

**(2223) 10 CHH CK 0006**  
**In the Chhattisgarh High Court**  
**Case No : ARBA No. 10 Of 2021**

Union Of India

APPELLANT

Vs

M/S Orissa Concrete And Allied Ind. Ltd.

RESPONDENT

**Date of Decision :** 04-10-2023

**Acts Referred:**

Arbitration and Conciliation Act, 1996 — Section 11(6), 18, 31(3), 34, 34(2A), 34(2)(a) (iii), 34(2)(b)(ii), 37, 48, 48(2)(b)(ii)

**Citation :** (2223) 10 CHH CK 0006

**Hon'ble Judges :** Goutam Bhaduri, J; Sanjay S. Agrawal, J

**Bench :** Division Bench

**Advocate :** Keshav Prasad Gupta, Chandresh Shrivastava, Nitesh Jain

**Final Decision :** Allowed

## Judgement

Goutam Bhaduri, J

1) This appeal is filed against the judgment and decree dated 10th February 2021 passed by the learned Commercial Court (District Level) Raipur in MJC No.10/2019 whereby the appeal filed by the respondent/Union of India (appellants herein) challenging the Sole Arbitrator's Award dated 03.02.2019 was dismissed. Being aggrieved by such order, the instant appeal is before this Court.

2) Brief facts of this case are that the appellant Railways through its Chief Engineer South Eastern Central Railways floated the tender for manufacture and supply of mono-block pre-stressed broad gauge concrete sleepers to be used in the Railway Tracks. The respondent made its offer which was accepted by the Railways and vide Letter dated 17.10.2013, 1,40,750 nos. of concrete sleepers were ordered to be manufactured at the rate of Rs.1589.00 per sleeper for a total consideration of Rs.22,36,51,750/- and the complete supply was to be made within a period of two years and 30 days from the date of counter-offer made by the respondent Company i.e., from 28.09.2013. As such, the said number of sleepers were to be supplied uptill 27.10.2015. The respondent could

supply only 48,006 number of sleepers till the contract was terminated on 18.11.2014. On inspection, the quality of sleepers were found sub-standard, as such, the supply already made were treated as no supply. In consequence thereof, before the termination of contract, a notice was served to the respondent by the Railways on 12.11.2014, for which, the reply was submitted resisting such termination. Indisputably, after issuing 7 days' notice and 48 hours notice, invoking clause 0702 the contract was terminated vide letter dated 18.11.2014 and liquidated damages @ 5% was imposed upon the respondent and Security Deposit was also forfeited and further as per termination clause, recovery of payment of Rs.8,55,78,821/- made to the respondent towards already dispatched sleepers was ordered treating them as rejected sleepers.

3) Aggrieved by such termination, the respondents filed MJC before the High Court invoking the provisions of Arbitration Act and High Court vide its order dated 11.08.2017 in exercise of power under section 11(6) of the Arbitration Act, 1996 appointed the Arbitrator to adjudicate the issue.

4) The respondent Company stated that after the contract was awarded, they began to produce and started dispatching the concrete sleepers to different locations as per the order of Railways after being tested and passed by the Inspecting Officials of the Railways at the factory premises of respondent Company.

5) On inspection, the Deputy Chief Engineer, Railways on 14.07.2014 pointed out certain deficiencies at the factory of respondent and asked the Company to stop production until the deficiencies are rectified. On 16.07.2014, the factory premises of the respondent was inspected and instructions were given to correct the deficiencies. Subsequently at the request of the respondent Company, the Chief Engineer of railways vide letter dated 25.09.2014, revoked the temporary suspension of production of sleepers.

6) Thereafter, a 15 days' notice was issued for termination of contract on 07.10.2014 and the respondent was asked to increase the number of sleepers' production, but it was not acceded to showing the inability of the respondent Company and the dispute arose. Thereafter, a 7 days' notice dated 04.11.2014 was issued by the Railways alleging violation of conditions of contract and advised the respondent to show sufficient progress and eventually on 11.11.2014 Research Designs and Standards Organisation (RDSO) conducted a special quality audit of the Company premises of respondent. Thereafter, the notice was again issued on 12.11.2014 whereby 48 hours time was given by the Railways and in response thereto, vide letter dt. 13.11.2014 the respondent Company expressed to abide the instructions and requested for not taking any penal action.

7) Subsequently a termination letter 18.11.2014 was issued whereby the contract was terminated imposing penalties. In the meanwhile, the Central Bureau of Investigation (CBI) took up the issue of supply of substandard concrete sleepers and registered the case on the allegations of criminal

conspiracy, cheating and misconduct by the public servant i.e., Railway officials during the period of 2013-2014.

8) The CBI has filed a final closure report of the said case primarily on the role of Railway Officials with respect to determining the quality of sleepers. Such closure report was accepted by the Special Judge on 31.03.2018.

9) After the arbitrator was appointed, the respondent Company challenged the termination order and imposition of liquidated damages and on the contrary claimed an amount of Rs.7,10,18,524/- on various heads. The Railways also raised their claim for Rs.10,66,73,587/- under various heads.

10) On the pleading of the parties, the arbitrator framed the following 5 issues :

"01 Whether the termination of the contract by the respondents is legal and in accordance with the terms and conditions of the contract ?

