REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 4353 OF 2010

STATE OF CHHATTISGARH & ANR. ….. APPELLANTS

VERSUS

M/S SAL UDYOG PRIVATE LIMITED ….. RESPONDENT

J U D G M E N T

HIMA KOHLI, J.

1. The appellant-State of Chhattisgarh is aggrieved by a common judgment dated 21st October, 2009 passed by the Chhattisgarh High Court disposing of two appeals; one preferred by the appellant[1] and the other preferred by the respondent-M/s. Sal Udyog Private Limited[2], whereby the order dated 14th March, 2006 passed by the learned District Judge, Raipur in a petition filed by the appellant under Section 34 of the Arbitration and Conciliation Act, 1996[3] has been partially modified and the interest awarded in favour of the respondent from the date of the

1 Appeal No. 22 of 2006
2 M.A. No. 727 of 2006
3 For short "the 1996 Act"

notice i.e. 6th December, 2009 till realisation, has been reduced from 18 per cent per annum to 9 per cent per annum. At the same time, the appeal preferred by the respondent-Company came to be dismissed.

2. In brief, the relevant facts of the case are that on 30th August, 1979, the State of Madhya Pradesh had entered into an agreement with the respondent-Company for supply of 10,000 tonnes of Sal seeds per annum for a period of 12 years. In the year 1987, faced with loss of revenue, Government of Madhya Pradesh decided to annul all agreements relating to forest produce and enacted a legislation[4]. However, the said Act was notified after a decade, on 1st January, 1997. In the absence of any Notification of the said enactment, the agreement between the State of Madhya Pradesh and the respondent-Company was renewed on 30th April, 1992 and was valid till 29th April, 2004. Under the renewed Agreement, the State of Madhya Pradesh agreed to supply 10,000 tonnes of Sal seeds to the respondent-Company. When the Act was finally notified in the year 1996, by virtue of Section 5A, State of Madhya Pradesh terminated the Agreement dated 30th April, 1992, on 21st December, 1998. Aggrieved by the said termination, the respondent-Company issued a notice dated 6th December, 1999 invoking Arbitration

4 M.P. Van Upaj Ke Kararon Ka Punarikshan Adhiniyam No. 32 of 1987 dated nil

Clause No. 23 in the Agreement and raised certain disputes, including a claim for refund of a sum of Rs.1,72,17,613/- (Rupees One Crore Seventy Two Lakhs Seventeen Thousand Six Hundred and Thirteen Only) on the ground that the said amount had been paid in excess to the State of Madhya Pradesh for the supply of Sal seeds during the period between 1981-82 to 31st December, 1998.

3. For the sake of completeness, it may be noted that the respondent-Company had filed an application under Section 11(6) of the 1996 Act before the Jabalpur Bench of the Madhya Pradesh High Court praying *inter alia* for appointment of an Arbitrator. During the pendency of the said application, the Madhya Pradesh Re-organisation Act, 2000 came into force. Resultantly, the application moved by the respondent-Company was transferred to the High Court of Chhattisgarh at Bilaspur. With the consent of the parties, an order dated 21st March, 2002 was passed in the said proceeding, appointing a Sole Arbitrator, who was subsequently replaced by another Arbitrator.

4. Vide Arbitral Award dated 17.02.2005, the claim of the respondent-Company was allowed and a sum of Rs.7,43,46,772/- (Rupees Seven Crores forty three lakhs forty six thousand seven hundred seventy two only) was awarded in its favour which included interest at the rate of 18

per cent per annum upto February, 2005 along with future interest at the rate of 18 per cent per annum payable with effect from 1st March, 2005.

5. Aggrieved by the aforesaid Award, the appellant-State filed a petition under Section 34 of the 1996 Act before the District Judge, Raipur. Vide order dated 14th March, 2006, the learned District Judge declined to interfere with the Award except for modifying the same to the extent of the interest awarded in favour of the respondent- Company and making it payable from the date of the notice i.e. 6th December, 1999, instead of, from the date of the Agreement, till 31st December, 1999.

