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IN THE HIGH COURT OF DELHI AT NEW DELHI

OMP NO.120/2003

Reserved on : 19.07.2008

Pronounced On : 08.09.2008

Gas Authority Of India Ltd.

..... Petitioner

Through : Mr. Siddharth Yadav, Advocate

Versus

G.R. Engineering Works Ltd.

..... Respondent

Through : Mr.K.C. Mittal, Advocate

CORAM:

Mr. Justice S. Ravindra Bhat

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| 1. | Whether reporters of local papers may be allowed to see the judgment? | Yes. |
| 2. | To be referred to the Reporter or not? | Yes. |
| 3. | Whether the judgment should be reported in the Digest? | Yes. |

Mr. Justice S. Ravindra Bhat:

1. In these proceedings under Section 34 (3) of the Arbitration and Conciliation Act, 1996 (hereafter called as “the Act”) GAIL questions validity of an award of the Sole Arbitrator, dated 3rd December, 2003.
2. The brief facts of the case are that Gas Authority of India Ltd. (hereafter “GAIL”) floated a public tender bearing on 13.06.1996 for design, residual engineering, supply, fabrication, erection, construction, testing and commissioning of mounded LPG storage system at Usar, District Raigad, Maharashtra, on International Competitive bidding basis. The Letter of Award (LOA) was issued in favour of the respondent, GR Engineering Works Ltd. (hereafter called “GR”) on 22.04.1997. The contract was on lump-sum price. The work was completed by GR on 16.08.1998. All the running account bills of the GR were cleared. Its balance 10% of the final bill amounting to US \$ 236,600 and DM 368,000 were, however, withheld by GAIL. GAIL took the position that GR indulged in unilateral substitution of ‘gravel’ and ‘sand’ (as stipulated in the contract) with ‘murram’ (non-stipulated material). GAIL’s contention was that the material stipulated was:
 - (a) Use of gravel in tank bed; and
 - (b) Use of sand in tank surround/filling between tanks.

According to GAIL, instead of these materials, GR used murram, which was not agreed upon; it (GAIL) was therefore, entitled to deduct the amounts withheld.

3. GR invoked the arbitration clause and the dispute centered mainly around the issue of non-payment of the said amounts, on account of use of murram in place of gravel/sand. GAIL demanded cost benefit to be passed on to it by GR for using a cheaper material, namely 'murram' in place of more expensive contract stipulated material, namely 'gravel' and 'sand'. GAIL claimed that by using such cheaper material, than the contract stipulated material, GR unjustly enriched itself.
4. GR contended, before the arbitrator that the contract permitted use of alternative material in place of gravel/sand. This was disputed by GAIL on the ground that alternative material was permitted to be used at place other than tank bed and tank surround; it relied upon Clause 5.02. According to it, substituted material could be used, only with prior permission of GAIL and their consultants (M/s Engineers India Ltd., herein after referred to as "EIL"). GR contended before the Sole Arbitrator that they had not unjustly enriched themselves, because,

while submitting their bid, they had indicated, by “Exceptions and Deviations” set out in “Ex AK” that they would be using best quality “murram” in place of gravel and sand. GR relied upon Clause 4.0 of the bid document wherein there was a specific provision for submission of “Exhibit AK”. GAIL on the other hand, contended that use of substituted material was withdrawn by it by way of Corrigendum No.1, which was issued to all bidders prior to final consideration of their bids by letter dated 6.9.1996 that –

“In view of above, the mention regarding exclusion of cement, reinforcement, shuttering, etc. for certain items in Annexure-III has no relevance as bidders are to quote lump sum prices inclusive of everything as required for completing all the works as per terms of the bid document”. (emphasis supplied).

GAIL submitted that neither GR nor any other party could not unilaterally modify the tender terms and conditions and submit a bid for use of material, other than that stipulated in the bid documents. GAIL also relied upon a letter addressed by it to GR eliciting its response whether it (GR) was prepared to agree to complete compliance of the tender conditions, by its letter dated 27.12.1996, and the response by GR on 7-1-1997 that it agreed for complete

compliance of the tender specification and terms and conditions. GAIL contended therefore, that GR could only use gravel in tank bed and sand in tank surround and not murram, as earlier suggested by GR.

