

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
Date of Decision: 07.03.2014
+ **FAO(OS) 34/2006**

NATIONAL HIGHWAYS AUTHORITY OF INDIA Petitioner
Through: Mr. Chetan Sharma, Sr. Adv. with
Mr. Gupta, Advocate.

Versus

M/S. LANCO INFRATECH LTD. Respondent
Through: Ms. Manisha Agrawal Narain, Adv.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE NAJMI WAZIRI

% **MR. JUSTICE NAJMI WAZIRI**

1. This appeal under section 37 of the Arbitration and Conciliation Act, 1996 (“**Act**”) challenges the order of 24th November, 2005 (“**impugned order**”), of the learned Single judge dismissing OMP 431 of 2005 (“**section 34 petition**”) as not disclosing any ground warranting interference under section 34 of the Act with the award of the Arbitral Tribunal dated 20th August, 2005, as modified by the order dated 3rd October, 2005 (“**Award**”). The appellant primarily contends that the award was in excess of the contract that came into existence upon the award of tender by the appellant to the respondent for the project of four-laning of KM 476.150 to KM 500.000 of Dhalkola to Islampore sub-section 2 of National Highway 31 in the State of West Bengal.

2. In the impugned order, the learned Single Judge, while reiterating the dicta of the Supreme Court in *Oil and Natural Gas Corporation Ltd. v Saw Pipes Ltd.*,¹ held that the Court, when exercising jurisdiction under section 34 of the Act, ought to not sit in appeal over the findings of the arbitral tribunal. It was reiterated that the Court ought to not reappraise evidence or facts merely because the Court could have come to a different conclusion on the basis of the material available and that short of absurdity or patent illegality, a view of the arbitral tribunal, so long as it is a plausible view, ought to not be interfered with by the Court. The judgements of the Supreme Court in *Food Corporation of India v Joginderpal Mohinderpal & Anr.*,² *Gujarat Water Supply and Sewerage Board v Unique Erectors (Gujarat) (P) Ltd. & Anr.*,³ and *Sudarsan Trading Co. v The Govt. of Kerala and Anr.*,⁴ were cited in this regard.
3. Before an inquiry into the facts in the matter is embarked upon, it would be necessary to clarify that the impugned order is certainly not in error so far as the findings *qua* limited jurisdiction of the Court under section 34 of the Act is concerned. The issue that a Court exercising jurisdiction under section 34 of the Act has limited grounds on which an award may be interfered with is no longer *res integra*. A restatement of the law on this subject can be found in the decision of the Supreme Court in *Delhi Development Authority v R. S. Sharma and Co.*,⁵ wherein the Court, relying on the earlier dicta in *Grid Corporation of Orissa Ltd. v Balasore*

¹ (2003) 5 SCC 705.

² (1989) 2 SCC 347.

³ (1989) 1 SCC 532.

⁴ (1989) 2 SCC 38.

⁵ (2008) 13 SCC 80.

*Technical School,*⁶ *Northern Railway v Sarvesh Chopra,*⁷ *State of Rajasthan v Nav Bharat Construction Co.,*⁸ *Hindustan Zinc Ltd. v Friends Coal Carbonisation,*⁹ and *Oil and Natural Gas Corporation Ltd. v Saw Pipes Ltd.,*¹⁰ held:

“21. From the above decisions, the following principles emerge:

(a) An award, which is

(i) contrary to substantive provisions of law; or

(ii) the provisions of the Arbitration and Conciliation Act, 1996;

or

(iii) against the terms of the respective contract; or

(iv) patently illegal; or

(v) prejudicial to the rights of the parties;

is open to interference by the court under Section 34(2) of the Act.

(b) The award could be set aside if it is contrary to:

(a) fundamental policy of Indian law; or

(b) the interest of India; or

(c) justice or morality.

(c) The award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court.

(d) It is open to the court to consider whether the award is against the specific terms of contract and if so, interfere with it on the ground that it is patently illegal and opposed to the public policy of India.”

⁶ (2000) 9 SCC 552.

⁷ (2002) 4 SCC 45.

⁸ (2006) 1 SCC 86.

⁹ (2006) 4 SCC 445.

