

GAHC030000152013



**THE GAUHATI HIGH COURT**  
**(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)**

**Case No. : Arb.A./1/2013**

M/S Bhagheeratha Engineering Limited in Joint Venture with Ashoka Buildcon Limited  
Registered Office at Bhagheeratha Residency Banerjee Road, Kochin - 682018,  
Kerala R/b Thomas E.A. Power of Attorney Holder of M/S Bhagheeratha Engineering Limited and Ashoka Buildcon Limited Joint Venture

VERSUS

State of Mizoram  
R/b The Secretary, PWD, Govt. of Mizoram

**Advocate for the Petitioner** : Mr. Surajit Dutta, Sr. Adv.

**Advocate for the Respondent** : Addl. AG/GA, Mizoram

**BEFORE**  
**HONOURABLE MRS. JUSTICE MARLI VANKUNG**

**JUDGMENT & ORDER (CAV)**

**Date** : 29-05-2024

Heard Mr. George Thomas, learned counsel for the appellant along with Mr. Ajoy Roy, learned counsel for the respondent assisted by learned counsel Ms. Aishani Das.

**2]** This is an appeal filed under section 37(1) (b) of the Arbitration and Conciliation Act, 1996, against the Judgment and order dated 30.04.2013

passed by the Additional District Judge in Arb. case no. 3/2011 in a petition filed under section 34 of the Arbitration and Conciliation Act, 1996 wherein the learned Additional District Judge refused to set aside the impugned Arbitral Award dated 19.06.2011.

**3]** Brief facts of the case is that the appellant had entered into a contract agreement with the respondent for implementation of the project for "Improvement and Upgradation of PIA: Aizawl- Thenzawl- Buangpui Road via Hmuifang including Bridges over River Char and River Vanva and Rehabilitation and Major Maintenance of M-7: Damdai- Sialsuk Road' for the contract price of Rs.107,74,05,432/-.

**4]** The Agreement dated 28.03.2002 was executed between the appellant (Bhageeratha Engineering Ltd.) and the respondent (Govt. of Mizoram, Public Works Department). As per clause 10.1 of the agreement, the appellant Contractor shall provide security for his proper performance of the contract to the respondent/employer within 28 days of the Letter of Acceptance, in the form of a bank guarantee or performance bond. Accordingly, Performance Bank Guarantee: BG No.G/176/20 dated 23.03.2002 of an amount of Rs.10,80,000/- was given by the appellant.

**5]** In the Agreement dated 28.03.2002, time was the essence of the contract and the time allowed for completion of works was 36 months. The work commenced on 08.08.2002 and was to be completed within the stipulated period *i.e.* by 07.08.2005, but the appellant could not complete the work as stipulated and the respondent issued 'Certificate of Default' dated 14.06.2005. Pursuant thereto the respondent issued the 'Notice of Termination' of contract dated 15.07.2005 under Clause 63.1 of the Contract.

**6]** Aggrieved by the said termination of the Contract and encashment of the Bank Guarantees, the appellant approached this Court vide W.P.(C) No.71/2005 for appropriate relief. Wherein, vide judgment dated 22.07.2005 this court disposed of the matter and held that the appellant may refer the dispute to the Dispute Resolution Board (DRB). Pursuant thereto the appellant on 22.08.2005 referred the dispute to the DRB as per the amended clause 67.1 of the contract.

**7]** The Dispute Resolution Board (DRB) vide its order dated 17.10.2005 noted that no compensation was due to the appellant and upheld the termination of the contract under Clause 63.1 of the Conditions of Contract. Being aggrieved by the recommendation of DBR dated 17.10.2005 the appellant invoked the Arbitration clause as per Clause 67.3 of the agreement. Justice Raj Khowa and Shri K.K Sarin were appointed as Arbitrators by the petitioner and the respondent respectively, and both the Arbitrators appointed Justice K.N. Saikia (Rtd.) as the Presiding Arbitrator. Subsequently, Shri K.K Sarin resigned and Shri L.R Gupta was appointed in his place. Wherein the learned Arbitration Tribunal vide its Award dated 19.06.2011 held that by majority opinion, the notice of termination issued by the respondent was valid and pursuant to which none of the claims of the appellant/claimant survived.

