

IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
COMMERCIAL DIVISION
APPELLATE SIDE

Present:

The Hon'ble Justice Debangsu Basak
 And
The Hon'ble Justice Aryak Dutt

FMAT (ARBAWARD) 35 of 2022

State of West Bengal
Vs.
M/s. A.J. Sarkar & Co.

For the Appellant : Mr. Abhishek Banerjee, Adv.

For Respondent : Mr. Priyankar Saha, Adv.
 Ms. Srijani Mukherjee, Adv.

Hearing Concluded on : August 27, 2026
 Judgment on : September 22, 2026

DEBANGSU BASAK, J.:-

1. Appellant has assailed the judgment and order dated March 30, 2022 passed by the learned Commercial Court at Asansol in Misc. Arbitration Case No. 1 of 2019.
2. By the impugned judgment and order, learned Judge has dismissed the challenge under Section 34 of the Arbitration and Conciliation Act, 1996 directed against the award dated February 18, 2019.

3. Learned Advocate appearing for the appellant has contended that, the learned Arbitrator erred in granting some of the claims made by the respondent.

4. Referring to the impugned award, learned Advocate appearing for the appellant has contended that, learned Arbitrator relied upon documents which were not proved in accordance with the law. He has contended that, the appellant was denied any opportunity to inspect the original documents relied upon by the respondent. The appellant had denied the genuineness, factum, validity and contents of the documents as such documents were third party documents. He has contended that, the respondent was called upon to prove such documents by adducing cogent evidence as they were third party documents. He has pointed out that, in absence of examination of the authors of such documents, none of such documents were admissible in evidence.

5. Learned Advocate for the appellant has submitted that the learned Arbitrator had recorded submissions of the respective parties made in every sitting of the arbitration proceeding in extenso. He has pointed out that the basis of the claims of the respondent, being Annexure C-21 of the

statement of claim, is essentially a cost analysis and nothing more. He has contended that, cost analysis amounts to nothing and cannot be a substitute of actual proof. In support of his contention he has relied upon **1994 Volume 1 Arbitration Law Reporter 269 (Kochar Construction Versus Union of India and Another)**

6. Relying upon **2015 (2) Bom CR 697 (Rashmi Housing Private Limited Versus Pan India Infraprojects Private Limited)** learned advocate appearing for the appellant has contended that, although, Evidence Act has no application before any arbitration nonetheless the principles thereto are applicable.

7. Learned Advocate appearing for the appellant has contended that, although a document can be proved by examining the person who has seen the original nonetheless the contents of such documents has to be proved by the author of such document. In support of such contention he has relied upon **AIR 54 Bom 305 (Madholal Sindhu Versus Asian Assurance Co. Ltd and Others)**

8. Relying upon **2011 (2) SCC 532 (Kalyan Kumar Gogoi Versus Ashutosh Agnihotri and Another)** learned

advocate appearing for the appellant has contended that, evidence which is hearsay in nature is to be ignored and discarded outright.

9. Learned Advocate appearing for the appellant has contended that, events occurring subsequent to the contract had made the execution of the project impossible. He has pointed out there were litigations regarding the land and of there were problems with regard to the availability of the site. He has relied upon **1953 (2) SCC 437 (Satyabrata Ghose Versus Mugneeram Bangur and Company and Another)** for the proposition that, the contract stood terminated by reason of frustration of the contract and/or impossibility in execution of the contract.

10. Relying upon **2025 SCC OnLine SC 2857 (Ramesh Kumar Jain Versus Bharat Aluminium Company Limited)** learned Advocate appearing for the appellant has contended that, the learned Arbitrator ignored binding precedents and therefore, the award stands vitiated by reason of patent illegality.

11. Learned Advocate appearing for the appellant has contended that, while allowing claims No. 1 and 2 made by

the appellant, learned Arbitrator reproduced the arguments made by the respondent in the 21st sitting.