2 Whether the rejection of pre-tested Mono Block Concrete Sleepers already supplied and accepted after certification could be subsequently rejected on the ground of poor quality without following the procedure prescribed in the contract agreement ?

3. Whether the test results given by a machine installed in the premises of the claimant after due checking by the officers of the respondents could be rejected on the ground of tampering of machine without any verification ?

4. Whether the order of termination of contract by the respondent authority is without jurisdiction ?

5. Whether the claimant is entitled to a claim as described in paragraph 29 of the statement of claim ?

If yes, to what extent ?

In the alternative, whether the respondents are entitled for counter claims, as described under the head of counter claim ?

6 Reliefs & Cost ?"

11) Considering the evidence, the appellant Railways filed the affidavits of P.K. Samant Roy, R.K. Singh, R.K. Sahu and D.K. Mohanty. The respondent Company on its behalf examined one Bhagwati Prasad Agrawal. The learned arbitrator held that the order of termination dt. 18.11.2014 is illegal, therefore, the amount of Rs.4,54,18,524/- withheld under clause 2403 of IRS Conditions, is also illegal and further held that the respondent/claimant is entitled for the said sum. Further the Arbitrator held that the respondent/claimant is also entitled for refund of security deposit of Rs.20,00,000/- in the form of Bank Guarantee which has been encashed by the Railways and further directed the appellant to pay the costs incurred by the respondent Company which was quantified to Rs.12,50,000/-. Thus the Tribunal passed a total award of Rs.4,86,68,524/- in favour of respondent Company with a further direction that in case of failure to

pay the amount within 3 months, it would carry simple interest @ 9% per annum from the date of the award i.e., 03.02.2019 till realization. At the same time rejected the counter claim of the appellant. Being aggrieved by the award passed by the Arbitrator, Appellants challenged the same in appeal under section 34 of the Act of 1996, which was rejected by the learned commercial Court. Hence this appeal.

12) (a) Learned counsel for the appellant Railways would submit that both the Arbitrator and Commercial Court failed to take into consideration that CBI has taken a suo motu cognizance of quality of sleepers which was sub-standard and is proved by the evidence adduced on behalf of the appellant. It is stated that during the arbitral proceeding, the supply of substandard sleepers was proved by special quality audits and various tests conducted, which would show that the sleepers so supplied could not meet the requirement of safety norms of the Railways which runs the passenger trains and goods trains to transport the passengers and goods, therefore, the quality of sleepers cannot be compromised.

(b) He would submit that with the connivance of few of the Railway officers, the substandard sleepers were got supplied which were tested at their destination of supply made i.e., the place wherein it was dispatched. The quality test of sleepers, which were randomly chosen from stacks as per the testing procedure, would lead to show about substandard sleepers, as such, it was considered that no supply has ever been made as the defective goods stand automatically rejected. He would further submit that in case of untoward Railway accidents due to substandard sleepers, the technical aspect cannot be ignored which the learned arbitrator and Commercial Court failed to notice. He would, therefore, submit that the safety would be the primary object which cannot be ignored and negotiated in any way. He further submits that the safety would include the public policy of India and ignoring the same by the arbitrator would amount to illegality.

(c) He would further submit that the closure report of CBI would also show that it never gave any opinion that the quality of the rejected sleepers were good and the fact about substandard sleepers remains unrebutted. The explanation given by the independent agency RDSO also shows that deviation of any of the provisions of technical requirements or specifications would have the adverse affect on the quality of finished product. Therefore, supply of substandard sleepers would lead to no supply and further while placing the sleepers underneath the tracks, the quality cannot be tested by naked eye. Hence the supply of large number of rejected sleepers along with standard sleepers itself would amount to no supply at all as no segregation can be made.

(d) He would submit that the evidence on record would show that the respondent manipulated machine calibration which was placed in his premises, therefore, quality of the sleepers were not able to cope up with stress when tested separately which the learned arbitrator and learned commercial Court failed to consider. Under the circumstances, since the issue goes to the root of the matter,

the award of the Arbitrator and the order of the commercial Court are liable to be set aside.

(e) It is further submitted that the order of suspension of production was issued in view of the sleepers being of suspect quality making it necessary to investigate the manufacturing process and quality control measures. Since defects were found, the suspension order was issued.

(f) It is next contended that the both the learned Arbitrator and Commercial Court has completely over-looked the evidence and documents on record and there is no reason to disbelieve documentary evidence produced by the Railways in respect of failure of sleepers in quality test.

g) Further submission is that the grounds being contrary to fundamental policy and patent illegality, against the interest of India or justice or morality have been made out in this case as supply of substandard sleepers would amount to violation of safety measures causing loss of public life apart from huge monetary loss, therefore, since the public safety is involved in the case, the award passed by the learned sole arbitrator and commercial court cannot be sustained and by virtue of section 34 of the Arbitration Act, this Court has scope of interference in arbitral award.

13) (a) Per contra, learned counsel for the respondent would submit that the contract clause 0700 wherein the time and dates specified in the contract which includes the extended time contemplates that the delivery must be completed not later than the dates so specified or extended and as per the contract clause 0702 failure & termination would be deemed if the contractor failed to deliver the goods or any installments within a period fixed for delivery of contract.