**8]** Aggrieved by the Award dated 19.06.2011, the appellants filed a petition under Section 34 of the Arbitration & Conciliation Act, 1996 (hereinafter "the Act") before the Additional District Judge, Aizawl.

**9]** The contention of the appellant before the learned Addl. District Judge was that the Award dated 19.06.2011 is not an Award as there was no unanimity amongst the Arbitrators and hence the award was not an award by a majority. The purported Award dated 19.06.2011 is nothing but a mere

compilation of three individual Awards, as Arbitrators could not agree to one another, which cannot constitute a valid and binding Award. The other contention was that the Tribunal failed to give reasons in support of the award which is not as mandated under sub-section (3) of section 31 of the Act. The petitioner/appellant had also contended that the Tribunal failed to adjudicate on all the claims and counter claims made by the parties. That the Arbitrators without deciding on the issues, held the termination to be valid and thereby dismissed the claim. That the Award passed is in violation of clause 67 of the agreement which stipulated that all disputes arising out of the contract should be settled through Arbitration. However the Tribunal did not adjudicate the claims and counter claims made by the parties and did not finally settle the dispute but held that the dismissal of the Arbitration proceedings 'ipso facto' would not bar the parties going to the appropriate forum on the same grievances. Thus the impugned Award is not an award in terms of the act as it is not final and binding on the parties. The learned counsel for the appellant submitted that the order that "Claim application is dismissed" retaining the rights of the parties to re-agitate their Claims on a future date before another forum is not an Award and the action is an abdication of duty by the Arbitral Tribunal. The Arbitral Tribunal has no power or jurisdiction to direct parties to go before another Arbitral Tribunal when their decision ought to have been final for the parties.

**10]** The contentions of the respondents before the learned Addl. District Judge, on the other hand, was that the petitioners had failed to challenge the award within the meaning of sub-section(2) of section 34 of the Act. That the petitioners sought to re-appreciate the evidence and re-interpret the

documents, which is beyond the scope of section 34 of the Act. It was also contended that there was a clear majority among the Arbitrators wherein two of the arbitrators out of the three arbitrators had rightly held that the termination of the contract as valid. That since the termination was held valid none of the other claims made by the petitioners survived. The respondents further contended that majority is that of individual awards and not of award by majority of Arbitrators. That two of the Arbitrators that had come to the same conclusion and therefore there were no grounds to set aside the majority decision.

**11]** The learned Additional District and Sessions Judge-V after hearing both the parties in its order dated 30.04.2013 in Arbitration Case No.3/2011, dismissed the said petition u/s 34 and held that ;

- (a) The award was not in violation of the Contract or the Act.
- (b) That there was clear majority in numbers in rendering of the award, and
- (c) The arbitral award rendered was very much final and binding.

Being aggrieved by the aforesaid impugned order dated 30.04.2013 the present appeal is filed under section 37 of the Act .

**12]** Mr. George Thomas, learned counsel for appellant submitted that the Award dated 19.06.2011 is not an 'Award' as contemplated under the Arbitration and Conciliation Act, 1996. The learned counsel for the appellant submitted that there are three independent Awards made in this case by the members of Arbitral Tribunal instead of a unanimous Award or Award of Majority of

Arbitrators and the making of three awards, one by each member of the three member Arbitral Tribunal in one reference, cannot be a valid award in law. In the case of **Government of India, Bharat Sanchar Nigam Ltd** reported in **A.I.R. 2009 Delhi 102**, Para 9 it was held that "*section 31 contemplates a single award and there is no plurality of award and signatures of majority of the members of the minority arbitrator are contained in the majority award itself.*"

The learned counsel for the appellant submits that three individual Awards of the members of the Arbitral cannot be construed as an Award as contemplated under the Arbitration Act.