12. Relying upon **2022 (3) SCC 121 (I-Pay Clearing Services Private Limited Versus ICICI Bank Limited)**

learned Advocate appearing for the appellant has contended that, non-consideration of the binding precedents cited on behalf of the appellant constitutes patent illegality.

13. Relying upon **2026 (4) SCC 392 (Lancor Holdings Limited Versus Prem Kumar Menon and Others)** learned

Advocate appearing for the appellant has contended that, time in excess of two years elapsed between the date of conclusion of the hearing and the passing of the award. On that ground alone, the award should be set aside.

14. Learned Advocate appearing for the respondent has contended that, the appellant floated the tender for construction of box sales bridge and both side project over Gomani Khal in between 6th Km and 7th Km of Goas-Goraipur Road under Murshidabad Highway Division No. 1 in the district Murshidabad under tender No. 7/B of 2010/2011. He has contended that, the respondent participated in the tender and become a successful bidder. Appellant had issued the

acceptance cum work order by a letter dated November 15, 2010.

15. Learned Advocate appearing for the respondent has contended that, in terms of the acceptance cum work order the work was to be completed within ten months that is September 21, 2011. He has pointed out that immediately after the receipt of the acceptance cum work order the respondent mobilised itself and progressed with the work.

16. Learned Advocate appearing for the respondent has contended that, by a writing dated June 17, 2011, the appellant asked the respondent not to execute any further work till such problem was solved. Thereafter on September 9, 2011 the respondent had requested for extension of time since, the work could not be completed due to suspension of the work. By a letter dated September 20, 2011, the appellant had informed the respondent that the dispute was ongoing, the work cannot be started and directed the respondent to wait for a month with the hope that the matter will be resolved within such time. Thereafter, the respondent had by letters dated September 11, 2011, November 11, 2011, November 29, 2011, December 7, 2011 and March 23, 2012 informed the

appellant of the losses suffered by the respondent due to such prolonged suspension of the work.

17. Learned Advocate appearing for the respondent has submitted that, by a letter dated March 28, 2012 the appellant asked the respondent to submit the bills for the works executed before the suspension of the work in terms of clause 8 of the conditions of contract.

18. Learned Advocate appearing for the respondent has contended that, his client co-wrote several letters to the appellant detailing the losses and damages suffered by prolonged suspension of work and non-payment of the dues. He has pointed out that, by a letter dated June 24, 2013 respondent had submitted its assessed losses up to June 17, 2013 amounting to ₹ 1, 59, 53, 853 along with interest to the appellant. By a letter dated December 13, 2016, the appellant had confirmed that since an arbitrator was appointed, the job was formerly treated as closed.

19. Learned Advocate for the respondent has contended that, before the learned arbitrator, the respondent had made 5 heads of claim. He has pointed out that, the first claim related to amount payable for work done and others used as detailed

in the letters dated June 24, 2013 and September 13, 2013 amounting ₹ 1, 59, 53, 853. The 2nd head of claim had been premised on compensation and/or damages on account of prevention of the performance of the work which was assessed at ₹ 8,00,000/- Under the 3rd head of claim, the respondent had claimed interest at the rate of 18% per annum from June 24, 2013 till payment. On the 4th head of claim, the respondent had claimed any amount which may be found to in terms of the contract and/or in law has accrued. On the 5th of claim, the respondent had claimed cost of arbitration on actual basis.

20. Learned Advocate appearing for the respondent had contended that, parties had adduced evidence before the learned arbitrator by filing affidavit of evidence. Respondent had produced a documents in part 1 which has details of the measurement of the work done by the claimant, bills, money receipts, quantum of artwork in execution, a apron filling, dewatering, bamboo piling, wooden plank filing, etc. He has pointed out that, the witness of the respondent had been cross-examined in details.

21. Learned Advocate appearing for the respondent has contended that, the award is dated February 18, 2019. Learned arbitrator had allowed claim numbers 1, 2 and 5 along with interest at the rate of 9% from June 24, 2013 till payment, by the award. He has contended that, the award contains detailed reasons. Learned arbitrator has dealt with every fact and evidence placed before him.