6. The appellant-State assailed the order dated 14th March, 2006 by preferring an appeal under Section 37 of the 1996 Act. The respondent-Company also filed a Cross Appeal being aggrieved by the modification of the Award and reduction of the period of interest awarded in its favour. Several pleas were taken by the appellant-State in the appeal, including the ground of non-joinder of the State of Madhya Pradesh as a necessary party; that the respondent-Company never claimed refund of the excess recovery throughout the tenure of both the Agreements and that the respondent's claim was barred by limitation. A plea of estoppel was also taken against the respondent-Company.

7. In view of the order dated 30th April, 2010 whereunder leave was granted in the present petition limited to the issue of disallowance of

supervision charges to the tune of Rs.1.49 crores under the Award, which as per the appellant-State, was liable to be borne by the respondent-Company under the Agreement, this Court does not propose to examine the other pleas taken by the appellant-State in the present appeal.

8. Ms. Prerna Singh, learned counsel for the appellant-State has contended that a perusal of the terms and conditions of the Agreement make it apparent that the parties had agreed that the expenses incurred every year by the State Government for supplying Sal seeds to the respondent-Company would not only include the cost of collection, purchase price paid to the growers and Commission Agents, cost of storage and transportation, but also include handling and supervision charges. She pointed out that the said plea taken by the appellant-State was duly noted by the learned Arbitrator in para 18, but was erroneously turned down in para 19 of the Award. Paras 18 and 19 of the Award are extracted herein below for ready reference:-

> "18. The further submission of the defendant is that in clause 6(B) of the agreement in respect of supervision expense it is mentioned and the provision also enjoins that the supervision expenses along with other expenses which are spent by the defendant would be recoverable. In so far as the supervision expense is concerned that concerned that concerns will all those expenses with respect to collection of the Sal seeds under the banner of the government. And in these expenses there are certain expenses like godown rent, the Salary of the officers and the staffs, the appointment of the different persons of the work in the department and their travelling allowance, vehicle, telephone, furniture, transport and all other expenses of the vehicle. They are

> all such proportionate expenses which cannot be shown under the head of the bill or the voucher under the head of Sal seeds and therefore 10% supervision expenses are acceptable and recoverable.
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> 19. On the analysis of this issue there is a clear provision in the agreement that the purchase of the Sal seeds shall be divided into two parts, the first would be of royalty and the second part would be of the purchaser of Sal seed and all those expenses until its delivery in which the collection expenses, purchasing price, handling and supervision expenses, the agents commission, transports would all be assembled. After the examination of the price on both the ends the first end would be of royalty according to the industrial policy of the state government of Madhya Pradesh the meaning of royalty implies the meaning the price at the production site. For the calculation the bazaar rate or the auction or the price received on tender, the transport (in wood matter the cutting) expenses may be reduced. In this was in the matter of royalty from the point of production and protection and until the arrangement for the sake of trading all in direct expenses are assembled so far as the second part is concerned from the point of collection of Sal seeds until its delivery all expenses are assembled. In order it to make more clear the first part has been shown which relates to the expenses relating to 'storing and the purchase price to the producers and other handling and supervision expenses'. In so far as the guidelines which have been issued by virtue of the notification of the state government dated 25.04.1981 in so far as in para 17 is concerned and particularly the guidelines which has been issued by Madhya Pradesh Rajya Vanopaj Sangh it is apparent that the work of the supervisor has to be done by the agent/committee and particularly the expenses to the clerk checher etc and all those other expenses which goes to the handling expenses and the commission. And thus in so far as in the form of supervision expenses there is no basis to admit any indirect expense. In this situation the amount which is shown in the account by the account experts are liable to be admitted for adjustments."