(b) He would submit that the contract was of 28.09.2013 and the delivery period was 2 years 30 days which comes to an end on 27.10.2015 whereas in the instant case, the contract was terminated on 18.11.2014 much prior to the completion of date of delivery and the last date stipulated in the contract.

(c) He would further submit that as per the document Ex.C-5 Letter dated 14.07.2013, the Railways itself has directed to stop the production to rectify certain defects and the Letter C-6 would show the letters sent by the respondent that after the defects were satisfied, the production was allowed to be started and the temporary suspension of production was revoked by Chief Engineer, Railways. Therefore, it is stated that in between 14.07.2014 and 25.09.2014, the production was stopped for two months and 10 days. The production was resumed on 25.09.2014. So till termination on 18.11.2014 automatically leads to stoppage of production at the behest of the appellant Railways and non supply of sleepers was not at the behest of respondent.

(d) It is stated that as per the letter Ex.C-14 dated 04.11.2014 whereby 7 days time notice was given to the respondent, out of total supply of 60,390 sleepers, inspection certificate was issued for 47,870 sleepers and 47993 sleepers were

checked and dispatched, while 11728 were awaited to be checked. Therefore, having checked the sleepers about their quality, the Railways could not approbate and reprobate. He placed reliance on a case law reported in (2022) 2 SCC 25 titled as Union of India Vs. N. Murugesan.

(e) He would further submit that when the period for delivery was fixed by the end of contract of 2 years and 30 days, all of a sudden, a show cause notice for breach of supply was apparently wrong. Therefore, the finding of the arbitrator and the learned commercial Court is correct. He would submit that as per Clause 0700, time was essence of the contract, He placed reliance in Bangalore Electricity Supply Co. Ltd (BESCOM) Versus E.S. Solar Power Pvt. Ltd (2021) 6 SCC 719 and would submit that the language used in the contract is interpreted in the literal meaning and no additional interpretation can be added.

(f) He would submit that the finding of the learned arbitrator that there is no criminal conspiracy was also supported by the conclusion of CBI and enquiry and no deficiency in the manufacturing process was found is correct as such that finding of fact does not require any interference.

(g) He would further submit that in respect of bias that after filing of the affidavit by the respondent on 15.07.2018, 20 days' time was given to the railways to file the documents despite intervening dates between 05.08.2018 and 25.08.2018 the case was closed by the respondent itself and the closure report of the CBI which was filed by the appellant would show that no conspiracy or supply of substandard sleepers was said to have been found.

(h) He would submit that after the case was closed for orders on 25.11.2018, E-Mail was sent by the railways appellant on 07.12.2018 to place certain documents on 07.12.202108 but that was not allowed. Consequently, it cannot be said that the arbitrator had acted in bias.

(i) He would further submit that as per the law laid down in Ssangyong Engineering & Construction Co. Ltd. Vs. National Highways Authority (2019) SCC 131, no finding can be arrived at by the arbitrator behind the back of the parties and further reliance is placed in Larsen Air Conditioning and Refrigeration Company Versus Union of India (2023) SCC On-Line 982 to submit that the jurisdiction of the Court for interference in the appeal is limited unless there is a patent illegality which goes to the root of the matter and cannot be of trivial nature. Accordingly, the award of the learned arbitrator and the order of Commercial Court are well merited which do not call for any interference.

14) We have heard learned counsel for the parties and have also perused the documents.

15) The Supreme Court in case of Larsen Air Conditioning (supra) has laid down that the extra ordinary power to exercise the power of appeal in Arbitration is extremely limited except under certain conditions unless the award is in conflict with most basic notions of morality and justice or when it shocks the consciences

of court. At para 15, the Court has held as under:

"15. The limited and extremely circumscribed jurisdiction of the Court under Section 34 of the Act, permits the Court to interfere with an award, sans the grounds of patent illegality, i.e., that "illegality must go to the root of the matter and cannot be of a trivial nature"; and that the 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" [ref : Associate Builders (supra)]. The other ground would be denial of natural justice. In appeal, Section 37 of the Act grants narrower scope to the appellate court to review the findings in an award, if it has been upheld, or substantially upheld under Section 34. It is important to notice that the old Act contained a provision which enabled the court to modify an award. However, that power has been consciously omitted by Parliament, while enacting the Act of 1996. This means that the Parliamentary intent was to exclude power to modify an award, in any manner, to the court. This position has been iterated decisively by this court in Project Director, National Highways No.45E and 220 National Highways Authority of India v. M. Hakeem.

"42. It can therefore be said that this question has now been settled finally by at least 3 decisions [McDermott International Inc. v. Burn Standard Co. Ltd., (2006) 11 SCC 181], [Kinnari Mullick v. Ghanshyam Das Damani, (2018) 11 SCC 328 : (2018) 5 SCC (Civ) 106], [Dakshin Haryana Bijli Vitaran Nigam Ltd. v. Navigant Technologies (p) Ltd, (2021) 7 SCC 657] of this Court. Even otherwise, to state that the judicial trend appears to favour an interpretation that would read into Section 34 a power to modify, revise or vary the award would be to ignore the previous law contained in the 1940 Act; as also to ignore the fact that the 1996 Act was enacted based on the Uncitral Model Law on International Commercial Arbitration, 1985 which, as has been pointed out in Redfern and Hunter on International Arbitration, makes it clear that, given the limited judicial interference on extremely limited grounds not dealing with the merits of an award, the "limited remedy" under Section 34 is conterminous with the "limited right" namely, either to set aside an award or remand the matter under the circumstances mentioned in Section 34 of the Arbitration Act, 1996."