22. Learned Advocate appearing for the respondent has contended that, the learned arbitrator relied upon **1984 (4) SCC 59 (A.T. Brij Paul Singh Versus State of Gujarat)** for awarding 10 percent compensation on the proportion of work which could not be done due to land acquisition problem under the 2nd claim.

23. On the scope of judicial intervention in an appeal under section 37 of the act of 1996, learned Advocate appearing for the respondent has relied upon **2026 SCC OnLine SCC 1001 (Madhya Pradesh Road Development Corporation Versus Jabalpur Corridor Private Limited)** and **2026 (3) SCC 186 (Jan De Nul Dredging India Private Limited Versus Tuticorin Port Trust).**

24. Learned Advocate appearing for the respondent has submitted that the arbitrator is the ultimate master of the quality and quantity of evidence to be relied upon while passing the award. In support of such contention, he has relied upon **2015 (3) SCC 49 (Associate Builders Versus Delhi Development Authority)**.

25. Relying upon **2026 (4) SCC 392 (Lancor Holdings Limited Versus Prem Kumar Menon and Others)**, learned Advocate appearing for the respondent has contended that, delay in passing the award does not per se affect the award. Moreover, the same is also not a ground under section 34 of the Act of 1996 to set aside the award.

26. Appellant had floated a tender for construction. Respondent had participated in such tender and became successful therein. Appellant had issued an Acceptance-cum-Work order dated November 15, 2010 in favour of the respondent. Under the Acceptance-cum-work order, the contract had to be completed within 10 months from November 22, 2010, that is, till September 21, 2011.

27. Apparently, execution of the contract had been stalled due to problems at the site. The parties had gone to arbitration with regard to the contract and its execution.

28. Parties have raised issues with regard to the delay in making and publishing the award. It appears from the records that, the first meeting of the arbitration had been held on January 30, 2014. In aggregate, there have been 36 sittings of the arbitration.

29. On the last sitting of the arbitration, that is the 36th sitting, held on February 18, 2019, learned arbitrator had made and published the award and made over signed copies of the award to the parties.

30. The 35th sitting of the arbitration had been held on June 15, 2017 where, the learned Arbitrator has recorded that, both sides filed their respective notes an argument and that the same were taken on record. Learned Arbitrator has recorded that neither of the sides had any further submissions to make. He has also recorded that the respondent submitted non-judicial Stamp paper and that, the appellant requested for further time to do so. Prayer of the appellant to put in the non-judicial Stamp paper had been

allowed. The learned arbitrator has recorded that the arbitration stands concluded.

31. From the records made available to us therefore, conclusion of hearing in the arbitration had taken place on June 15, 2017. Learned arbitrator had passed the award on February 18, 2019. There has therefore been a gap in excess of 1 year 8 months from the date when, the hearing in the arbitration proceedings stood concluded.

32. ***Lancor Holdings Ltd (supra)*** has answered the issue as to what is the effect of undue and unexplained delay in the pronouncement of an arbitral award upon its validity. It has held as follows: –

“87.1.1. Delay in the delivery of an arbitral award, by itself, is not sufficient to set aside that award. However, each such case would have to be examined on its own individual facts to ascertain whether that delay had an adverse impact on the final decision of the Arbitral Tribunal, whereby that award would stand vitiated due to the lapses committed by the Arbitral Tribunal owing to such delay. It is only when the effect of the undue delay in the delivery of an arbitral award is explicit and adversely reflects on the findings therein, such delay and, more so, if it remains unexplained, can be construed to result in the award being in conflict with the public policy of India, thereby attracting Section 34(2)(b)(ii) of the 1996 Act or Section 34(2-A) thereof, as it may also be vitiated by patent illegality. Further, it would not be necessary

for an aggrieved party to invoke the remedy under Section 14(2) of the 1996 Act as a condition precedent to lay a challenge to that delayed and tainted award under Section 34 thereof.”