9. Learned counsel for the appellant-State argued that the aforesaid patent illegality on the face of the Award was highlighted in grounds (J) & (K) of the appeal preferred under Section 37 of the 1996 Act and was noted in para 3 of the impugned judgment but the High Court failed to return a finding. It was canvassed that 'supervision charges' have been clearly referred to in Clause 6(b) of the Agreement and is the subject matter of a Circular dated 27th July, 1987 issued by the State

Government. Levy of 'supervision charges' had also been intimated to the respondent-Company at the time of seeking advance payment and it did not raise any objection to paying the same. She adverted to the documents filed with the appeal and marked as Annexure P2(Colly.) which are specimen copies of the orders placed, indicating the price of the Sal seeds to be supplied by the State Government and the amount required to be paid by the respondent-Company to state that the same specifically refer to supervision charges described as "*Paryavekshan vyay*" in Hindi. It was thus submitted that the respondent-Company having failed to raise any objection regarding levy of 'supervision charges' over the years and having paid the said amount without any demur till termination of the contract, there was no reason for the learned Sole Arbitrator to have deducted 'supervision charges' and directed refund thereof to the respondent-Company. To buttress the argument that the plea of patent illegality is a permissible ground for reviewing a domestic Award, the ruling in ***Delhi Airport Metro Express Pvt. Ltd. v. Delhi Metro Rail Corporation Ltd.***[5] has been cited.

10. *Per contra*, Mr. Pranav Malhotra, learned counsel for the respondent-Company argued that the appellant-State having failed to raise any objection relating to deduction of 'supervision charges' in its

5 2021 SCC Online SC 695

Section 34 petition, it must be assumed that it had waived its right to take any such plea in the Section 37 petition filed in the High Court and for that matter, before this Court. He cited ***State of Maharashtra v. Hindustan Construction Company Limited***[6] to substantiate such an objection.

11. Learned counsel for the appellant-State relied on the judgment in ***Lion Engineering Consultants v. State of Madhya Pradesh and Others***[7] to meet the aforesaid objection raised by learned. counsel for the respondent-Company that the appellant-State did not take a specific ground in the Section 34 petition on the aspect of refund of 'supervision charges'. She reiterated that the objection regarding 'supervision charges' was taken by the appellant-State before the learned Sole Arbitrator as also in the Section 37 petition and ought to have been considered by the High Court.

12. We have carefully perused the records and given our thoughtful consideration to the submissions advanced by learned counsel for the parties.

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6 [2010] 4 SCC 518
7 [2018] 16 SCC 758

13. The law on interference in matters of Awards under the 1996 Act has been circumscribed with the object of minimising interference by courts in arbitration matters. One of the grounds on which an Award may be set aside is "patent illegality". What would constitute "patent illegality" has been elaborated in ***Associate Builders v. Delhi Development Authority***[8], where "patent illegality" that broadly falls under the head of "Public Policy", has been divided into three sub-heads in the following words:-

> "...42. In the 1996 Act, this principle is substituted by the "patent illegality" principle which, in turn, contains three subheads:
>
> 42.1. (a) A contravention of the substantive law of India would result in the death knell of an Arbitral Award. This must be understood in the sense that such illegality must go to the root of the matter and cannot be of a trivial nature. This again is really a contravention of Section 28(1)(a) of the Act, which reads as under:
>
> **"28. Rules applicable to substance of dispute. – (1) Where the place of arbitration is situated in India-**
>
> > (a) In an arbitration other than an international commercial arbitration, the Arbitral Tribunal shall decide the dispute submitted to arbitration in accordance with the substantive law for the time being in force in India;"
>
> 42.2. (b) A contravention of the Arbitration Act itself would be regarded as a patent illegality – for example if an arbitrator gives no reasons for an award in contravention of Section 31(3) of the Act, such award will be liable to be set aside.
>
> **42.3. (c) Equally, the third subhead of patent illegality is really a contravention of Section 28(3) of the Arbitration Act, which reads as under**:
>
> **"28. Rules applicable to substance of dispute. – (1) – (2) *****
>
> (3) In all cases, the Arbitral Tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction."