16) Further, the Supreme Court in State of Chhattisgarh Versus Sal Udyog Private Ltd, (2022) 2 SCC 275 at para 15 has reiterated the observations made in Ssangyong Engineering & Constructions Company Limited (2019) 15 SCC 131 which spelt out the contours of the limited scope of judicial interference in reviewing the Arbitral Awards under the Act. Paras 34 to 41 of Ssangyong Engineering (supra) are relevant and quoted below :

"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 his 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.

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. Equality, 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) 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 back-door when it comes to setting aside an award on the ground of patent illegality.

38. Secondly, it is also made clear that re-appreciation 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 India", 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 characterized as perverse."

(emphasis added)

17) As per the terms of contract, "special conditions of contract" includes that the contract will be governed by IRS Conditions of Contract as amended upto-date as well as the Special Conditions of Contract mentioned herein. In case of conflict between the two i.e., between IRS Conditions of Contract and Special Conditions of Contract, the provisions of Special Conditions of Contract shall prevail. The relevant provisions of the contract are reproduced as under:

Indian Railways Special Conditions of Contract :

0103 "Consignee" means where the stores are required by the stores are required by the acceptance of tender to be dispatched by rail, road, air or steamer, the person specified in the Acceptance of Tender to who they are to be delivered at the destination where the stores are required by the acceptance of tender to be delivered to a person as an interim consignee for the purpose of dispatch to another person, such other persons; and in any other case the

person to whom the stores are required by the acceptance of tender to be delivered in the manner therein specified ;

0109 "The Inspecting Officer" means the person specified in the contract for the purpose of Inspection of stores or work under the contract and includes his authorized representative;

0113 "The Purchaser" means the President of India in the case of stores ordered for the Indian Government Railways and includes his successors and assignees;

0121 The delivery of the stores shall be deemed to take place on delivery of the stores in accordance with the terms of the contract, after approval by the Inspecting Officer if so provided in the contract, to

- (a) The consignee at his premises; or
- (b) Where so provided the interim consignee at his premises; or
- (c ) A carrier or other person named in the contract for the purpose of transmission to the consignee, or
- (d) The consignee at the destination station in case of contract stipulating for delivery of stores at destination station

#### 0600 Delivery

0601 The Contractor shall as may be required by the Purchaser either deliver free or F.O.R., or c.i.f., at the place/places detailed in the contract, the quantities of the stores detailed therein and the stores shall be delivered or dispatched not later than the dates specified in the contract. The delivery, will not be deemed to be complete until and unless the stores are inspected and accepted by the inspecting officers as provided in the contract.

0603 Notwithstanding any inspection and approval by the Inspecting Officer on the Contractor's premises, property in the stores shall not pass on to the Purchaser until the stores have been received inspected and accepted by the consignee

#### 0700 Time for and Date of Delivery; the Essence of the Contract

The time for and date specified in the contract or as extended for the delivery of the stores shall be deemed to be of the essence of the contract and delivery must be completed not later than the date(s) so specified or extended.

0702 Failure and Termination : If the Contractor fails to deliver the stores or any installment thereof within the period fixed for such delivery in the contract or as extended or at any time repudiates the contract before the expiry of such period the Purchaser may without prejudice to his other rights-

- (a) Recover from the Contractor as agreed liquidated damages and not by way of penalty a sum equivalent to 2 per cent of the price of any stores (including

elements of taxes, duties, freight, etc.) which the Contractor has failed to deliver within the period fixed for delivery in the contract as extended for each month or part of a month during which the delivery of such stores may be in arrears where delivery thereof is accepted after expiry of the aforesaid period, or

(b) Cancel the contract or a portion thereof and if so desired purchase or authorise the purchase of the stores not so delivered or others of similar description (where stores exactly complying with particulars are not in, the opinion of the Purchaser, which shall be final, readily procurable) at the risk and cost of the Contractor. It shall, however, be in the discretion of the purchaser to collect or not the security deposit from the firm/firms on whom the contract is placed at the risk and expense of the defaulted firm.

0703 Consequences of Rejection.- If on the stores being rejected by the Inspecting officer or Interim Consignee or Consignee at the destination, the Contractor fails to make satisfactory supplies within the stipulated period of delivery, the Purchase shall be at liberty to

(i) require the Contractor to replace the rejected stores forthwith but in any event not later than a period of 21 days from the date of rejection and the Contractor shall bear all cost of such replacement including freight, if any, on such replacing and replaced stores but without being entitled to any extra payment on that or any other account; or

#### 1300 Inspection by Inspecting Officer

1301 (a) When inspection during manufacture or before delivery or dispatch is required, notice in writing shall be sent by the Contractor to the Inspecting Officer when the stores or material to be supplied are ready for inspection and test, and no stores shall be delivered or dispatched until the Inspecting Officer has certified in writing that, such stores have been inspected and approved by him.