¹⁰ (2003) 5 SCC 705.

4. Negatively stated, the Court exercising jurisdiction under section 34 of the Act has certain restrictions placed on it, such as:
- 4.1. It ought to not re-appreciate evidence merely to arrive at a different conclusion.¹¹
- 4.2. If the interpretation of the contract by the arbitral tribunal – even if it leads to issues of law – is a plausible interpretation, Court ought to not interfere with it even if it would have come to a different interpretation.¹²
- 4.3. If in arriving at quantum of damages, the arbitral tribunal chose a particular formula, Court ought to not interfere with it simply because another formula could have been chosen, as long as the contract does not provide for any formula and the formula adopted by the arbitrator is an acceptable and reasonable one.¹³
- 4.4. If the Court is to set aside the award as being unfair or unreasonable, the award should be such as to shock the conscience of the court.¹⁴
- 4.5. Even to hold an award as being opposed to public policy, the illegality must be patent and should go to the very root of the matter – it cannot be a frivolous or trivial illegality.¹⁵
5. Shorn of irrelevant details, the case of the appellant commences from the award of the tender in the aforementioned project to the respondent,

¹¹ *McDermott International Inc. v Burn Standard Co. Ltd. & Ors.*, (2006) 11 SCC 181; *Numaligarh Refinery Ltd. v Daelim Industrial Co. Ltd.*, (2007) 8 SCC 466; *P. R. Shab, Shares and Stock Brokers Pvt. Ltd. v B. H. H. Securities Private Ltd. & Ors.*, (2012) 1 SCC 594.

¹² *Numaligarh Refinery Ltd. v Daelim Industrial Co. Ltd.*, (2007) 8 SCC 466; *Rashtriya Ispat Nigam Ltd. v Dewan Chand Ram Saran*, (2012) 5 SCC 306.

¹³ *McDermott International Inc. v Burn Standard Co. Ltd. & Ors.*, (2006) 11 SCC 181.

¹⁴ *J. G. Engineers Private Limited v Union of India & Anr.*, (2011) 5 SCC 758.

¹⁵ *McDermott International Inc. v Burn Standard Co. Ltd. & Ors.*, (2006) 11 SCC 181; *J. G. Engineers Private Limited v Union of India & Anr.*, (2011) 5 SCC 758.

whose bid was found successful. According to the appellant, the contract came into existence after the respondent was given sufficient opportunities to apprise itself of the particulars of the same and the requirements thereunder. The project, which the respondent was to undertake for the appellant, was to involve certain civil engineering works, which were to be undertaken on the basis of the specification (Third Edition) issued by the Ministry of Surface Transport, (“**MoRTH specifications**”). It is not in dispute that the amendments and modifications to the MoRTH specifications were made a part of the contract.

6. The work had indeed commenced; the respondent sought to complete the work using aggregates based on crushed stones sourced from the river banks of Balason / Matigara. This was opposed by the appellant, who directed that only aggregates from Pakur shall be used. Admittedly, neither the contract nor the tender documents provide for aggregates from Pakur being used. Aggregates from Pakur were used by the respondent as directed and the project work was undertaken under protest.
7. Pakur being admittedly further from the project site than Balason/Matigara, disputes arose as to whether the extra lead involved in procuring the aggregates from Pakur was to be borne by the appellant or the respondent. When the matter was eventually referred to the arbitral tribunal, two claims were raised by the respondent while work was still under way – both in respect of the extra lead – one *qua* bituminous work and the other *qua* concrete work.

8. The respondent's claim contended that its bid was on the basis that aggregates based on crushed stones from Balason/Matigara may be used for the works. It had contended that it was only in view of the appellant's insistence that aggregates from Pakur were used for undertaking the works. It contended that the extra lead involved in procuring the aggregates from Pakur was a cost not contemplated in the bid and, not forming a part of the contract, was an expense that ought to be compensated for by the appellant, who insisted on its usage.
9. The appellant opposed the claims. It contended that its insistence was not to use aggregates from Pakur, but to not use aggregates from Balason / Matigara, which do not meet the MoRTH specifications. It contended that given the fact that the aggregates from Balason/Matigara would not conform to MoRTH specifications, the contention of the respondent that its bid was based on the assumption that aggregates from Balason/Matigara may be used is specious and fit to be disregarded. It contended that there is no basis for claiming *extra* lead, when the aggregates from Balason/Matigara could never be used without going against the terms of the contract.
10. Both parties were firstly at issue over whether clause 507.2.2 of the MoRTH specifications, as amended by the parties, could be read to include aggregates based on material sourced from river beds – which the aggregates from crush stones from Balason/Matigara were. While it is doubtless that even the material as specified in clause 507.2.2 were to meet further requirement to be regarded as suitable per the MoRTH