**13]** The learned counsel further submitted that the learned Addl. District Judge had wrongly concluded that there is unanimity in the opinion of the two Arbitrators. He submitted that the two Arbitrators disagreed to make a majority award despite several internal meetings and had decided to make individual awards. The three Arbitrators held 69 hearings with the parties and a few internal meetings among themselves and they could not agree on any issue or on any dispute. Ld. Arbitrator Justice K.N. Saikia (Rtd.) stated in his award that he is agreeing with two points only, of the award of Ld. Arbitrator Mr. L.R Gupta. But in his individual award the learned Arbitrator Justice K.N. Saikia did not decide any dispute or issues framed in his individual Award. The Ld. Arbitrator Mr. Gupta in his award did not agree with any part of learned Arbitrator Justice K.N. Saikia's award. Both the learned Arbitrators Justice K.N. Saikia and Mr. Gupta did not mention in their individual awards that "Claim application should be dismissed" or give any reason for such a decision. The learned counsel thus submitted that the award did not satisfy the requirement of section 29 of the Act, in that " any decision of the arbitral tribunal shall be made by a majority of

all its members.”

**14]** The learned counsel for the appellant further submitted that the Judgment of the Learned .Additional District Judge is liable to be set aside since the Additional District Judge did not make any findings on most of the grounds of the Appellant raised under section 34 of the Act while passing the judgment and order, and erred in upholding the Award, when many of the grounds of challenge of the Appellant against the Award was narrated but they were not considered or decided in the judgment. The finding of the Arbitral Tribunal that the parties should wait for the completion of balance work by 3rd parties is in violation of the Arbitration Agreement. The “dismissal of claim application” without deciding the Claims is in violation of the stipulations in Clause 67.1 and 67.3 of the Contract elicited above. The finding in Para 61 that the rights and obligations of the parties will be crystalized only on completion of the balance work is in violation of the arbitration agreement. The learned counsel thus submitted whether an Award can be said to be an award under section 29 and 31 of the arbitration Act when all the claims and counter claims referred to in the Arbitration tribunal have not been decided, he submits that 27 issues were framed but no award was made on the issues in the alleged Award. Two of the Arbitrators did not decide any issue or disputes referred to Arbitral Tribunal. That instead of making an Award on 10 Claims and 15 Counter Claims of the parties referred to it as contemplated under the Arbitration and Conciliation Act, the Arbitral Tribunal terminated arbitral proceedings without making any Award on claims and counter claims. The learned counsel submits that once Arbitral proceeding are started, the Arbitral Tribunal is bound make Award of all Claims

and Counter Claims as also reasons should be given for decision on each of them.

The learned counsel cited **Lingam Dasardhamayya Vs. Raja Rao** reported in **AIR 1964 AP 348** wherein it was noted that the arbitrator was called upon to give his finding on the specific and distinct matters in controversy between the parties. From out of these, he failed to give findings on three specific items which were matters of considerable importance having regard to the nature of dispute between the parties.

**15]** The learned counsel for the appellant submitted that the Arbitrators decided the validity of termination and therefore held that the other claims need not be adjudicated. The learned counsel for the appellant submitted that this proposition is wrong. since the Arbitral Tribunal never held that termination of contract was correct. and the Arbitral Tribunal also did not hold that if the termination of the contract is decided, other claims need not be adjudicated. The learned counsel for the appellant also submitted that for coming to the conclusion learned .Additional District Judge relied on the individual Award of Ld. Arbitrator Justice K.N. Saikia which cannot be looked into as the other arbitrators did not agree to any paragraph of Ld. Arbitrator Justice K.N. Saikia's Award.. That the learned. Additional District Judge relying on para 57 and 58 of individual award of Ld. Arbitrator Justice K.N. Saikia held that counter claims only could be adjudicated in future. The learned counsel submitted that the individual award of Ld. Arbitrator Justice K.N. Saikia was not agreed to by Ld. Arbitrator Mr. Gupta. Further there is no such finding by the Ld. Arbitrator Justice K.N. Saikia in his Award that claims cannot be arbitrated along with or