33. In ***Lancor Holdings Limited (supra)*** learned Arbitrator had reserved the arbitral award on July 28, 2012 and pronounced it on March 16, 2016, that is, nearly three years and eight months after reserving the decision. Moreover no explanation had been offered for the delay. Supreme Court has held that, the award did not resolve the disputes between the parties. Supreme Court has invoked Article 142 of the Constitution of India to grant reliefs to the parties.

34. A Court exercising jurisdiction under Section 34 of the Act of 1996 would necessarily have to evaluate whether there was delay in making and publishing the award and whether such delay remained unexplained. The Court will also have to evaluate whether the delay has an adverse impact on the final decision of the Arbitral Tribunal thereby vitiating the award owing to such delay or not.

35. In the facts and circumstances of the present case, there is a delay of more than 1 year 8 months from the date of conclusion of the hearing of the arbitration proceeding till the date of making and publishing the award which has not been

explained. We now have to evaluate as to whether such unexplained delay in making and publishing the award had an adverse impact on the final decision of the arbitrator or not.

36. Records disclosed before us have established that, the learned Arbitrator made elaborate notes of the proceedings on each day. Respective submissions of the Advocates appearing for the respective parties have been recorded in the minutes by the learned Arbitrator.

37. *Jan De Nul Dredging India Private Limited (supra)* has noticed the limited scope of the interference with the award of Court exercising powers under Sections 34 and 37 of the Act of 1996. It has held that, powers of a Court under Section 37 of the Act of 1996 are even more restricted than the powers under Section 34. Appellate powers under Section 37 of the Act of 1996 has been held to be exercisable only to find out if the Court exercising powers under Section 34 of the Act of 1996 has acted within its limits as prescribed thereunder or has exceeded or failed to exercise the powers so conferred. The Appellate Court exercising powers under Section 37 of the Act of 1996 has no authority of law to

consider the matter in dispute before the Arbitral Tribunal on merits so as to hold as to whether the award is right or wrong. Appellate Court has no power as a court of appeal to re-appreciate the evidence and record a contrary finding.

38. *Madhya Pradesh Road Development Corporation (supra)* has held that, the architecture of appeal under Section 37 of the Act of 1996 is restrictive. It has observed that, jurisdiction under Sections 34 and 37 of the Act of 1996 cannot be equated with mandatory appellate jurisdiction. The Appellate Court under Section 37 of the Act of 1996 does not sit as a Court of Appeal on the merits of the Arbitral Tribunal. Its role is confined to examine whether the Court under Section 34 of the Act of 1996 has acted within the limits prescribed by law or not. Interference is permissible only where the Section 34 Court has exceeded its jurisdiction or failed to exercise it within the confines of Section 34 and not merely because another view of the facts or interpretation of the contract may appear preferable.

39. Having noted the periphery of the jurisdiction under Section 37 of the Act of 1996 as enunciated in ***Madhya Pradesh Road Development Corporation (supra)*** and ***Jan***

De Nul Dredging India Private Limited (supra) the contentions of the respective parties have to be assessed on the merits of the matter.

40. *Associate Builders (supra)* has held that, the Arbitrator is the sole Judge of the quantity and quality of evidence when he delivers the Arbitral Award. Powers under Section 34 of the Act of 1996 cannot be exercised to set aside an award merely because the award is based on little evidence or on evidence which does not measure up in quality to a trained legal mind. In the event, it is established that, the approach of the Arbitrator to the issues is neither arbitrary nor capricious then no interference is called for on facts.

41. In *Kochar Construction (supra)* Supreme Court however has disallowed claim for escalation on the ground that no evidence had been led in support of such claim. It has noted that, no evidence at all was led by the claimant on the point except filing of the chart containing cost analysis. This chart containing cost analysis has been held to be of no evidence at all.

42. In *Madholal Sindhu (supra)* the Single Bench of the Bombay High Court has held that, mere proof of the

signatures or the handwriting of the persons who signed or wrote the various documents without calling the persons who could depose as to the correctness of the contents of such documents, amounts to no evidence at all.