specifications – which shall be shortly adverted to – the first of the disputes, essentially, was *qua* whether such aggregates could be used in the project. The respondent contended in the affirmative, the appellant in the negative. Similar was the issue *qua* clause 1004 read with clause 1007. The distinction being that clause 507.2.2 is *qua* bituminous work and clause 1004 read with clause 1007 being *qua* concrete work.

11. The parties were thereafter at issue over whether aggregates based on material sourced from Balason/Matigara were compliant with the physical requirements in Table 500-8. The respondent contended in the affirmative, arguing that the report from IIT Kharagpur sets out that the aggregates based on material sourced from Balason/Matigara would meet the physical requirements if lime is used as a filler. The appellant contended in the negative on three bases (a) that its own reports from other laboratories set out that the aggregates based on material sourced from Balason/Matigara do not meet the physical requirement; (b) that the report from IIT Kharagpur allows lime to be used only as a filler, not as an anti-stripping agent; (c) that the findings in the report from IIT Kharagpur were not based on the AASHTO T-182 test, which was specified in the MoRTH specifications and ought to not be considered.
12. The three member arbitral tribunal passed a majority award in favour of the respondent's first claim and rejected the second claim. The reasoning of the tribunal, as can be ascertained from the Award, is as follows:
 - 12.1. The dispute turns on whether the respondent is right in assuming that aggregates from Balason/Matigara could be used for bituminous work and concrete work.

- 12.2. Clause 507.2.2, even post amendment, retained the word *shingles*. Shingles are material sourced from riverbeds.
- 12.3. The appellant's contention that the word *shingles* is surplusage and ought to be disregarded cannot be accepted. The appellant's further contention that the intent of the amendment was to ensure that material sourced from riverbeds ought not to be used is not borne out from the contract. This is *a fortiori* since clause 1007 specifically deletes all references to material sourced from riverbeds.
- 12.4. It is a dispute involving interpretation of clause 507.2.2.
- 12.5. Applying the principle of interpretation of *contra proferentem*, the existence of the word shingles post amendment, must be interpreted to mean that material sourced from riverbeds may be used for bituminous works, provided they meet the physical requirements in Table 500-8.
- 12.6. This is further supported by the existence of the provision in the MoRTH specification that allows usage of anti-stripping agents in hydrophylic aggregates of approved quality and in suitable doses.
- 12.7. The report from IIT Kharagpur indicates that the aggregates based on material sourced from Balason/Matigara would meet the physical requirements specified in Table 500-8 if lime is used as a filler.
- 12.8. The report from IIT Kharagpur is based on the ASMT:D-3625 test, which is "more serious" than the specified AASHTO T-182 test.
- 12.9. Although lime is not specified as an anti-stripping agent, there is no provision forbidding its usage as an anti-stripping agent either. Further, MoRTH's manual for construction and supervision of

bituminous work specifically mentions that hydrated lime may, on occasions, be used instead of propriety (*sic*) anti-stripping agent.

12.10. Thus, the respondent was justified in making the bid on the assumption that aggregates based on material sourced from Balason/Matigara may be used for the bituminous works.

12.11. Thus, the respondent is entitled to the first claim.

12.12. Since clause 1004 read with clause 1007 removes all references to any material sourced from riverbeds, the use of the same was clearly prohibited.

12.13. Thus, the respondent was not justified in making the bid on the assumption that aggregates based on such material may be used.

12.14. Thus the respondent is not entitled to the said claim.

Since there is no dispute *qua* the basis of calculation, it would be unnecessary to relate the reasoning for the same herein. Furthermore, since there is no challenge to the dissenting award, the same need not be related here either.