counter claims. Further the two Arbitrators contradicted themselves as they terminated the Arbitral proceeds contrary to their own order passed under Section 16 of the Act ruling that the Arbitral Tribunal will pass award on Claims and Counter Claims and further, individual Awards of each Arbitrator are no Award in the eye of law.

**16]** In support of his submissions the learned counsel for the appellant has relied on the decision of the Apex court in **Dakshin Haryana Bijli Vitran Nigam Limited Vs. Technologies Private Limited** reported in (2021) 7 **Supreme Court Cases 657** wherein it was held that "... *The statute recognizes only one arbitral award being passed by an Arbitral Tribunal, which may either be a unanimous award, or an award passed by a majority in the case of a panel of members. An award is binding decision made by the arbitrator(s) on all the issues referred for adjudication.....*"

**17]** The learned counsel for the appellant further submits that assuming without admitting that Para 61 of the award can be construed as an alleged majority Award, the same is liable to be set aside for a verity of reasons. The Arbitrators in para 61 of the award state that there is a majority opinion. Majority opinion is not a Majority Award. Further who are those in majority is not disclosed in the paragraph. That subject to the submission that individual awards are no awards, in their individual awards, none of the learned arbitrators stated that the claim application should be dismissed or any reasons were stated in support of their decision.

**18]** The learned counsel for the appellant submitted that Section 31 (3) of the Arbitration Act stipulate that the Arbitral Award shall state reasons upon which it is based. No reason for the Arbitral Award is given in para 61. The same is in violation of the Section 31(3) and is liable to be set aside. The learned counsel has relied on the following authorities on this point

**i) Prabartak Commercial Corporation v. Ramsahaimull More Ltd., AIR 1963 Cal 137.**

**ii) Ganga Dhar vs. Indar Singh AIR 1938 Allahabad 195**

**iii) Dyna Technoloties Pvt. Ltd. Vs. Crompton Greaves Ltd.** reported in **(2019) 20 SCC 1** in para 35 *wherein the Apex court held that : "35. When we consider the requirement of a reasoned order, three characteristics of a reasoned order can be fathomed. They are: proper, intelligible and adequate. If the reasoning in the order are improper, they reveal a flaw in the decision-making process. If the challenge to an award is based on impropriety or perversity in the reasoning, then it can be challenged strictly on the grounds provided under Section 34 of the Arbitration Act. If the challenge to an award is based on the ground that the same is unintelligible, the same would be equivalent of providing no reasons at all. Coming to the last aspect concerning the challenge on adequacy of reasons, the Court while exercising jurisdiction under Section 34 has to adjudicate the validity of such an award based on the degree of particularity of reasoning required having regard to the nature of issues falling for consideration. The degree of particularity cannot be stated in a precise manner as the same would depend on the complexity of the issue. Even if the Court comes to a conclusion that there were gaps in the reasoning for the conclusions reached by the Tribunal, the Court needs to have regard to the documents submitted by the parties and the contentions raised before the Tribunal so that awards with inadequate reasons are not set aside in casual and cavalier manner. On the other hand,*

*ordinarily unintelligible awards are to be set aside, subject to party autonomy to do away with the reasoned award. Therefore, the courts are required to be careful while distinguishing between inadequacy of reasons in an award and unintelligible awards."*

The learned counsel for the Appellant submitted that in **Som Datt Builders Limited Vs. State of Kerala** reported in **(2009) 10 SCC 259**, the Apex court held that "*to satisfy the requirement of section 31(3) , the reasons must be stated by the Arbitral Tribunal upon which the Award is based, want of reasons would make such award legally flawed."*

The learned counsel has also cited **Mc Dermott International Inc. Vs. Burn Standard Co. Ltd. and Ors** reported in **(2006) 11 SCC 181** and **Jajodia (Overseas) P. Ltd. Vs. Industrial Dev. Corpn of Orissa** reported in **(1993)2 SCC 10**, wherein the Apex court laid emphasis on the necessary for passing reasoned awards by Arbitral Tribunals.