(b) In cases where the Inspecting Authority specified in the contract required on behalf of the Purchaser that, inspection of the raw materials to be used and/ or stage inspection during the manufacturing process of the component/stores, etc., is also be done, notice in writing shall be sent by the Contractor to the Inspecting Officer to visit his premises/works to test the raw materials and/or conduct necessary inspection during the manufacturing process of the component/stores, etc., as deemed essential.

#### 1502 Consignor's Right of Rejection

Notwithstanding any approval which the Inspecting Officer may have given in respect of the stores or any materials or other particulars or the work or workmanship involved in the performance of the contract (whether with or without any test carried out by the Contractor or the Inspecting Officer or under the direction of the Inspecting Officer) and notwithstanding delivery of the stores where so provided to the interim consignee, it shall be lawful for the consignee,

on behalf of the Purchaser, to reject the stores or any part, portion or consignment thereof within a reasonable time after actual delivery thereof to him at the place or destination specified in the contract if such stores or part, portion or consignment thereof is not in all respects in conformity with the firms (terms) and conditions of the contract whether on account of any loss, deterioration or damage before dispatch or delivery or during transit or otherwise however .

Note: In respect of materials pre-inspected at the firm's premises the consignee will issue rejection advice within 90 days from the date of receipt.

#### Special Conditions of Contract

##### 6. Inspection

6.1 Inspection of finished sleepers will be carried out by the Railway nominee of the concerned Zonal Railways at the contractor's premises.

6.4 The passed sleepers, for which inspection certificates have duly been obtained, only shall be allowed to be taken for loading in railway wagons/road vehicles. Any damage to the sleepers in the process of loading in wagons/vehicles or carrying to the loading sites from the contractor's premises shall be to contractor's account.

6.7 The production of PSC sleepers against this tender shall be permitted only when the Concrete Sleeper Plant complies all the provisions of STR. During course of execution, the production of the concrete sleepers may be temporarily suspended by PCE of the Zonal Railway at the advice of inspecting officials including RDSO, in serious cases of non-adherence to Specifications/Schedule of Technical Requirement or large scale premature failure of sleepers in track. Railway may order for temporary suspension of the production in above cases and direct the manufacturer to identify the defects in the manufacturing process and rectify the same within a reasonable period. Production will be resumed once the manufacturer identifies and removes the defects and same is verified by the Zonal Railway and/or RDSO as the case may be. While allowing resumption of production, Railway may also order for higher scale of testing, till quality of production is stabilized.

##### 12. Liquidated Damages for Failure to Complete Supplies within Delivery Period or Termination of Contract :

The Liquidated damages in pursuance of clause 0702 of IRS Conditions of Contract along with L.D., specified in Para 11 above will be limited to a maximum of 5% of the cost of stores which the contractor fails to deliver within the period fixed for delivery in the contract or as extended, where delivery of the stores is accepted after expiry of the aforesaid period. In case, the delivery of the stores is not accepted by the purchaser after expiry of the period fixed for delivery in the contract or as extended or the contract is terminated before expiry of the contract due to failure of the contractor to execute the contract as per the agreed terms and conditions of the contract during its currency, the liquidated damages

equivalent to 5% of the cost of sleepers undelivered/cancelled would be recovered from the contractor.

INDIAN RAILWAY SPECIFICATION SERIAL NO. T-39-85 :

5.1 The manufacturer shall supply at his expense, all the sleepers required for tests and re-tests, samples of materials, labour, machine, tools, gauges, apparatus, forms of test reports etc., and any other item which may be necessary or required by the Inspecting Officer for carrying out any or all of the checks and tests mentioned in these specifications and shall render all reasonable assistance in conducting such checks and tests. All measuring and testing appliances shall be got checked and calibrated according to the schedule given in Annexure-I, through government approved agency or as directed by the Inspecting Officer. The calibrations shall be borne by the manufacturer.

5.2 Inspecting Officer and the Purchaser shall have free access at all reasonable times to the works in which the sleepers are manufactured. They shall be at liberty to inspect the manufacture of sleepers at any stage and to reject any material supplied not conforming to the terms of the specifications and to reject sleepers not manufactured according to approved manufacturing process. They shall be provided with necessary assistance for inspection by the manufacturer."

18) The appellant Railways had issued a letter C-5 dated 14.07.2014 which would show that there are certain deficiencies during manufacturing process of sleepers at Bhanpuri Concrete Sleeper Plant. On inspection of premises of the factory, as many as 10 deficiencies were pointed out which includes the following (1) one graduate Engineer and two diploma holders are required to inspect the quality as per STR; (2) as per STR, bottom vibrators are used for production of PSC sleeper, but it is not successful till date ; (3) aggregate mixing machine operator was frequently changed despite instructions; (4) some benches required proper strengthening and rectification so as to ensure proper alignment;

(5) a large number of moldus require repairing; (6) the disturbed old rejected sleepers were not in countable manner; (7) new rejected sleepers are also not countable; (8) 5000 rejected sleepers were directed to be destroyed, but not done; (9) acute shortage of fresh water for curing during summer and (10) as per the report of officer D.K. Mohanti , approx. 600 PSC (N) sleepers were produced during night shift for private supply but on ground there was no production from 01.07.2014 to 03.07.2014. The Letter C-5 also reflects that the production may be stopped till the deficiencies at Bhanpuri Plant are rectified.