5. GAIL issued the Letter of Award (herein after referred to as "LOA") dated 22.04.1997 to GR. The LOA at Clause 10 included a list of documents which collectively comprised of the contract documents. The said list included Corrigendum No.1, and Annexure I to VIII. Annexure II stated –

"... all other stipulations made by the contractor in discussion held and/or correspondence exchanged prior to issue of Fax of Order dated 25.03.1997 shall be treated as null and void..." (emphasis applied).

6. On 01.05.1997 GAIL issued a change order, forming integral part of the letter of acceptance dated 22.04.1997. This was concerned with the question of bank guarantee. While accepting the change however, GR stated by its letter dated 08.05.1997 that though its acceptance and deviations in Ex.AK, (adverted to the comments of GAIL dated 22.12.1996). The latter had not been made part of the contract documents and requested for a necessary change order to that effect, immediately. GR also followed it up to the fax of 09.05.1997 intimating GAIL as follows:

"They have already excavated the required level and we have to start filling up murram material as per the clarifications given by us in Ex. AK. We will be filling with the best quality murram. This is in line with Vol. III of IV under Section 10. Kindly approve the above as per return fax".

7. GAIL, declined GR'S request, stating that the deviations in Exh.AK of GR's offer regarding alternative material for tank mound were withdrawn by its letter dated 07.01.1997. It (GAIL), requested GR to proceed with the work strictly in accordance with the specifications in the bid document. GR, however, disagreed with this interpretation of its letter dated 07.01.1997 stating that

"we would like to clarify that Serial No. S 7 and 8 of Ex. AK were not withdrawn by us vide S-20 of our letter of 07.01.1997 but it was only compliance statement towards accepting specifications of various materials as and when they are used. In other words, the clarifications given by us in our letter Ex. AK is the basis of our quotation and we are going ahead with filling up of murram as mentioned in our earlier letter dated 09.05.1997. You would appreciate that the work of re-filling cannot be stopped at this stage as the monsoon is fast approaching".

GAIL wrote again on 17.05.1997. After referring to its earlier letter of 12.05.1997, it said :

".... In the subsequent meeting held on 14.05.1997, held on your request, it was made clear to you that you are to use gravel s the fill material as per contract and request for

filling with murram / the sub-grade maybe considered only "as a special case subject approval of all the required test reports for murrum by M/s PLE and CIS". Calling for test reports, the letter asked GR to continue to fill the area with gravel as specified in the tender document in order to avoid any delay..." GAIL followed this up with another letter dated 19.05.11997 in which it referred to GR's request to use murrum as a "deviation request" and approved the use of murrum "as filling material below the sand bed in lieu of gravel"

and added:

"Please note that your deviation request is being technically acceptable as a special case as above with cost benefit, if any, for the same to GAIL."

8. G.R. completed the work on 16.08.1998 and submitted its final bill through EIL; it sought payment of the balance of US \$ 236,600 and DM 368,000 due to it, which comprised of the 10% withheld by GAIL under the contract till completion of the contract. On 18.08.1999, GAIL wrote to GR stating that

"with regard to the release of balance payment, necessary instructions had been issued to the site to process the case for recovery of cost benefit for use of murrum in lieu of gravel and sand which is around 106 lakhs (approx.)".

9. By a further letter of 11.02.2000, GAIL quantified the cost benefit to be passed on to it by GR at Rs.1,41,71,091 and requested the latter to refund

the amount and stated that it would be recovered from the last payment due in order to close the matter. On 18.02.2000, GAIL furnished the break-up of the cost benefit sought to be recovered as comprising of

- (a) Rs.65,43,880 against usage of 23,371 cu.m. of murram in place of gravel below sand bed;
- (b) Rs.35,85,185 against usage of murram in place of sand for tank surround and filling between;
- (c) Rs.36,90,000 towards the cost of murram excavated from GAIL's site; and
- (d) Rs.3,52,026 towards royalty paid to the state authorities for the murram excavated from GAIL's site

10. GR initiated arbitration proceedings claiming an award against GAIL of the sums of US \$ 236,00 and DM 368,000 withheld by the latter with interest up to 30.06.2001 calculated at US \$ 58,639 and DM 91,205. In all, the total claim of GR against GAIL was US \$ 295, 239 and DM 459,205, with further interest till date of payment as well as costs.