**19]** The learned counsel for the appellant also cited the following cases to bring home his point that there can be only one award in one reference unless there is an agreement between the parties which authorizes the arbitrator to make several awards - **Prabartak Commercial Corporation Vs. Ramsahaimull More Ltd.** reported in **AIR 1963 Calcutta 137** and in the case of **Ganga Dhar Vs. Indar Singh** reported in **AIR 1938 Allahabad 195**.

**20]** The learned counsel for the appellant further submitted that it is the settled law that an Arbitrator is a creature of the contract and is bound by the terms of the Contract. The dismissal of Claim application in Para 61 of the award is in violation of the Arbitration Agreement. The learned counsel submits that

the Arbitrators violated the Arbitration agreement in the following instances.

(i) The Arbitration Agreement stipulates that each and every disputes which is decided by the Dispute R. B should be finally settled by Arbitration. This contract provision is violated. The aforesaid contractual provisions mandate that when the disputes are referred to Arbitral Tribunal after the D. R. B recommendation, those disputes should be decided finally in the Award. Arbitral Tribunal has violated the contract.

(ii) Any dispute arisen during the execution or after termination can be referred to Arbitration and Arbitral Tribunal is bound to make an Award. The Arbitral Tribunal refused to make an Award when the Contract was terminated and disputes referred.

(iii) The finding of the Arbitral Tribunal that the parties should wait for the completion of balance work by 3rd parties is in violation of the Arbitration Agreement. The "dismissal of claim application" without deciding the Claims is in violation of the stipulations in Clause 67.1 and 67.3 of the Contract elicited above. The finding in Para 61 that the rights and obligations of the parties will be crystallized only on completion of the balance work is in violation of the arbitration agreement.

**21]** The learned counsel for the appellant further submitted that there is no provision in the Arbitration and Conciliation Act enabling the Arbitral Tribunal to terminate Arbitral proceedings except under Section 32. Instead of making an Award in the Reference, the two Arbitrators terminated the Arbitral proceedings after closing the case for making an Award which is in violation of Section 32 (1) of Arbitration and Conciliation Act. Paragraph No. 57 of the individual award

passed by Ld. Arbitrator Justice K.N. Saikia and Paragraph No. 61 of the Award being the relevant parts. A perusal of the aforementioned Paragraph No. 61 would reveal that not only did the purported Majority Arbitrators not make an award on the 10 claims and 15 counter-claims referred to them, they merely terminated the arbitral proceedings by an order stating that they cannot decide the disputes referred to them and that the parties could raise the same before a future arbitral tribunal, once the balance works were completed. The learned counsel also submits that in the Paragraph No. 61 it is observed that "the claim application is dismissed" and not that the claims are dismissed. The aforementioned paragraphs clearly demonstrate that the learned majority Arbitrators refused to answer the reference made to them inasmuch as the settled law is that all claims and counter-claims under one reference should be decided in one award.

**22]** The learned counsel thus submits that the aforesaid action of the two Arbitrators is also in clear violation of the mandate given to them under section 32 (2) (C) of Arbitration and Conciliation Act which stipulates as to under what circumstances a reference can be terminated. Once a reference is made and Arbitral Tribunal accepted to decide the reference it should end in the determination of disputes one way or other and nothing should survive for a future adjudication and that once an order is made under Section 32 (2) (c), the same disputes cannot undergo another Arbitration.