43. Another Single Bench of the Bombay High Court in ***Rashmi Housing Private Limited (supra)*** has held that, although, Evidence Act, 1872 is not applicable in an arbitration proceedings, nonetheless, an Arbitral Tribunal is bound to consider the principles of the Evidence Act, 1872.

44. ***Kalyan Kumar Gogoi (supra)*** has dealt with the Evidence Act, 1872 in the context of hearsay evidence. It has held that, idea of best evidence is implicit in the Evidence Act, 1872. It has noted that, in the case of oral evidence, only that person who has actually perceived something by senses through which he is capable of perception who should make the statement about it and no one else. If it is documentary evidence, then, ordinarily the original thereof be produced because a copy may contain commission of mistake of a deliberate or accidental nature.

45. ***Satyabrata Ghose (supra)*** has noted the distinction between frustration of a contract and repudiation thereof. It

has noted that, frustration of a contract occurs automatically. It has noted that, termination of a contract on the ground of repudiation or breach is dependent upon choice or election of either of the parties to the contract.

46. *Ramesh Kumar Jain (supra)* has explained the phrase patent illegality appearing in Section 34 of the Act of 1996. It has noted various authorities on the subject and held that, patent illegality goes to the root of the award and includes an award deciding matters outside the scope of the arbitration, an award contradicting the substantive law of India or the Act of 1996 itself, an award against the terms of the contract and award so unreasoned or irrational that it manifest an error on its face.

47. *I-Pay Clearing Services Private Limited (supra)* has considered the scope and ambit of Section 34(4) of the Act of 1996. It has held that, powers under Section 34(4) of the Act of 1996 are discretionary and may be exercised where there is inadequate reasoning in the award or to fill up the gaps in the reasoning in support of the findings which are already recorded in the award.

48. A.T. Brij Paul Singh (supra) has considered claims on account of damages in the context of Section 73 of the Act of 1872. It has held that, where, a contractor claimed damages on the Government committing breach by improperly rescinding the contract, the Court should make a broad evaluation instead of entering into minute details.

49. Respondent had filed the statement of claim containing five heads of claim which are as follows:-

List of Claims/Disputes

<i>Sl. No. Due</i>	<i>Description of Item</i>	<i>Amount</i>
1.	<i>Amount payable for works done and other dues as detailed in my Client's letter dated 24th June, 2013 and also Letter dated 13th September, 2013</i>	<i>Rs. 1,59,53,853.00</i>
2.	<i>Compensation and/or damages on account of prevention of our performance by the Department for which the work could not be completed depriving us from the expected profit which remained unexecuted. Assessed 10% of the value of work which remained unexecuted.</i>	<i>Rs. 8,00,000.00</i>
3.	<i>Interest @ 18% p.a from 24.06.2013 till payment.</i>	<i>As accrued.</i>
4.	<i>Any other claim and/or amounts which may be found due to us in terms of the Contract and/or in law.</i>	<i>As may be found due.</i>
5.	<i>Cost of Arbitration</i>	<i>On actual.</i>

50. Learned Arbitrator in his Award has noted that claim no. 1 comprised of amounts payable for work done and other dues as detailed in the letters dated June 24, 2013 and September 16, 2013 of the respondent herein.

51. In the body of the Award, Learned Arbitrator has noted the Assessment of Claims which has 19 heads. Head numbers 1 to 11 under the Assessment of Claims had added upto Rs. 28,67,812/-. Respondent had added compound interest @1.5% per month for 24 months aggregating to Rs. 40,99,545/-. Likewise, respondent has added compound interest for 24 months @1.5% per month to head no. 13,14,15,16,17,18,19. Significantly, by adding interest at the compound rate of 1.5% for 24 months for such heads under claim no. 1, interest component has exceeded the principal claim on each of the heads.

52. Respondent has claimed a sum of Rs. 1,59,53,853/- under claim no. 1 which included the compound rate of interest. Learned Arbitrator has allowed it in its entirety.

53. Our attention has not been drawn to any agreement for interest far less in position of interest at the compound rate.