8 [2015] 3 SCC 49

> This last contravention must be understood with a caveat. An Arbitral Tribunal must decide in accordance with the terms of the contract, but if an arbitrator construes a term of the contract in a reasonable manner, it will not mean that the award can be set aside on this ground. Construction of the terms of a contract is primarily for an arbitrator to decide unless the arbitrator construes the contract in such a way that it could be said to be something that no fair-minded or reasonable person could do."
>
> (emphasis added)

14. In ***Ssangyong Engineering and Construction Company Limited v. National Highways Authority of India (NHAI)*** [9], speaking for the Bench, Justice R.F. Nariman has spelt out the contours of the limited scope of judicial interference in reviewing the Arbitral Awards under the 1996 Act and observed thus :

> "**34.** What is clear, therefore, is that the expression "public policy of India", whether contained in Section 34 or in Section 48, would now mean the "fundamental policy of Indian law" as explained in paras 18 and 27 of Associate Builders [Associate Builders v. DDA (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] i.e. the fundamental policy of Indian law would be relegated to "Renusagar" understanding of this expression. This would necessarily mean that Western Geco [ONGC v. Western Geco International Ltd., (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12] expansion has been done away with. In short, Western Geco [ONGC v. Western Geco International Ltd.,(2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12], as explained in paras 28 and 29 of Associate Builders [Associate Builders v. DDA,(2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204], would no longer obtain, as under the guise of interfering with an award on the ground that the arbitrator has not adopted a judicial approach, the Court's intervention would be on the merits of the award, which cannot be permitted post amendment. However, insofar as principles of natural justice are concerned, as contained in Sections 18 and 34(2) (a)(iii) of the 1996 Act, these continue to be grounds of challenge of an award, as is contained in para 30 of Associate Builders [Associate Builders v. DDA(2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204].
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> 35. It is important to notice that the ground for interference insofar as it concerns "interest of India" has since been deleted, and therefore, no longer obtains. Equally, the ground for interference on the basis that the award is in conflict with justice or morality is now to be understood as a conflict with the "most basic notions of morality or justice". This again would be in line with paras 36 to 39 of Associate Builders [Associate Builders v. DDA (2015) 3 SCC 49 : (2015) 2 SCC (Civ)

9 [2019] 15 SCC 131

204], as it is only such Arbitral Awards that shock the conscience of the court that can be set aside on this ground.

36. Thus, it is clear that public policy of India is now constricted to mean firstly, that a domestic award is contrary to the fundamental policy of Indian law, as understood in paras 18 and 27 of Associate Builders [Associate Builders v. DDA (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204], or secondly, that such award is against basic notions of justice or morality as understood in paras 36 to 39 of Associate Builders [Associate Builders v. DDA (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204]. Explanation 2 to Section 34(2)(b)(ii) and Explanation 2 to Section 48(2)(b)(ii) was added by the Amendment Act only so that Western Geco [ONGC v. Western Geco International Ltd., (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12], as understood in Associate Builders [Associate Builders v. DDA (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204], and paras 28 and 29 in particular, is now done away with.

37. Insofar as domestic awards made in India are concerned, an additional ground is now available under sub-section (2-A), added by the Amendment Act, 2015, to Section 34. Here, there must be patent illegality appearing on the face of the award, which refers to such illegality as goes to the root of the matter but which does not amount to mere erroneous application of the law. In short, what is not subsumed within "the fundamental policy of Indian law", namely, the contravention of a statute not linked to public policy or public interest, cannot be brought in by the backdoor when it comes to setting aside an award on the ground of patent illegality.

38. Secondly, it is also made clear that reappreciation of evidence, which is what an appellate court is permitted to do, cannot be permitted under the ground of patent illegality appearing on the face of the award.