11. In the impugned award, the arbitrator, Mr. Justice S. Ranganathan, Retired Judge of the Supreme Court, partially allowed GAIL's claim, and allowed GR's claim. He reasoned that Clause 5 envisioned that gravel and sand of the given specifications had to be used for the tank bed and tank surrounds. Clause 5.02, according to the arbitrator, however

provided that alternative materials could be used in place of sand otherwise for the general mound subject to acceptance by GAIL and EIL. It was noticed that disputes between parties started on 09.05.1997 when, after excavating the ground for the required level, GR proposed to fill it up with murrum, which was objected to by EIL. GR sought GAIL's intervention. The arbitrator noticed that at first, GAIL refused permission for this on the ground that the deviations sought in Ex.AK had been given up by GR on 07.01.1997. According to him, this was not the correct interpretation of what happened on 07.01.1997. He however, observed that on 17.05.1997, after meeting and discussions, GAIL wrote to GR stating that:

"it was made clear that you are to use gravel as the fill material as per contract and request for filling up with murrum in the sub-grade may be considered only as a special case subject to approval of all the required test reports for murrum by M/s PLE and CIS".

12. It would be relevant at this stage to extract the relevant findings of the arbitrator, on the merits, after noticing the facts and contentions:

"16....It is not in dispute that these test results were obtained and indeed a report of PEL seems to suggest that the use of murrum might be preferable to use of gravel. This was indeed confirmed by GAIL by its letter of 19.05.1997 approving the use of

murram as filling material in lieu of gravel but added the rider that the "deviation" though technically acceptable, was being accepted, "with cost benefit, it any, for the same to GAIL". Execution of the contract was completed accordingly. It is this "cost benefit" which GAIL now claims to be set off against GR's claim for the balance of the contract price.

17. In the light of the above discussions, it is clear that the stand of GAIL that the contract required gravel/sand filling and that, as murram filling was permitted only conditionally, GR is bound to make over the cost benefit to GAIL has to be accepted. The argument of GR that as it had made its bid only on the basis of murram filling and this bid had been accepted by GAIL, it had derived no benefit which needed to be passed on to GAIL is seemingly very logical, attractive and acceptable but to accept it would mean – a total disregard of corrigendum No.1 and the statement of agreed variations both of which were part of the contract and this cannot be done. These deleted ten list of items in Annexure III and insisted on compliance of the technical and material specifications of the contract and GR's acceptance of these had the effect of converting its bid into one for the execution of the contract in accordance with these specifications i.e. by the use of gravel/sand and not murram for the foundations.

18. GR seeks to derive support for its contention from certain correspondence between GAIL and EIL. It is pointed out that the execution of the contract with use of murram was accepted by GAIL. A completion certificate by EIL, a take-over certificate and a general certificate by GAIL were also given to GR by the end of September 1998. On June 17, 1998 GAIL asked GR about the cost benefit to GAIL due to use of murram in place of gravel. Some letter also seems to have been sent to EIL on 22.06.1998 in

response to which EIL stated that while GAIL had informed it about the deviation in the above matter, "it had not been informed to any cost implication I the contract due to the above change in specification". On 11.03.1999, GAIL wrote to EIL reiterated its opinion that it had been asked to send the cost analysis by its letter dated 17.06.1998 (which is not correct, as that was a letter sent to GR and not EIL) and calling upon EIL to do so at once. On 13.05.1999, EIL reiterated its opinion stating that "since lump sum prices (had been) based on the murram filling, there is no price implication and hence no cost analysis is required". However, on 26.03.1999, GAIL explained to EIL that this was not a correct approach and called upon EIL to furnish a cost analysis which it subsequently did under cover of its letter dated 13.04.1999. The amount of the claim and its break-up were intimated to GR in February 2000 but the working of the EIL in this regard – I its annexure to the letter dated 13.04.1999 has been furnished only along with the Respondent's reply to the statement of claim.

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XXXXX

20. To come to merits of the claim by GAIL in its Ex D-3, the claimant filed a belated rejoinder contending that, if at all, only Rs.26,88,000 could be reduced from its bill whereas Ex D-3 gives a figure of Rs.1,41,71,091. Counsel for GAIL objected orally as well as by application to a fresh opportunity being given to the claimant to meet this point by filing an additional rejoinder after the arguments were over. This objection was overruled at the hearing itself. In arbitration proceedings substantial justice should be done to the parties and an answer need not be ruled out merely because it is belated. Moreover, it is seen that the claimant has answered this claim in its

correspondence with GAIL discussed below and it is really not a fresh plea.