13. The respondent sought a clarification of the Award under section 33 of the Act. It submitted that the operative portion of the Award has erroneously scored out the letters **BC**, after the letters **DBM**, both within parentheses, after the words “bituminous works”. The respondent contended that the award was for all bituminous works, i.e., both Dense Bituminous Macadam and Bituminous Concrete and the letters **BC**, which stand for *Bituminous Concrete* ought to not have been scored out. This was opposed by the appellant on the ground that the claim was only

for Dense Bituminous Macadam and hence the scoring out was warranted.

14. The appellant also appears to have sought a clarification in the Award under section 33 of the Act. It appears to have sought a clarification that in the part of the Award reproducing clause 507.2.2, the words “...*coarse aggregate shall consist of crushed stone shingle. They shall...*” ought to read as “...*coarse aggregate shall consist of crushed stone, /shingle. They shall...*”
15. By their order of 3rd October, 2005, the tribunal amended the award and directed that *for Bituminous Works (BC) the additional expenditure incurred on transportation of aggregates from Pakur shall be worked out on the same principle as indicated in pages 19 and 20 of the award.* It further allowed the amendment sought for by the appellant.
16. The appellant preferred the section 34 petition challenging the award. The appellant contended *inter alia*:
 - 16.1. That the amended clause 507.2.2 of the MoRTH specifications, in its letter and spirit, does not allow for aggregates based on material sourced from riverbeds being used.
 - 16.2. That lime cannot function as an anti-stripping agent – which ideally should be fatty acids and amines with long hydrocarbon chains.
 - 16.3. That the ASTM:D-3625 is not more serious than the AASHTO T-182 test and ought to not have been given preference.

- 16.4. That the amended clause 507.2.2 of the MoRTH specification does not contain the word *crushed*, and hence the word *shingles* would have no relevance.
 - 16.5. That the respondent's contention that the bid is based on the assumption that aggregates based on material sourced from Balason/Matigara is belied by its own documents.
 - 16.6. That the claim for extra lead for material procured for Bituminous Concrete works was not even raised and the amendment to the Award, allowing the same, is clearly an excess of jurisdiction.
 - 16.7. That the arbitral tribunal has failed to appreciate various documents submitted by the appellant in support of its case. Had the same been appreciated, the arbitral tribunal would have arrived at a different conclusion than the one arrived at.
17. The impugned order, as earlier recounted, dismissed the section 34 petition. By it, the learned Single Judge reasoned:
- 17.1. The objections raised by the appellant pertain to interpretation of the contract, which is in the dominion of the arbitrator.
 - 17.2. The Court ought to not interfere with the interpretation of the contract as given by the arbitrator.
 - 17.3. The grounds in the section 34 petition are, in effect, an appeal from the Award. The court exercising jurisdiction under section 34 of the Act cannot sit in appeal over the findings in the Award.
 - 17.4. The grounds are merely regarding the tribunal's appreciation of material before it, which cannot be interfered with under section 34 of the Act.

- 17.5. The Award, as modified by the order of 3rd October, 2005, merely provides for the consequences arising out of the extra lead incurred by the respondent procuring aggregates from Pakur, on the basis of the tribunal's interpretation of the clauses of the contract. It cannot be said to be in excess of the contract.
18. Challenging the same, the appellant has filed the instant appeal. Since a large portion of the submissions pertained to clause 507.2.2 of the MoRTH specification, although irrelevant, it may be useful to set the same out below. The portions removed by the amendment are set out in bold:

*“507.2.2. Coarse aggregates : The Coarse aggregates shall consist of crushed stone, **crushed gravel/shingle or other stones**. They shall be clean, strong, durable, of fairly cubical shape and free from disintegrated pieces, organic or other deleterious matter and adherent coating. The Aggregates shall preferably be hydrophobic and of low porosity. If the hydrophilic aggregates are to be used the bitumen shall be treated with anti stripping agents of approved quality in suitable doses. The aggregates shall satisfy the physical requirements set forth in Table 500-8.*