39. To elucidate, para 42.1 of Associate Builders [Associate Builders v DDA(2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204], namely, a mere contravention of the substantive law of India, by itself, is no longer a ground available to set aside an Arbitral Award. Para 42.2 of Associate Builders [Associate Builders v DDA (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204], however, would remain, for if an arbitrator gives no reasons for an award and contravenes Section 31(3) of the 1996 Act, that would certainly amount to a patent illegality on the face of the award.

40. The change made in Section 28(3) by the Amendment Act really follows what is stated in paras 42.3 to 45 in Associate Builders [Associate Builders v. DDA (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204], namely, that the construction of the terms of a contract is primarily for an arbitrator to decide, unless the arbitrator construes the contract in a manner that no fair-minded or reasonable person would; in short, that the arbitrator's view is not even a possible view to take. Also, if the arbitrator wanders outside the contract and deals with matters not allotted to him, he commits an error of jurisdiction. This ground of challenge will now fall within the new ground added under Section 34(2-A).

41. What is important to note is that a decision which is perverse, as understood in paras 31 and 32 of Associate Builders [Associate Builders v. DDA (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204], while no longer being a ground for challenge under "public policy of In-

> dia", would certainly amount to a patent illegality appearing on the face of the award. Thus, 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 on the ground of patent illegality. Additionally, a finding based on documents taken behind the back of the parties by the arbitrator would also qualify as a decision based on no evidence inasmuch as such decision is not based on evidence led by the parties, and therefore, would also have to be charcterised as perverse."
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> (emphasis added)

15. In *__Delhi Airport Metro Express Pvt. Ltd.__* (supra) referring to the facets of patent illegality, this Court has held as under:

> "**26.** Patent illegality should be illegality which goes to the root of the matter. In other words, every error of law committed by the Arbitral Tribunal would not fall within the expression 'patent illegality'. Likewise, erroneous application of law cannot be categorised as patent illegality. In addition, contravention of law not linked to public policy or public interest is beyond the scope of the expression 'patent illegality'. What is prohibited is for courts to re-appreciate evidence to conclude that the award suffers from patent illegality appearing on the face of the award, as courts do not sit in appeal against the Arbitral Award. The permissible grounds for interference with a domestic award under Section 34(2-A) on the ground of patent illegality is when the arbitrator takes a view which is not even a possible one, or interprets a clause in the contract in such a manner which no fair-minded or reasonable person would, or if the arbitrator commits an error of jurisdiction by wandering outside the contract and dealing with matters not allotted to them. An Arbitral Award stating no reasons for its findings would make itself susceptible to challenge on this account. The conclusions of the arbitrator which are based on no evidence or have been arrived at by ignoring vital evidence are perverse and can be set aside on the ground of patent illegality. Also, consideration of documents which are not supplied to the other party is a facet of perversity falling within the expression 'patent illegality."

16. Having regard to the aforesaid parameters, we may proceed to examine the facts of the instant case. As noted above, this Court is required to examine the singular issue as to whether any interference is called for in the Award on the ground taken by the appellant-State that the learned Arbitrator

as also the High Court has ignored the binding terms of the contract governing the parties relating to recovery of 'supervision charges' from the respondent-Company and the Circular dated 27th July, 1987 issued by the State Government on the same lines which as per the appellant-State, goes to the root of the matter.

17. Some of the relevant terms and conditions of the Original Agreement dated 30th August, 1979, are extracted below for ready reference:-