21. In the Annexure to its letter of 13.04.1999, EIL worked out the savings of Rs.1,03,41,500 by GR on the following basis"

- (i) Total quantity of murram used : 19,900 cu.m. in place of sand and 18,100 u.m. in place of gravel or 38,000 cu.m. in all*
- (ii) Saving due to use of murram in place of sand at Rs.365-100 or Rs.265 per cu.m. in place of gravel or 38,000 cu.m. in all : Rs.52,83,500.*
- (iii) Saving due to use of murram in place of gravel at Rs.380-100 or Rs.280 per cu.m. : Rs.50,68,000*
- (iv) Total Savings = Rs.1,03,41,500.*
- (v) Savings due to transportation costs : Rs.82,440 which had already been accepted between EIL and GR in their exchange of letters in October 1998 and recommended for deduction from a supplemental bill of GR.*
- (vi) It was suggested that to the above two should be added royalty and basic cost of murram fixed by the owner and the determination of these two figures was left to GAIL.*

22. As already mentioned, GAIL has worked out its claim of Rs.1,41,71,091 in its letter dated 18.02.2000, as follows :

- (1) Rs.65,43,880 against usage of 23,371 cu.m. of murram in place of gravel.*
- (2) Rs.35,85,185 against the use of murram in place of sand for tank surround and filling between.*

(3) Rs.36,90,000 being the cost of murram excavated from GAIL's site.

(4) Rs.3,52,026 towards royalty paid for murram excavated from GAIL's site.

23. GR, in its reply of 07.03.2000, while reiterating its non-liability to pay any cost benefit, also controverted the figures given above by GAIL. It stated that

(1) that the volume of excavated portion filled with murram was only 9,600 cu.m. and not 23,371 cu.m.

(2) that use of murram in place of sand filling for tank surround and filling between tanks was permitted.

(3) that the murram used from GAIL's site was only 27,600 cu.m;

(4) the cost of murram fixed at Rs.100 per cu.m. was excessive and included several other incidentals and should not exceed Rs.30-40 per cu.m; and,

(5) that a recovery at Rs.40 per cu.m. for 27,600 cu.m. or Rs.11,04,000 was acceptable to them.

It denied that GAIL had made any royalty payments and stated that it was prepared to reimburse any such royalty payment actually made, if proved. In the additional rejoinder GR accepts a differential cost of Rs.280 being applied in place of gravel at Rs.280 and conceded that the compensation, if any, could not exceed Rs.280x9600 or 26,68,000/-.

24. A perusal of the correspondence between GR, EIL and Gail extracted above shows several contradictions in regard to relevant quantities and rates but they provide clues which make it possible

to arrive at a figure of the compensation that GAIL should be granted on the above account. In the first place GAIL's letter of 18th February 2000 is seen to claim a compensation for the use of murrum in place of sand. But the letters of 17th and the 19th May, 1997 show that the condition of passing on 'cost benefit' to GAIL related only to the use of murram in place of gravel; it does not include the use of murrum in place of sand. GAIL cannot therefore, be entitled to any 'benefit' on this account. So far as the use of murram in place of gravel is concerned, its extent has been mentioned as 23,371 cu.m. by GAIL on 18.02.2000 as 9,600 cu.m. in GR's additional rejoinder and as 27,600 cu.m. in its letter of 07.03.2000. In this state of affairs, it is best to rely upon the figures given by EIL after measurements in its letter of 13.04.1999. According to this letter, the amount of murrum used in place of gravel comes to 18,100 cu.m. of which 12,000 cu.m. came out of GAIL's site. The cost of gravel has been given as Rs.380 and the differential cost at Rs.280 is accepted by GR in its additional rejoinder. Murrum of 12,000 cu.m. from GAIL can be taken as used proportionately (19900 : 18100) or, roughly, to the extent of, half in place of gravel and half in place of sand. GR will thus become liable to compensate GAIL thus .