If crushed gravel/shingle is used, not less than 90% by weight of the gravel/shingle pieces retained on 4.75 mm sieve shall have at least two fractured faces. The portion of the total aggregate passing 4.75 mm sieve shall have a sand equivalent

value of not less than 50 when tested in accordance with the requirement of IS:2720 (Part-37). ”

19. Senior Counsel Mr. Chetan Sharma, contended on behalf of the appellant that the Award fell into an error in holding that clause 507.2.2 of the MoRTH specifications permitted using aggregates based on shingles. He submitted that the terms of the contract do not admit of such an interpretation; that the word *shingle* is a mere surplusage and has no useful meaning in the provision; that it is hardly a plausible interpretation that the word *shingle* would have any meaning when it is immediately preceded by a stroke (the character “/”); that this is a clear indication that it was mere *erratum* that it subsisted in the clause post amendment. He further submitted that the interpretation placed upon clause 507.2.2 by the tribunal is implausible and ought to have been set aside by the learned Single Judge in exercise of his powers under section 34 read with section 28 (3) of the Act. In support of this contention, he cited the judgement of this Court in *R. S. Builders v D. D. A & Anr.*¹⁶
20. He next contended that the arbitral tribunal had misapplied the *contra proferentem* principle in the facts of the case. He submitted that there was no circumstance warranting the application of the *contra proferentem* rule, as the respondent was – or was atleast deemed to be – fully aware of all the terms of the contract and had sufficient opportunities to seek clarification before it even bid for the tender. He contended that the *contra proferentem* rule ought to not have been used in the circumstances of the case, as it can hardly be said that the appellant was the *proferens* in

the contract, which was a commercial contract signed by both parties. He submitted that in view of the same, the learned Single Judge ought to have set the Award aside. He relied on the decision of a learned Single Judge of this Court in *Tehri Hydro Development Corporation Ltd. v Lanco Construction Ltd.*¹⁷ in support of his submission.

21. Learned Counsel also contended that even assuming that the word *shingle* was not an error, and that shingles / material sourced from riverbeds were to be allowed, it still does not justify the respondent making the bid on the assumption that material from Balasore / Matigara could be used. This, he contends, is in view of the fact that the material from Balasore / Matigara ought were not in compliance of the physical requirements as specified in Table 500-8 of the MoRTH specifications. He contended that the findings in the report from IIT Kharagpur ought to not be placed reliance on, since it is based on the ASTM:D-3625, while the proper test as per the contract is the AASHTO T-182 test. He submitted that this makes the instant dispute a fit case for exercise of the powers under section 34 of the Act to set aside the Award. He relied upon the judgement of this Court in *Delhi Development Authority v Sunder Lal Khatri and Sons*¹⁸ to contend that insufficiency of reasons in the award is a ground for setting aside the award.

22. Learned Counsel also contended that the report from IIT Kharagpur only recommended lime being used as a filler. He submitted that a *filler* is different from an *anti stripping agent*. He submitted that the provisions

¹⁶ 2008 (2) Arb. L. R. 361 (Delhi).

¹⁷ 2007 (3) Arb. L. R. 194 (Delhi).

of clause 507.2.2 of the MoRTH specifications allowed usage of an approved anti-stripping agent in case of hydrophilic substances, which hydrated lime is admittedly not. He submitted that the Award, which proceeds on the premise that as long as hydrated lime is not prohibited, its usage cannot be regarded as illegal, is patently and manifestly illegal. This illegality, he submits, goes to the very root of the matter and vitiates the entire award, which is premised on this illegality. He contends that the learned Single Judge ought to have set the Award aside in view of the same. He drew the attention of this Court to the judgement of the Supreme Court in *Hindustan Zinc Ltd. v Friends Coal Carbonisation*,¹⁹ to the issue that an award cannot be contrary to the terms of the contract.

23. He then submitted that the material on record before the arbitral tribunal clearly indicated that the contention of the respondent that its bid was based upon the assumption that aggregates based on material sourced from Balason/Matigara may be used is specious. He drew reference to the bid documents, specifically the document pertaining to *methodology* to submit that the methodology specified by the respondent is not one that could be used in respect of anything other than crushed stones – which the material from Balason/Matigara was not. He submits that the Award clearly fell into an error in holding that the respondent's bid was based upon the assumption that aggregates based on material sourced from Balason/Matigara may be used. He contended that this was sufficient ground for the learned Single Judge to have set the Award

¹⁸ 2009 1 Arb. L. R. 240 (Delhi) : 157 (2009) DLT 555.