> "**6**. The price payable by the Purchaser for the Sal Seeds supplied under this agreement shall consist of: -
>
> (a) Royalty at the rate of Rs. 312.50/- (Rupees Three Hundred Twelve and Fifty Paise only) per tonne for the initial four years of this agreement and.
>
> **(b) All expenses incurred by the Governor each year, till the delivery of the Sal Seeds to the Purchaser, which shall include the cost of collection and/or the Purchase price paid to growers, as well as handling supervision charges, commission to agent, cost of storage, transportation etc.**
>
> **8.** Supply of Sal Seeds shall be made to the Purchaser against advance payments as given below: -
>
> At the beginning of each working season not later than 1st April each year, the Conservator(s) of Forests of the Circle(s) mentioned in Schedule 'A' shall intimate to the Purchaser the price payable as per clause 6 above. The Purchaser shall pay the same in the following manner: -
>
> (i) The amount of royalty as per clause 6(a) shall be deposited initially (not later than 30th April each year) and 500 quintals of Sal Seeds through a crossed Bank Draft or a Call Deposit Receipt in favour of the concerned Divisional Forest Officer(s). This initial payment shall be replenished by the Purchaser every week or immediately after delivery of the quantity paid for, whichever is earlier.
>
> Provided that in case of a shortfall in the supply of Sal Seeds for any such payment, the amount paid to the Sal Seeds not actually supplied shall be adjusted towards the subsequent payment.
>
> (ii) Advance payment on account of collection costs and/or the purchase price as specified in clause 6(b) above shall be made in cash simultaneously and separately for the quantity mentioned

> above and as laid down above to such officer who may be authorized by the concerned DFO in this behalf.
>
> **9**.(i) The Purchaser shall arrange to take delivery of the Sal Seeds at the collection centre(s) or godown(s) as decided by the DFO within 24 hours of its collection there and shall arrange to remove the Sal Seeds so deposited within 15 days of the delivery thereof.
>
> **(ii) If the Purchaser fails to take delivery of the collected Sal Seeds or fails to remove the same within the period prescribed above, then the Purchaser shall pay to the Governor supervision charges and godowns rent at the rate of five paise per quintal per day from the date of expiry of the period mentioned above.**
>
> (iii) If failure to take delivery of Sal Seeds continue beyond the prescribed period of 15 days, the concerned Divisional Forest Officer may, in tis discretion, refuse delivery of Sal Seeds to the Purchaser and permit delivery to any other person or party in respect of a part or the whole quantity of such Sal Seeds to any other person or party and in such circumstances, the Purchaser shall be liable to pay the amount of loss as well as other expenses on supervision etc. Incurred by the Governor and this sum shall be recoverable as arrears of land revenue."

18. It is an admitted position that both, the Original Agreement dated 30th August, 1979 and the renewed Agreement dated 30th April, 1992 included a clause relating to levy of "supervision charges". Most of the terms and conditions of the Original Agreement dated 30th August, 1979 and the Renewed Agreement dated 30th April, 1992 are materially the same. Clause 6(b) of the Agreement dated 30th August, 1979 is identical to Clause 5(b) of the Agreement dated 30th April, 1992. The said clauses stipulate that expenses incurred by the State Government towards supply of Sal seeds were to include amongst others, 'supervision charges'. Clause 8 of the first Agreement is identical to Clause 7 of the second Agreement which stipulates that supply of Sal seeds to the respondent-Company would be against advance payment. There is also a similarity between Clause 9(ii) of the

Agreement dated 30th July, 1979 and Clause 8(ii) of the Agreement dated 30th April, 1992, that require the respondent-Company to take delivery of the collected Sal seeds within a stipulated time and prescribe that in case of failure to do so, supervision charges and godown rent shall be payable at a fixed price of 0.05p. [five paise] per quintal per day.

19. Circular dated 27th July, 1987 issued by the Government of Madhya Pradesh provides for the assessment of the actual collection expenditure of the Sal seeds supplied from the year 1981 to 1986, and stipulates that:-

> "2. The imposition of 10% supervision charges on the amount calculated after deducting the actual expenditure, adding the cost of sukhat (illegible) in the Sal seeds in the expenditure, and computation & recovery of interest for the period from the date of supply order till the date of supply after the order of Court, in certain cases wherein stay orders were passed by High Court & Supreme Court, have been recommended."