At Rs.380 per cu.m. in respect of 6000 cu.m. =

Rs.22,80,000

At Rs.280 per cu.m. in respect of 12100 cu.m =

Rs.33,88,000

Total = Rs.56,68,000

The only remaining claim of GAIL is in respect of royalty, GR in its rejoinder has pointed that there could be no

question of GAIL paying royalty on murrum excavated from its mines for its own projects but has offered that it is prepared to reimburse to GAIL any such royalty payment that may have been made by GAIL. GAIL has filed no receipts in respect of royalty payments and hence no payment to GAIL can be directed in this award on that account. In other words, the amount of cost benefit GAIL is entitled to is Rs.56,68,000 and not Rs.,41,091/- claimed by it.

25. The result of the above discussion is that while GR is entitled to be paid the amounts of USD 236,000 and DM 368,000 retained by GAIL out of GR's bills, GAIL is entitled to adjust thereagainst the cost benefit of Rs.56,68,000 as computed above. Counsel for GR has informed the Arbitrator that as on 04.01.1999, the value of 1 USD was equal to Rs.42.72 and that of 1 DM equal to Rs.26. The sum of Rs.56,68,000 is thus equal to 218,000 DM. Deducting this GAIL has to pay GR a sum of USD 236,600 and DM 150,000 as on 04.01.1999. Alternatively, if the deduction of Rs.56,68,000 is effected in terms of dollars, GAIL will have to pay GR a sum of US \$103,922 and a sum of DM 368,000. It has been ascertained that, as on 01.10.2002, one US \$ is equal to Rs.48.56 and 1 DM to Rs.24.41. The amount payable to GR by GAIL, if worked out in terms of rupees, will be Rs.1,40,29,332 on the second basis and Rs.1,52,25,796 on the first basis. Giving GR the benefit of this difference it is awarded that GAIL should pay GR the sums of USD 236,600 and DM 150,000."

13. Mr. Siddharth Yadav, learned counsel contends that the arbitrator's finding on the first claim, in not awarding Rs.65,43,880/- disclose an erroneous approach which the Court should interfere with under Section 34 of the Act. GAIL next seriously contests the finding of the arbitrator that it was not entitled to claim any amounts for murrum

used by GR instead of sand in the tank surround and that such use was permissible without any cost benefit accruing to it. Counsel submitted that the arbitrator misinterpreted the true intent of the letter dated 17.05.1997, which only stated to cost benefit in respect of murrum, as a replacement of gravel, though not murram instead of sand. It was urged that relieving GR of the burden of adhering to one specification subject to cost benefit did not imply that it was free to deviate from specifications as regards other items of work. Murrum for tank surround was never agreed; therefore the arbitrator acted contrary to contract disallowing GAIL's claim. It was contended that this part of the award had to be set aside in view of the judgment in *ONGC Vs. Saw Pipes* 2003 (5) SCC 705. Learned counsel relied heavily on the correspondence between the parties, particularly the letter of GAIL dated 27th December, 1996 and GR's letter of 7-1-1997. He contrasted these with the Note in the contract of April, 1997, stating that GAIL had clearly indicated that the previous correspondence and reservations had been nullified, at the stage of award of contract. Therefore, it was urged that the use of murram instead of sand, for the tank surround

was never agreed; GAIL was therefore, entitled to the amounts claimed by it.

13. It was next urged that the finding about use of 12,000 cu.m. of murrum, is patently erroneous, since it is contrary to the express admission by GR about having used 27,600 cu.m. murrum from GAIL's site. Thus, GAIL was entitled to cost of murrum excavated from its site and used by GR. It is urged that similarly, the arbitrator granted Rs.30-40 per cu. metres for 12,100 cu.m. of murrum, as against Rs.100 per cu.m. to arrive at a much lower figure which is contrary to the records.

14. Counsel lastly submitted that the arbitrator also erred patently in law, in not awarding any amount of royalty – as against the claim of Rs.3,52,026/-. This was clearly admissible, since murrum was used by GR, the contractor.