¹⁹ (2006) 4 SCC 445.

aside. He relied on the judgement of this Court in *Oil and Natural Gas Corporation Ltd. v Schlumberger Asia Services Ltd.*²⁰ in this regard.

24. Lastly, he contended that there is no material on record to show that a claim in respect of Bituminous Concrete works (which is governed by clause 512 of the MoRTH specifications but has the same requirement *qua* material as Dense Bituminous Macadam works – clause 507.2.2) had been raised or prosecuted by the respondent. He submitted that the application under section 33 of the Act is not one that could have been made by the respondent when the original statement of claim contained neither averments nor a claim for extra lead incurred in procuring aggregates from Pakur for Bituminous Concrete works. He submits that this falls squarely within the provisions of section 34(2)(a)(iv) of the Act and ought to have been set aside.

25. Counsel for the respondent opposed the appeal and contended that the learned Single Judge had rightly refused to interfere with the award. He contended that the interpretation placed on clause 507.2.2 of the MoRTH specification by the arbitral tribunal is not only a plausible interpretation, it is the only interpretation. He submitted that the mention of the word *shingle* therein, when read in conjunction with the lack of similar words in clause 1004 read with 1007 of the MoRTH specifications, is a clear indication of the intent of the appellant to allow the material sourced from riverbeds.

²⁰ (2006) 3 Arb. L. R. 610.

26. He contended that there is no basis for the section 34 petition or the present appeal. He submits that the limited jurisdiction under section 34 and section 37 of the Act does not permit the Court to decide the present appeal. He also contended that the arbitral tribunal has rightly come to the conclusion that the aggregates based on the material sourced from Balason/Matigara do comply with the physical requirements under Table 500-8 of the MoRTH specifications; he drew reference to the report from IIT Kharagpur in this regard.

27. The primary contention, as earlier stated, of the appellant is that the interpretation placed by the Award on clause 507.2.2 of the MoRTH specifications is incorrect. This court finds itself unable to agree with the contention. The arbitral tribunal has considered the terms of the MoRTH specifications and also considered the fact that the provisions of 507.2.2 of the MoRTH specifications do specify the word *shingle* while clause 1004 read with clause 1007 thereof does not, and consequently held that the same indicates that *shingle* being retained in clause 507.2.2 is not an *erratum*. This is a plausible interpretation of the contract; even if not mentioned, it is apparent that it follows the principle enunciated in the maxim *expressio unius est exclusio alterius*²¹ – a well-established rule of interpretation qua deeds and other instruments.²² The law as laid down by the Supreme Court in its various judgements enjoins this Court from interfering with the interpretation placed by the arbitral tribunal upon a

²¹ Latin: The expression of the one is the exclusion of the other.

²² *A. B. C. Laminarts Pvt. Ltd. & Anr. v A. P. Agencies, Salem*, (1989) 2 SCC 163; *Hanil Era Textiles Ltd. v Puromatic Filters (P) Ltd.*, (2004) 4 SCC 671; *Swastik Gases Pvt. Ltd. v Indian Oil Corporation Ltd.*, (2013) 9 SCC 32; *Max India Ltd. v General Binding Corporation*, 2009 (3) Arb. L. R. 162 (Delhi).

contract, so long as it is plausible; this Court shall not interfere with the same.