20. The appellant-State had taken a plea on the aspect of levy of 'supervision charges' in Ground (J) and (K) of the Section 37 petition as follows:

> "J. For that the Ld. Arbitrator failed to appreciate that general supervision charges which includes administrative expenses including Salary, telephone, TA/DA, POL and other expenses incurred on officers and staff of the Department and, therefore, vide circular No. 7/87 dated 27.07.87 the erstwhile State of Madhya Pradesh has fixed the general supervision charges as 10% of the price which do not require any assessment.
>
> K. That vide order dated 27.08.1999 of Hon'ble High Court, Jabalpur in W.P. No. 3177/99 in Bastar Oil Mills case, recovery of handling and supervision charges was fixed at 20% of the price, which was subsequently fixed by the Supreme Court as Rs. 1500/- per tonne vide order dated 17.01.2000 in SLP (C) No. 6/2000, State of M.P. Vs. Bastar Oil Mills case, that was about 60% of the price, meaning thereby the terms of contract contains two types of supervision charges i.e. one is General handling and Supervision charges and second is Special supervision charges when there is delay in the taking of delivery of Sal Seed under Clause (9) of the agreement and there was no dispute at all about the supervision charges charges under Clause (6) at the rate of 10% of the price nor such dispute was ever raised by the respondent. So, the order directing refund of general handling and supervision charges collected is bad in law and is error apparent on the face of the record."

21. Though the aforesaid plea has been recorded in paras 3 and 5 of the impugned judgment, as can be seen from the following, it has remained un-answered by the High Court:-

> "3 ***
> ***
>
> Learned Arbitrator has also ignored circular of the erstwhile State Government whereby general supervision charges was fixed by 10% of the price which did not require assessment. Learned Arbitrator also not considered that High Court of M.P. at Jabalpur in W.P. No. 3177/99 in Bastar Oil Mill's case fixed the recovery towards handling and supervision charges at 20% of the price, which was subsequently fixed by the Hon'ble Supreme Court at Rs. 1,500/- per ton vide order dated 17.01.2000 by S.L.P. (Civil) No. 6/2000. Thus, the impugned award whereby the State has been directed refund of general handling and supervision charges collected by the State is bad in law.
>
> 4 ***
>
> 5 "....The State was within its right to recover supervision charges under Clause 6 at the rate of 10% of the price and there was no dispute raised by the purchaser in this regard and thus, the award

> directing refund of general handling and supervision charges collected by the State is contrary to law."

22. On a conspectus of the facts of the case, it remains undisputed that though the appellant-State did raise an objection before the Arbitral Tribunal on the claim of the respondent-Company seeking deduction of supervision charges, for which it relied on Clause 6(b) of the Agreement and the Circular dated 27th July, 1987 to assert that recovery of supervision charges along with expenses was a part and parcel of the contract executed with the respondent-Company, the said objection was turned down by the learned Sole Arbitrator by giving a complete go by to the terms and conditions of the Agreement governing the parties and observing that there is no basis to admit any such "indirect expenses". The Circular dated 27th July, 1987 issued by the Government of Madhya Pradesh that provides for imposition of 10% supervision charges on the amounts calculated towards the cost of the Sal seeds in the expenditure incurred, was also ignored. Pertinently, the respondent-Company has not denied the fact that supervision charges were being levied by the appellant-State and being paid by it without any demur as a part of the advance payment made on an annual basis, right from the date the parties had entered into the first agreement, i.e., from 30th August, 1979. This fact is also borne out from the specimen copies of the orders filed by the appellant-State with the appeal that amply demonstrate that the cost of the Sal seeds required to be paid by the respondent-company included 'supervision charges' described as "*Paryavekshan vyay*" in vernacular language. It was

only after the appellant-State had terminated the second contract on 21st December, 1998, that the respondent-company raised a dispute and for the first time, claimed refund of the excess amount purportedly paid by it to the appellant-State towards supervision charges incurred for supply of Sal seeds. In our opinion, this is the patent illegality that is manifest on the face of the Arbitral Award inasmuch as the express terms and conditions of the Agreement governing the parties as also the Circular dated 27th July, 1987 issued by the Government of Madhya Pradesh have been completely ignored.