15. GR contends that GAIL was unable to point to any infirmity in the award on the findings about the first counter claim. Learned counsel contended that the evidence on record by way of letter dated 13-4-1999 of EIL, the GAIL consultant indicated that cost benefit was payable in respect of murrum used instead of gravel. The quantity of murrum used was 18,100 cu.m. of which 12,000 cu.m. were excavated

at GAIL's site. The differential cost was calculated at Rs.22,80,000. The balance of amount claimed, was not held payable. Counsel contended that Court under Section 34 of the Arbitration and Reconciliation Act, 1996 (hereinafter referred to as 'Act') cannot be expected to re-appreciate the evidence led in arbitral proceedings. Once the arbitrator was shown to have applied his mind and arrive at findings which are within the bounds of reason, the Court cannot proceed to arrive at contrary findings and hold the award to be patently illegal. It was submitted that the cost benefit of Rs.33,88,000/- towards murrum used instead of gravel was worked out for 12,100 cu.m. of murrum. No infirmity can be found on this aspect.

16. Learned counsel contended that the findings of the arbitrator on the question about GAIL's disentitlement to any cost benefit for use of murrum instead of sand cannot be called illegal or contrary to contract. It was urged that the GR's offer dated 13.09.1996 along with the deviations specified in Ex. AK were never withdrawn. Learned counsel submitted that the confirmatory letter dated 07.01.1997, in answer to GAIL's query of 27.12.1997 did not have effect of withdrawing the deviations; it only confirmed the bid with the deviations. Thus, when

the question of executing the work arose, GR insisted that the deviations notified should be duly reflected. The letters dated 09.05.1997, 12.05.1997, 13.05.1997, 17.05.1997 and 19.05.1997 have thus to be seen in the background of such facts.

17. It was urged that GAIL's foreign technical consultant was satisfied about use of murrum and certified it to be so on 20.05.1997. Learned counsel relied upon the arbitrator's records in that regard. He also submitted that the question of alleged deviation in use of murrum instead of sand was raised for the first time in 1999 after the contract was successfully performed and the site was handed over, in July 1998. Neither during the contract nor, after the work was handed over did GAIL raise the issue. It claimed the cost benefit for the first time on 11.02.2000 and issued the break-up in this regard for the first time on 18.02.2000. In these circumstances the arbitrator's findings that the letters of 17th and 19th May, 1997 disclosed that the condition of passing of cost benefit to GAIL related only to use of murrum instead of gravel and therefore no such benefit could have been claimed, for the use of murrum towards tank surrounds.

18. Learned counsel submitted that no exception can be taken in regard to the claim for cost of murrum excavated from GAIL's site. The arbitrator here had considered the GAIL's contention about the extent of murrum as 23,371 cu.m. by its letter dated 18.02.2000 as against 9,600 cu.m. in GR's additional rejoinder and 27,600 cu.m. in its letter dated 07.03.2000. He, however, relied upon the figures furnished by GAIL's consultant, EIL after measurement, in its letter of 13.04.1999 which showed that murrum used instead of gravel was 18,100 cu.m. Of this 12,000 cu.m. was from GAIL's site. The differential cost here was accepted by the GR in its additional rejoinder at Rs.280/-. Learned counsel submitted that the cost of murrum thus calculated was premised upon materials on the record.. The Court should therefore not conclude that such findings are in error of law or contrary to contract.

19. Learned counsel submitted that the award cannot be challenged on the ground of its not granting any amount towards payment of royalty since GAIL never adduced evidence in this regard. Learned counsel relied upon the judgments reported as *Municipal Corporation of Delhi Vs. M/s Jagan Nath Ashok Nath* , AIR 1987 SC 2316; *Hindustan*

Tea Company Vs. M/s K. Shashikant & Company, AIR 1987 SC 81 and *Union of India Vs. India Metals* 116 (2005) DLT 311 to say that an arbitrator is the sole judge of the matters referred to him and unless an error is apparent on the face of the award itself, the Court should not examine it as if it were an appellate body and scrutinize factual findings.

20. After coming into force of the Act, intervention of courts with awards of arbitral tribunals is to be minimalistic and confined to statutorily spelt out reasons outlined under Section 34. This provision was scrutinized by the Supreme Court, in *Saw Pipes Ltd.*(supra) where it was held that interference is permissible on grounds of public policy, which in turn was explained as the award being contrary to :

- (a) Fundamental policy of Indian Law;
- (b) the interest of India; or
- (c) Justice or morality;
- (d) in addition, if it is patently illegal.