**23]** The learned counsel for the appellant further submitted that, if the Arbitral Tribunal wanted to terminate the Arbitral proceedings without making

an Award the same should be for the stipulations contained in Section 32 (2) (c) of the Act, wherein the Arbitral Tribunal can terminate the Arbitral proceedings if it finds that the continuation of the proceedings has for any other reasons become unnecessary or impossible. This sub section provides that there should be some reason for the Arbitral proceedings become unnecessary or impossible. No reason is mentioned to support that the proceedings are unnecessary or impossible.

**24]** The learned counsel for the appellant submitted that the other condition is with regard to impossibility to continue the Arbitral proceeding and making an Award, while, in the instant case there was no impossibility for making an Award. The Arbitration Agreement stipulate that during the execution of the work or after termination of the contract parties can refer disputes to Arbitration. After the compliance of Dispute Resolution Board (DRB) adjudication, the Appellant referred all the Claims before the Arbitral Tribunal and the Arbitral Tribunal never stated till the date of Award that it is impossible to conduct the Arbitral proceedings and make an Award on Claims and Counter Claims. In fact Arbitral proceedings were completed and declared so by the Arbitral Tribunal in its last meeting dated 10th May, 2011 and the Award was expected on Claims and Counter Claims by the parties. Therefore the termination of the Arbitral proceedings after closing the case for making the Award and then making an Award without deciding the disputes is in violation of Section 32 (1) and 32 (2) (c) of the Act.

In support of his submissions the learned counsel has relied on **Kifayatullah Haji Gulam Rasool v Bilkish Mehsanta, A.I.R. 2000**

**Bombay 424, Unibros Vs. All India Radio Supreme Court S. L. P (Civil) No. 8791/2020 date of judgment –19.10.2023, In Associate Builders Vs. Delhi Development Authority (2015) 3 Supreme Court Case 49, Oil and Natural Gas Corporation Ltd. V Saw Pipes Ltd. (2003) 5 SCC 705 and Oil & Natural Gas Corporation v. Western Geco International Limited (2014) 9 SCC 263** where the Hon'ble Apex Court conclusively held that a Court hearing a petition under Section 34 of the Act is required to satisfy itself that the findings arrived at by an arbitral tribunal are not patently perverse, irrational or untenable.

**25]** Per contra, Mr. Ajoy Roy, learned counsel for the respondent submitted that a majority awards is that of individual awards and not of award by majority of Arbitrators.

**26]** The learned counsel for the respondent first led the court to the relevant clauses of the agreement dated 28.03.2002: 1. Clause 3.1 deals with Assignment of Contract and states that the contractor shall not, *without the prior consent of the employer assign the contract or any part thereof, or any benefit or interest therein or there under, otherwise than by a charge in favour of the Contractor's bankers of any monies due or to become due under the Contract, or .....*

*Clause 4.1 .deals with Subcontracting and provides that except where otherwise provided by the Contract, the Contractor shall not subcontract any part of the Works without the prior consent of the Engineer.....*

*Clause 47.1 deals with Liquidated Damages for delay and provides if the contractor fails to comply with the time for completion in accordance with*

*clause 48 for the whole of the works or, if applicable, any section within the relevant time prescribed by clause 43, then the contractor shall pay the Employer the relevant sum stated in the Appendix to Tender as liquidated damages for such default and not as a penalty.....*

*Sub clause 63.1 deals with Default of the Contractor of the agreement it provides that "if the Contractor is deemed by law unable to pay his debts as they fall due, or enters into voluntary and involuntary bankruptcy, liquidation or dissolution (other than a voluntary liquidation for the purposes of amalgamation and or reconstruction), or becomes insolvent, or makes an arrangement with, or assignment in favour of his creditors, or agrees to carry out the contract under a committee of inspection of his creditors, or if a receiver, administrator, trustee or liquidator is appointed over any substantial parts of his assets, or if, under any law or regulation relating to reorganization, arrangement or readjustment of debts, proceedings are commenced against the Contractor or resolutions passed in connection with dissolution or liquidation or of any steps are taken to enforce any security interest over a substantial part of the assets of the contractor, or if any act is done or event occurs with respect to the Contractor or his assets which, under any applicable law has a substantially similar effect to any of the foregoing acts or events or is the Contractor has contravened Sub-clause 3.1 or has an execution levied on his goods or if the Engineer certifies to the Employer, with a copy to the Contractor, that, in his opinion the Contractor.....*