19) Subsequent letter dated July 31, 2014 (Annexure C-6) shows that certain rectifications were made. After the production was temporarily closed, revocation of suspension of production was allowed by letter dated 25.09.2014 (Annexure C-9). Reading of the contents of letters produced by the respondent Company would show that in process of production, some gross deficiencies were pointed out for a considerable period though the production was said to be stopped. It is not clear that whether the production was still carried out or not. The submission

of respondent Company is that at the behest of the Railways, the production was stopped, as such, the respondent was not liable for non-supply of number of sleepers during such time. The said submission of the respondent Company, cannot be appreciated for the reason that taking into fact the nature of goods which was required by the Railways, the supplied sleepers could not escape the safety measures or can be exempted, if at the very inception the standard for manufacturing process is compromised. Naturally the end result would be on the quality of sleepers.

20) If the supplied sleepers were defective, one cannot claim that he has supplied the specified goods as per technical terms of contract. The proposition cited by the respondent of "Approbate and reprobate" as held in Union of India Vs. N. Murugesan (2022) 2 SCC 25 would equally apply to the instant case. The respondent cannot be allowed to say that though they did not follow the condition and safety standards to manufacture sleepers and were stopped by Railways to rectify such defect in process of manufacture, therefore, they cannot be held for non-supply of sleepers. The Court cannot ignore the safety norms of sleepers to achieve the quality as it would ultimately be used under the Railway tracks and usage of defective sleepers may lead to causalities claiming human lives besides being loss of economy to the Nation. Consequently the supply of defective sleepers in the lot would be no supply at all for the entire lot of supply.

21) (a) The evidence adduced on behalf of Railways shows that witness No.1 P.K. Samant Roy who was working as Deputy Chief Engineer (TS), SECR, Bilaspur has stated that the sleepers supplied by the respondent were tested on hydro-electronic machine and quality was approved by the Railway Inspecting Officials and these sleepers were then dispatched to various work sites. It was further stated that a foul play was suspected and element of fraud in manufacturing and testing aspect was taken up by CBI. It was further stated that the sleepers were not conforming to the specifications. He states that if the sleepers are made with specified norms, they should not have cracked and failed during retesting by Railways and CBI. That shows that the Appellant has individually tested few of sleepers. He further says that claimant had failed to supply qualitative sleepers and further entirely failed to adhere to the prescribed standard. Therefore, they were advised by Letter dated 14.07.2014 and were directed to stop the production.

21(b) This witness further states that a surprise inspection was conducted on 02.07.2014 and further inspection was made on subsequent date i.e., 25.7.2014 during which certain deficiencies were pointed out. He states that respondent firm did not make any changes as pointed out by the RDSO. The affidavit of Witness No.1 further shows that site inspection of Bhanpuri Unit was done on 11th & 12th November, 2014. It further says that the quality as laid down by RDSO can easily be deviated after departure of inspecting officials in order to increase output by compromising quality and during oversight inspection, a number of deficiencies were found and if they were not removed, it would result

into manufacturing poor quality of sleepers. It further states that the claimant has adopted all sorts of tricks like usage of inferior material viz., cement and unsuitable aggregates and due to such malpractices adopted by the claimant, the CBI suo motu took the cognizance to investigate the matter regarding tinkering with sleeper strength which involves safety of the public and the said investigation was still pending when the witness deposed.

21(c) It is further stated by Witness No.1 that subsequently on 17.12.2014 when the inspection was done at the plant situated in Dongargarh, the Railway officials also inspected the "supplied" concrete sleepers in presence of CBI Officials along with claimant's representative. In such random check, two sleepers were tested and one was found fail. Subsequently in another testing, 30 sleepers were randomly picked up from the stacks of sleepers in presence of CBI Official and Railway officials. The testing was conducted on 22.12.2014 at Dongargarh in which all the 30 sleepers were found failed. He states that such random selection of sleepers from stacks and their testing in presence of officials was purely in the interest of public safety. As testing was done in presence of representatives of claimant, the outcome is fully known to claimant. According to him, during further testing, out of 32 sleepers 31 were failed, as such, 97% sleepers had failed to prove quality.

21(d) The affidavit of witness No.1 further shows that a summary was prepared with respect to the testing report made by the Railways and CBI which shows that in total 86.72% sleepers of the claimant could not pass the norms of the agreed conditions and got failed. The Railways as a major public and goods transport organization which transports passengers and goods cannot use the poor quality of concrete sleepers under the railway tracks which can result in fatal accidents. Under the circumstances, the "supply of sleepers though was made", they were not treated to be sleepers of standard quality, as such, the supply was taken to be no supply at all and the contract was terminated. The affidavit shows that with respect to the substandard quality of the sleepers, nothing has been brought on record by the respondent to negate such statement to prove it otherwise. He states in cross examination that the Railway administration has initiated disciplinary proceedings against the erring officials of the Railways who were allegedly involved in such process.

22) (a) Another witness Ranjit Kumar Singh who was working as Senior Section Engineer, SECR, Durg was examined as Witness No.2 by Railways. He states that phase-wise sleepers testing was done by CBI in four phases at Kapa and Dongargarh Plants as per Railway Specification T-39 in presences of CBI and Railway Officials. He states that the first-phase testing was done on 17.12.2014 and 22.12.2014 in respect of sleepers loaded from Kapa and Bhanpuri plants and were brought to Dongargarh Plant for testing. He states that in the testing done on 22.12.2014 at Dongargarh, 30 sleepers which were supplied by the respondents were found failed. Copy of calibration report is also filed as Annexure R-18.