21. The above decision was affirmed in *Hindustan Zinc Ltd. Vs. Friends Coal Carbonization* 2006 (4) SCC 445; *Mc Dermott International Inc Vs. Burn Standard Co. Ltd.* 2006 (11) SCC 181. In both cases, awards or portions of

awards which were contrary to contract or contravened substantive provisions of law, were set aside. One cannot be unmindful of Parliamentary intent that court intervention should be in rare cases, and unless awards disclose patent illegalities which reveal fatal flaws in the approach or reasoning of the arbitrator, errors committed by arbitrators, even of law, should be left undisturbed, as the adjudicatory process- as also the adjudicator- are through volition of parties.

22. The law, as explained in the preceding paragraph, should be applied to the facts of this case. Here, the arbitrator examined the materials in great detailed and returned his findings. The core of the reasoning is to be found in Paras 24 and 25 of the award. The arbitrator held that according to EIL, a total quantity of 18,100 cu. Metres of murram was used, instead of gravel. The cost of gravel was also a matter of record; it was Rs. 380/- (per cu. metre). The award reasoned that applying a ratio (of 19900: 18100) on the basis of figures supplied by GAIL, approximately half the murram used was in place of gravel, and the other half instead of sand. This ratio was deduced from the total actual consumption of murram, i.e 38,000 cu. m. The cost analysis for use of murram for gravel was worked out to Rs. 22, 80, 000/- (i.e Rs. 380 X 6000 cu. m). As regards the balance, the arbitrator relied on the

fact that 12,100 cu. m was procured from GAIL's site; the differential cost of this was fixed at Rs. 280/-. The court can discern no infirmity with this reasoning, or approach, as it is completely supported by materials on the record. The possibility of a different approach by the court cannot impel it to conclude "patent illegalities" in the award, or say that it is contrary to the contract. The parties here agreed that murram could be used, and also that GAIL was entitled to cost benefit. The arbitrator's formula is neither unfeasible nor implausible; on the contrary it appears to be sound and reasonable. Therefore, the conclusions on the first and third claims of GAIL cannot be disturbed.

23. As regards the second claim, ie compensation for the use of murram instead of sand, the arbitrator held that cost benefit was agreed only for substitution of gravel. The evidence here would show that while submitting its tender, GR outlined exceptions and deviations in Ex. AK, including Sl. No. 7 and 8, where it proposed use of "best quality murram". GAIL's letter of 27-12-1996 required GR's confirmation of the tender conditions, to the techno-commercial queries. The crucial aspect here is that it asked GR that:

"Please note that your offer shall be evaluated based on your quotation and replies/ confirmation along with the documents furnished against above queries."

GR confirmed compliance. And thereby hangs a tale. GR's contention in arbitral proceedings appears to have been that its letters, including compliance never implied its going back from its position that deviations and exceptions were insisted upon; it also relied on letters exchanged till 19th May, 1997. These apart, crucially, its letter Ex. P-18 of 13th June, 1997, shows that it had suspended work for a week pending clarity on these aspects. Ex. P20 is a letter, enclosing the agreed, signed change Order No. 2, executed by both parties in August, 1997. As against the item "material specifications for tank mound" GR indicated that:

" Accepted, subject to deviations given in Exhibit AK which is part and parcel of our offer"

22. It thus appears that GAIL understood the matter differently from GR; the documents however, show that both parties signed the changed order; the Annexure to Ex. P-20 shows as much. In these circumstances, the finding of the arbitrator that cost-benefit was inadmissible, to GAIL for the use of murram instead of sand can hardly be termed unreasonable, or contrary to the record, or the contract. Besides, GAIL accepted the site, when it was completed, without any reservation; no document to the contrary was shown to the court. It appears to have claimed the cost benefit on this score, for the first time, more than 3 years after award of contract, on 11-2-2000, and

quantified the break up on 18th February, 2000. In the circumstances, the findings, of the arbitrator, on GAIL's second claim are neither implausible, nor illegal. As regards the last claim, regarding payment of royalty, the court can discern no infirmity in the approach of the arbitrator, since GAIL did not produce any evidence on the question.

23. In view of the above discussion, the court is of opinion that the petition has to fail; it is accordingly dismissed, without any order on costs.

DATED: 8th September, 2008

S. RAVINDRA BHAT, J