*(d) despite previous warning from the Engineer, in writing, is otherwise persistently or flagrantly neglecting to comply with any of his obligations under the Contract, or*

*(e) has contravened Sub-clause 4.1*

sub-clause 63.1: provides as follows

*‘Delete the last paragraph of this sub-clause and substitute:*

*"then the Employer may after giving 14 days notice to the Contractor terminate the contract or a part thereof without thereby releasing the Contractor from any of his obligations or liabilities under the Contract or affecting the rights and powers conferred on the Employer or the Engineer by the Contract, and recover the possession and enter upon the Site and the Works and may himself complete the Works or may employ any other contractor to complete the Works. The employer or such other contractor may use for such completion so much of the Contractor's Equipment, Temporary works and materials which have been deemed to be reserved exclusively for the execution of the works, under the provisions of the contract, as he or they may think proper, and the Employer may, at any time, sell any of the said Contractor's equipment, Temporary Works, and unused Plants and material and apply the proceeds of sale in or towards the satisfaction of any sums due or which may become due to him from the Contractor under the Contractor."*

*Sub clause 63. 3 deals with Payment after Termination as follows:*

*“If the Employer terminates the Contractor's employment under this Clause, he shall not be liable to pay to the Contractor any further amount (including damages) in respect of the Contract until the expiration of the Defect Liability Period and thereafter until the cost of execution, completion and remedying of any defects, damages for delay in completion (if any) and all other expenses incurred by the Employer have been ascertained and the amount thereof certified by the Engineer. The Contractor shall be entitled to receive only such sum (if any) as the Engineer may certify would have been*

*payable to him upon due completion by him after deducting the said amount. If such amount exceeds the sum which would have been payable to the contractor on due completion by him, then the contractor shall, upon demand, pay to the Employer the amount of such excess and it shall be deemed a debt due by the Contractor to the Employer and shall be recoverable accordingly."*

The learned counsel thus submits that as per the clause 63.3 of the contract, the Defect liability period will commence only after the project is complete and not before that. Thus any kind of entitlement of claims of the Appellant could not have been decided during the arbitral proceedings as the work was not completed when the award was passed on 19.06.2019. Therefore, there was no question of deciding the claims of the Appellant while passing arbitral award.

**27]** The learned counsel for the respondent further submitted that the preliminary issue framed by the Arbitral Tribunal is "Whether the termination of the contract has been in accordance with the terms of the contract, and if not, with what effect." That, the moment the termination was held to be valid none of the claims would survive. All the claims of the Appellant is based on the assumption that the termination is illegal thus the moment the Tribunal by majority held that termination is valid the question of deciding the claims do not arise as Section 73 of the Indian Contract Act, 1872 is not attracted and therefore, the Appellant/ Claimant has no locus to maintain the said claims. Therefore the question of deciding each claims or giving an item- the wise award does not arise. The learned counsel submitted that the learned Arbitral Tribunal after having held that notice of termination issued by the Respondent was valid, there was no occasion for the tribunal to decide on each claim

separately or give an item wise award as the same would be contrary to the mandate of Section 73 & Section 74 of the Indian Contract Act, 1872 and the terms of the contract

**28]** The learned counsel submitted that in the Arbitral Award dated 19.06.2011, none of the 3 opinions/awards given by the respective arbitrators in the award have addressed to the claims/counterclaims, including the dissenting judgment written by Justice S.P. Rajkhowa (Retd.) because it was agreed by the parties in the order dated 20.11.2007 that the issue of termination was to be decided first then the consequential relief(s) to follow, as the claims flowed and owed its survival on termination being held to be illegal.