23. We are afraid, the plea of waiver taken against the appellant-State on the ground that it did not raise such an objection in the grounds spelt out in the Section 34 petition and is, therefore, estopped from taking the same in the appeal preferred under Section 37 or before this Court, would also not be available to the respondent-Company having regard to the language used in Section 34(2A) of the 1996 Act that empowers the Court to set aside an award if it finds that the same is vitiated by patent illegality appearing on the face of the same. Once the appellant-State had taken such a ground in the Section 37 petition and it was duly noted in the impugned judgment, the High Court ought to have interfered by resorting to Section 34(2A) of the 1996 Act, a provision which would be equally available for application to an appealable order under Section 37 as it is to a petition filed under Section 34 of the 1996 Act. In other words, the respondent-Company cannot be heard to state that

the grounds available for setting aside an award under sub-section (2A) of Section 34 of the 1996 Act could not have been invoked by the Court on its own, in exercise of the jurisdiction vested in it under Section 37 of the 1996 Act. Notably, the expression used in the sub-rule is "*the Court finds that*". Therefore, it does not stand to reason that a provision that enables a Court acting on its own in deciding a petition under Section 34 for setting aside an Award, would not be available in an appeal preferred under Section 37 of the 1996 Act.

24. Reliance placed by learned counsel for the respondent-Company on the ruling in the case of ***Hindustan Construction Company Limited***(*Supra*) is found to be misplaced. In the aforesaid case, the Court was required to examine whether in an appeal preferred under Section 37 of the 1996 Act against an order refusing to set aside an Award, permission could be granted to amend the Memo of Appeal to raise additional/new grounds. Answering the said question, it was held that though an application for setting aside the Arbitral Award under Section 34 of the 1996 Act had to be moved within the time prescribed in the Statute, it cannot be held that incorporation of additional grounds by way of amendment in the Section 34 petition would amount to filing a fresh application in all situations and circumstances, thereby barring any amendment, however material or relevant it may be for the consideration of a Court, after expiry of the prescribed period of limitation. In fact, laying emphasis on the very expression "*the Courts find that*" applied in Section

34(2)(b) of the 1996 Act, it has been held that the said provision empowers the Court to grant leave to amend the Section 34 application if the circumstances of the case so warrant and it is required in the interest of justice. This is what has been observed in the preceding paragraph with reference to Section 34(2A) of the 1996 Act.

25. To sum up, existence of Clause 6(b) in the Agreement governing the parties, has not been disputed, nor has the application of Circular dated 27th July, 1987 issued by the Government of Madhya Pradesh regarding imposition of 10% supervision charges and adding the same to cost of the Sal seeds, after deducting the actual expenditure been questioned by the respondent-Company. We are, therefore, of the view that failure on the part of the learned Sole Arbitrator to decide in accordance with the terms of the contract governing the parties, would certainly attract the "patent illegality ground", as the said oversight amounts to gross contravention of Section 28(3) of the 1996 Act, that enjoins the Arbitral Tribunal to take into account the terms of the contract while making an Award. The said 'patent illegality' is not only apparent on the face of the Award, it goes to the very root of the matter and deserves interference. Accordingly, the present appeal is partly allowed and the impugned Award, insofar as it has permitted deduction of 'supervision charges' recovered from the respondent-Company by the appellant-State as a part of the expenditure incurred by it while calculating the price of the Sal seeds, is quashed and set aside, being in direct conflict with the terms of the

contract governing the parties and the relevant Circular. The impugned judgment dated 21st October, 2009 is modified to the aforesaid extent.

26. The present appeal is disposed of in the above terms, while leaving the parties to bear their own costs.

.................................**CJI.**
[N. V. RAMANA]

..................................**.J.**
[SURYA KANT]

..................................**J.**
[HIMA KOHLI]

New Delhi,
November 08, 2021