appellants and even then, substantive payment was made only in the year 2017.

25. On a query made by this Court to point out the price schedule mentioned in ‘clause 4h’, the learned

Additional Advocate General submitted that it does not exist. The learned Counsel for the respondent confirmed this statement.

26. The learned Arbitrator has awarded the escalation charges on a reasoned award which has been tested before the learned Commercial Court. The learned Commercial Court has come to the conclusion that grant of the escalation charges by the learned Arbitrator did not result in patent illegality.

27. Therefore, the facts of the present case would be completely distinguishable from the facts that were before the Supreme Court in ***Pam Developments Private Limited*** (supra) where there was a specific clause prohibiting any amount towards idle machinery, etc.

28. The learned Additional Advocate General also took another plea which was neither agitated before the learned Arbitrator nor before the learned Commercial Court. It was submitted that after entering into the agreement dated 24.02.2004, the work was completed on 18.02.2008 and thereafter, the second agreement was entered into on 30.03.2017. This agreement quantified the total amount

payable to the respondent by the appellant as Rs.1129.94 lakhs only, and therefore, having agreed to the payment of the said amount the respondent is precluded from seeking any further amount either on account of interest on delayed payment or for escalation cost.

29. It is noticed that the appellants had infact admitted the facts stated by the respondent as to how the cost increased and why the agreement dated 30.03.2017 was entered into. With these admitted facts, the parties decided to resolve their disputes through the process of arbitration. Before the learned Arbitrator, the respondent made his claims and the appellants filed their statement of defence. The learned Arbirator examined all these facts, framed relevant issues and decided them. The agreement dated 30.03.2017 does not even indicate that it was a full and final settlement as argued by the learned Additional Advocate General. A holistic reading of the agreement dated 30.03.2017 suggests that the parties thereto agreed to revise the schedule of rates agreed upon in the year 2004 which increased the total amount payable for works from Rs.7,79,33,000/- to Rs.1129.94 lakhs. The agreement dated 30.03.2017 also does not prohibit interest on delayed payment or escalation cost. Therefore, the appellants are

precluded from stating anything contrary at the stage of an appeal under section 37 of the Arbitration Act.

30. We find that there is, in fact, no scope of interference under section 37 of the Arbitration Act. The impugned judgment is a reasoned one, which has correctly appreciated the limited scope of interference under section 34 of the Arbitration Act. Accordingly, the appeal stands dismissed. Parties to bear their respective costs.

(Bhaskar Raj Pradhan)
Judge

(Biswanath Somadder)
Chief Justice

Approved for reporting : **Yes**
Internet : **Yes**
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