(b) He further submits that for testing of 2nd 3rd & 4th phase, the random selection of the sleepers was done from the stacks by crane and loaded in Truck with the support of wooden batten and sleepers were unloaded at Kapa Plant and testing was done as per the specification. According to this witness, sleepers were tested in four phases and report of test results were forwarded to superior officer vide Annexures R-19 & R-24 wherein many sleepers which were picked-up at random in respect of Kapa and Bhanpuri plants are shown to have been failed.

23) Another witness R.K. Sahu, Assistant Inspecting Engineer also states that CBI officials chose one sleeper from Bhanpuri plant and one from Kapa Plant for testing and decided to test at Dongargarh plant wherein he represented Railways. Subsequently, different lots were picked up from another site "wherein the respondent has supplied the sleepers". Thereafter, on instructions of CBI, the Railway officials sorted out 30 sleepers and 15 sleepers supplied from Bhanpuri and Kapa plants respectively and those sleepers were taken from the organization of respondent which were marked and signed for identification and maximum number of sleepers in such tests failed to fulfill the specification. Copy of the report has been marked as Annexure R-18 which would show that all 30 sleepers of Bhanpuri were found fail and 11 sleepers out of 15 of Kapa plant were found fail. Thus only four sleepers of Kapa were found passed meaning thereby maximum number of sleepers which were supplied or it was marked to be supplied were not found fit. In cross examination, this witness states that normally, testing of sleepers takes 15-20 minutes upto passing level, however, in the present case, the result came immediately as it was of substandard quality.

24) Likewise, statement of Dilip Kumar Mohanty, Witness No.4, also shows that the respondent Company failed in its various duties to fulfill the technical requirements. He stated that Annexure R-14 the Special Quality Audit of Concrete Sleeper Plant M/s. Orissa Concrete and Allied Industries Ltd, Bhanpuri, Raipur shows that number of deficiencies were found in quality test of sleepers during audits/inspections which were conducted on 11th & 12 November, 2014.

25) The learned Arbitrator has observed that the testing of the sleepers were done after the termination of contract and it has not been proved by producing test results by examining CBI Officials, who conducted the tests. On the contrary, the evidence of witnesses adduced on behalf of Railways shows that along with CBI Officials, the officers of Railways were also present along with the representative of Respondent Company when the sleepers were tested. They were the primary witnesses to the testing and not an hear-say. The Railways had produced the testing results wherein number of sleepers marked for supply and/or already supplied were found to be substandard. The arbitrator has ignored those test reports on the ground that sleepers were tested after the termination of contract. To this aspect, the test result of substandard sleepers were sidelined by the arbitrator. The series of events shows that initially when the contract was awarded and production of sleepers commenced, the contractor failed to maintain the standard to be applied during production, therefore, the production



was stopped. After some time, the production of sleepers commenced wherein obviously it was required that contractor was bound to supply quality sleepers as per standard specified by Railways. However, on subsequent point of time, after supply made, when such sleepers were tested they were found to be sub-standard. Therefore, considering the nature of goods and passage of time, the test result would relate back before the date of termination of contract.

26) (a) Further plain reading of closure report of CBI which is on record reveals the respondent Company was clamped with an allegation that sub-standard concrete sleepers were manufactured by it by using low quality rejected cement which were supposed to destroy the quality of sleepers which ultimately would cause danger to the railway tracks apart from monetary loss.

(b) The stacked sleepers were randomly selected on 16.012.2014 and were subjected to Static Bending Test (SBT) at sleeper manufacturing unit at Dongargarh on 17.12.2014 and it was found that three sleepers out of four failed the quality test. Based on the result of the SBT dt.17.12.2014, further test of 45 number of sleepers were again subjected to Static Bending Test at manufacturing Unit Dongargarh on 22.12.2014 and it was found that 41 out of 45 sleepers failed the quality test.

(c) The result of "investigation and charges" would show that on a query made by CBI, the RDSO Lucknow answered that prima-facie report of SBT during product inspection was not clear. Therefore it was concluded that it cannot be concluded that the Railway Inspecting Officials had falsely recorded the inspection reports at the initial stage to give a passing report.

(d) With respect to the quality of sleepers, it was found that quality of the finished product not only depends on the material quality but also on adherence to various provisions of T-39 Quality Assurance Plan, Schedule of Technical Requirements etc., and if any of the provisions are deviated, it will have the adverse affect on the quality of finished product. Therefore, it was stated that it cannot be concluded with certainty that low quality/rejected raw material is only the cause of poor SBT results observed during the joint testing and it may be due to non-adherence to various provisions of T-39 Quality Assurance Programme, Schedule of Technical Requirement etc., during manufacturing process.

(e) In respect of involvement of Railway Officers, it was found that the allegation against the erring officers that they issued false inspection certificates accepting the rejected sleepers as passed sleepers could not be substantiated in the light of the expert opinion given by RDSO, Lucknow.