54. On Claim No. 1, learned Arbitrator has held as follows:-

“The Claim No. 1 is subject matter in both during examination in chief and also Cross-examination. It is a fit case when the Claimant is entitled to full Award in respect of Claim No. 1. There has been no defence at all by the Respondent against Claim No. 1 either in their Statement of Defence or during cross-examination of the Claimant’s witness. The Claim No. 1, the Claimant is entitled to full Award, which I decide unhesitatingly and the same is decided on consideration of evidence.”

55. No document in support of the work that the respondent had actually executed at the site was tendered in evidence. What had been tendered in evidence by the respondent in support of the claim of the quantum of work are statements unilaterally noted by an engineer appointed at the behest of the respondent. Appellant did not accept such measurements. The quantum work claimed to have been done has not been corroborated by any other evidence apart from the unilateral measurement of the engineer of the respondent.

56. Learned Arbitrator did not give any reason as to why he was relying upon such measurement details and why he did not call for the measurement book which is required to be maintained in a construction work of this nature.

57. Associate Builders (supra) and Kochar Construction (supra) have laid down that, although, the Arbitrator is the sole Judge of the quantity and quality of evidence, nonetheless, if the award is based on no evidence at all, then, a Court exercising jurisdiction under Section 34 of the Act of 1996 is obliged to set aside such award, on the ground of patent illegality.

58. By the award, the learned Arbitrator has included component of compound rate of interest of every heads of claim under Claim No. 1. He has proceeded to award the interest independently while allowing interest at the rate of 9% under claim no. 3. Essentially, the learned Arbitrator has awarded compound interest up to a given stage and thereafter simple interest on the sum waived at after adding interest at the compound rate. Learned Arbitrator has not ascribed any reason as to why compound rate of interest has been allowed by him for a period of time while simple interest has been allowed subsequently.

59. The award as it stands today contains interest at compound rate. The amount arrived after calculating interest at compound rate will carry further interest at the rate of 9%

per annum. In effect the appellant has to pay interest on compound rate of interest.

60. The nature of the contract is a social welfare measure which a State is required to discharge. The contract is of construction of a bridge. It is not a project from which the appellant is expected to earn or generate revenue. Award of interest at compound rate and thereafter interest on interest would render the award as shocking to the conscience of the Court.

61. An inference that the, passage of time between the date when the learned Arbitrator reserved the award for decision and its ultimate publication affected the decision on such an aspect is plausible.

62. Significantly, claim no. 1 has sub heading which relates to the claim on account of refund of security deposit. On such sub heading also, claim no. 1 included compound interest as also alleged loss of business for withholding such security deposit. Learned Arbitrator has however allowed refund of security deposit as an independent claim under the heading claim no. 2. The award therefore suffers from non-application of mind.

63. Under the contract, the date of commencement had been fixed at November 22, 2010 with completion being fixed at September 21, 2011. By a letter dated June 17, 2011 appellant had called upon the respondent not to execute further work till the land problem issue was solved. Records made available have established the respondent was aware of the land acquisition problem.

64. By a letter dated September 9, 2011 the respondent had requested for extension of time to complete the contract. By letter dated September 20, 2011 appellant had requested the respondent to wait for a month.

65. Respondent had not taken any steps to mitigate the losses to be recovered or claimed, at least none has been pleaded or established before the learned Arbitrator. Arbitral Tribunal has also failed to take into consideration the issue of frustration of the contract due to supervening impossibility. The contract was for construction of a bridge. The requisite land for such construction was not available. This factor had to be taken into consideration by the learned Arbitrator which he did not do.

66. In such circumstances, learned Judge erred in correctly evaluating the award in terms of Section 34 of the Act of 1996 and failed to exercise jurisdiction vested upon to in law.

67. Consequently, the impugned judgment and order dated March 30, 2022 is set aside. The award dated February 18, 2019 is set aside. FMAT (ARBAWARD) 35 of 2022 is disposed of without any order as to costs.

[DEBANGSU BASAK, J.]

68. I agree.

[ARYAK DUTT, J.]