28. The second contention *qua* the interpretation placed upon the contract was that the rule of *contra proferentem* ought to not have been applied in this matter as it was a commercial contract signed by the parties after all terms have been understood fully. Thus, it is contended that there is no mandate to construe the terms of the contract against the appellant. Indeed, it is a well established principle of construction of contract that if the terms employed by one party are unclear, an interpretation against that party will be preferred. This proposition of law appears in the award of the arbitral tribunal at paragraphs 2.6.5 to 2.7.3, and there is no dispute as to its validity.²³ Following from this proposition of law, the arbitral award stated that “[w]e will be justified in giving effect to the meaning of the word “shingles” more favourable to the contractor and accept his submission so far as the construction of the clause goes.” The learned single judge declined to enter this debate as it related to the construction of the contract – a matter properly reserved within the domain of the arbitral tribunal. Given that no argument as to an error in law has been pursued, the interpretation placed on the contract is a matter within the jurisdiction of the arbitral tribunal, and thus, even if an error exists, this is an error of fact *within* jurisdiction, which cannot be re-appreciated by the Court under sections 34 or 37 of the Act.²⁴ The appellant, rather, invites the Court to question the inferences drawn from an application of this rule of law; such re-appreciation is impermissible.

²³ *Bank of India v K. Mohandas and Ors.*, (2009) 5 SCC 313.

29. The contention of the appellant *qua* the report from IIT Kharagpur is clearly an issue of appreciation of facts. As earlier observed, this Court is enjoined from re-appreciating evidence merely to arrive at a different conclusion from the arbitrator. It can hardly be said that the findings of the arbitrator are patently erroneous or without material to support the same. It has observed *inter alia* that the ASTM:D-3625 test is more serious than the AASHTO T-182 test, that lime's anti stripping properties have been discussed in MoRTH's manual for construction and supervision of bituminous work and that clause 507.2.2 itself provides for use of an anti-stripping agents in case of hydrophilic material, before coming to its conclusions *qua* the report from IIT Kharagpur. The learned Single Judge has rightly refused to interfere with the Award on this count and this Court shall follow suit.
30. Similarly, the contention that the respondent's bid was not based on the assumption that material from Balason/Matigara may be used has to be rejected. This Court will not re-appreciate evidence merely to come to a different conclusion than the arbitral tribunal.
31. This Court, once again, finds itself unconvinced by the contentions of the appellant on this ground. It has been contended that the claim has been only for Dense Bituminous Macadam works and the award, to the extent it awarded extra lead in respect of material procured for Bituminous Concrete works, deserves to be set aside with under section 34(2)(a)(iv). This Court is unimpressed with the contention. The Award, in paragraph

²⁴ *Sudarshan Trading Co. v. Govt. of Kerala*, (1989) 2 SCC 38; *Oil and Natural Gas Corporation Ltd. v Saw Pipes Ltd.*, (2003) 5 SCC 705.

2.6 *et. seq.*, discusses *bituminous works*. That no discussion under clause 512 of the MoRTH specifications is made in the Award is understandable, inasmuch as the MoRTH specifications, in clause 512, itself refers to clause 507.2.2, which – as stated earlier – was the subject matter of discussion in the Award. The Award, discussing the first claim in paragraph 3.1 *et. seq.* discusses claims for *DBM etc. (Bituminous Works)*. The wordings used in the said paragraphs, once again, is *bituminous works*, as opposed to *Dense Bituminous Macadam* as sought to be contended by the appellant herein. The *Declaration about the future* of the Award in paragraph 3.6 *et. seq.* also employs the words *Bituminous Works*. Even the MoRTH specifications provide for both *Dense Bituminous Macadam works* and *Bituminous Concrete works* under the same chapter.

32. Especial reliance was sought to be placed by the appellant upon the insertion of the figures and letters **(DBM)** in sub-paragraph (i) of the *Final Award* at paragraph 4.0 to contend that the Award has intentionally restricted itself to the claim made based on extra lead for Dense Bituminous Macadam works and that the scoring out sought to be *clarified* by the application under section 33 was rightly made. This Court finds itself, once again, unconvinced by this argument. It is not the case of the appellant that the term *Bituminous works* refers only to *Dense Bituminous Macadam works*, nor is such a contention borne out from the records. Should the appellant have wanted to so contend, it is reasonable to assume that the appellant ought to have sought the clarification under section 33 of the Act. Given the same, this Court finds no substance in this contention as would warrant interference with the impugned order.

33. For the above reasons, this Court finds no reasons to interfere with the impugned order. Consequently, the appeal is dismissed as being without merits. The parties are left to bear their own costs.

NAJMI WAZIRI
(JUDGE)

S.RAVINDRA BHAT
(JUDGE)

MARCH 07, 2014