The entire closure report by the CBI predominantly revolved upon involvement of Railway Officials who gave a positive report of quality of sleepers as passed one though they were substandard. The closure report of CBI in its entirety no where spells out the supplied sleepers by the contractor passed the quality test for use in Railway track. The closure report entirely revolved around the role played by Railway officials and testing conditions at plants and was uncertain as to whether

they contributed for such substandard supply. The closure report by CBI shows that it failed to carry out to find the answer to the quality of substandard sleepers and did not answer to give a positive report that supplied sleepers passed the quality test.

27) The finding of the learned Arbitrator that the test results subsequent to the termination of contract cannot be the sole criteria to adjudge the cancellation of termination of contract cannot be justified as this finding would justify and legalise the supply of sub-standard sleepers to Railways. Since the case pertains to supply of Railway concrete sleepers in conformity with specified guidelines of the Railways, the prior conduct during the period of supply prior to termination of contract would also be relevant. The evidence shows that when the inspection was carried out during initial production, it was found that the respondent Company is not adhering to the guidelines issued to keep the quality of the sleepers to the standard. The evidence of the Railways would show that even before the termination of contract also, the sleepers were tested which were not found fit. This Court cannot ignore the allegation that the railway officials were also under the scanner for giving a favourable report of quality in respect of sleepers. Though the guilt was not proved to hilt taking into various ancillary circumstances but eventually when the sleepers were tested subsequent to their supply from random selection from the stacks of different places, large number of sleepers miserably failed in quality test of safety norms.

28) The Railways was under a positive obligation to take into considerations to assess the risk of lives of citizens which would include the practical measure to arrest such risk by effective protection measures of citizens. The man made hazards cannot be allowed to precipitate, when right to life is in stake. Taking into consideration those factors, the fact finding by the learned arbitrator would show that the arbitrator has ignored the vital evidence on record of substandard quality. In the instant case, the CBI conducted detailed investigation about the quality of sleepers supplied by the respondent in presence of Railway Officials and the representative of respondent Company. On such inspection, defects were noticed in sleepers. During such investigation, as per the procedures when the random selection of sleepers was made for quality testing from the stacks which were supplied from different plants for their quality testing, maximum number of sleepers were found to be substandard. Merely by simple visible bare inspection, the quality of the sleepers cannot be tested. Obviously it must be upto the standard as specified by the railway guidelines to sustain the stress when the Train runs over the track. Supply of any defective sleepers of substandard quality, therefore would be a non-negotiable one. The sleepers were required to be manufactured as per design, specification and particular manufacturing process. Therefore, the primary responsibility of producing standard sleepers as per the specification is on the manufacturer.

29) The Court cannot ignore the vital aspect that defective sleepers are one of the main causes for the catastrophes. Thousands and lakhs of people travel in

trains. If defective or substandard sleepers are allowed to be supplied, accidents can be caused resulting in loss of human lives. Therefore, if such defective sleepers are allowed to be laid underneath the tracks, it may lead to fatal rail tragedies. Hence, the quality of sleepers cannot be compromised considering the public safety.

30) The evidence and documents are on record which would go to show that the sleepers failed in quality test. There is no reason to disbelieve the evidence of Railway Officials along-with documentary evidence produced by the Railways that the respondent Company was not maintaining the standard quality as per specification during the course of manufacture of sleepers. Therefore, the production was stopped and subsequently again when production was permitted to be started, the supply must stand the test of quality specification being maintained by the Railways. The commodity which was supplied was not a perishable in nature to lose its efficacy by passage of time. Therefore, the testing of the supplied sleepers after termination of the contract would relate back to the quality which was prescribed in the contract. The learned arbitrator, has construed the terms of contract by ignoring the supply of substandard quality of sleepers. The arbitrator, therefore, failed to take into account the illegality which goes to the root of the matter and was not trivial in nature as it cannot be construed that the terms of the contract allow the supply of sub-standard sleepers and once supply is made it cannot be looked into.

31) In Delhi Airport Metro Express Pvt. Ltd v. Delhi Metro Rail Corporation Ltd 2021 SCC OnLine SC 695 referring to the facets of the 'patent illegality, Hon'ble Supreme Court held that the scope has been narrowed down but in case of "patent illegality" interference in the arbitral award would be permissible. At para 26, the Court has observed 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 categorized 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 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'."

32) Applying the aforesaid principle to the instant case and considering the nature of goods i.e., railway concrete sleepers, any deviation of technical specification i.e., T-39 Quality Assurance Plan and Schedule of Technical Requirements etc., prescribed by the Railways could not have been allowed to compromise with safety as centrality of contract is for supply of standard quality sleepers. If the Railways would not have terminated the contract, supply of defective sleepers would have been made which could have been proved fatal before horror is caused by accidents. Even otherwise, order of arbitrator to hold to pay the amount to Company for supplied sleepers would tantamount to patent illegality. The defective sleepers along with standard one would make the lot a homogeneous and laying down the same, the crisis of safety may not abate to await for a large scale of horrifying devastation. The award, therefore, is against the public interest, justice or the basic notion of morality and fundamental policy of Indian Law. In view of the foregoing discussion, the appeal is allowed and the award passed by the Commercial Court as well as the sole Arbitrator are set aside.

33) In execution of recovery, if the respondent has received the amount, the same shall be returned to the appellant within a period of 30 days with an interest of 6% per annum from the date of payment of amount. The respondent shall also bear the costs of this appeal.