**29]** The learned counsel further briefly discussed the findings of the three arbitrators namely Hon'ble Mr, Justice K.N Saikia (Rtd.), Presiding Arbitrator, Justice S.P Rajkhowa (Rtd.), Arbitrator, and Mr. L.R Gupta, Arbitrator. The learned counsel submitted that the Arbitral Tribunal rightly arrived at the conclusion that the Appellant had sufficient notice of the termination of the Contract. That the 'Notice of Termination' clearly mentions that the termination would be effective after 14 days of its service, hence there was no deficiency in the 'Notice of Termination'.

**30]** The learned counsel for the respondent submitted that the main grievance of the Appellant has always been the termination of the Contract, which they claimed was done illegally and was hence invalid in law. It is on account of this termination that they raised the claims in the Statement of Claims (the Claim Application) filed before the Arbitral Tribunal. That in view of

Section 73 and 74 of the Contract Act, if the termination is held to be valid the Respondent is entitled to liquidated damages as per the counter claims, however, allowing the claims after holding the termination to be valid will lead to inconsistency with the judicial precedents which is not sustainable in the eye of law. Thus, the majority of the Arbitral Tribunal having considered the question of termination and having found that the said termination was valid, the question of the survival of the claims or the rendering of an award on each individual claims on the does not arise.

In support of the above submissions the learned counsel placed reliance upon the judgment of Hon'ble Supreme Court of Indian Judgment in **J.G. Engineers v Union of India &Ors. [(2011) 5 SCC 758]** (paras 1, 4 to 10, 19, 22, 23, 26, 27, 28, 32, 33 & 34)

**31]** The learned counsel for the respondent further submitted that the Arbitral Tribunal is not bound to give Item-wise Award. He submitted that the contention of the Appellant that the majority award ought to have given a detailed and item wise award is also unfounded and does not merit any decision.

The learned counsel relied on the judgment of the Supreme Court of India in **Santa Sila Deviv Dhirendra Nath Sen[AIR 1963 SC 1677]** wherein the Apex court held that the approach of the court is to support the Award and that the court can deliver a consolidated award instead of dealing with each and every claim separately.

**32]** The learned counsel for the respondent submitted that the award and reasons opined by the majority of the arbitrators are correct and has dealt with the primary issues in question considering the submissions of the rival parties. He submitted that the contention of the Appellant that the individual awards made do not sustain the conclusion at Para 61 is grossly incorrect and that both the Ld. Arbitrators being Justice K.N. Saikia and Mr. L.R. Gupta have held that the termination of the contract by the Respondent was valid and legal. The learned counsel has also cited the decision the Supreme Court of India in the case of **M.K. Shah v State of M.P. [(1999) 2 SCC 594]** where it was held that

*"9. It is well-settled that an arbitration award is not vitiated merely because the arbitrator has not given item-wise award and has chosen to give a lump sum award. A lump sum award is not a bad award. So also it is well-settled that an award need not formally express the decision of the arbitrator on each matter of difference nor is it necessary for the award to be a speaking one. It will be presumed that the award disposes of finally all the matters in difference."*

**33]** The learned counsel submits that a majority opinion can further be inferred in respect of the two arbitrators agreeing on the factum of termination of the contract being valid which is evident from Para 58 of the Award, the relevant portion of which is as under:

*"I have also perused the individual award of Hon'ble Mr. L.R. Gupta who has elaborately discussed and opined on the relevant points of facts and law, and I respectfully agree with his findings that the notice was valid and the Petitioner sub contracted part of the work ..."*

That after hearing the respective issues of the parties, the issue with regard to the termination notice was decided to be the first issue and in the event of the impugned termination order being held to be illegal being a violation of the clause 63.1 of the contract, the tribunal rightly did not proceed to give an item wise award. Even the dissenting judgment by Justice S.P.Rajkhowa (Rtd) (Arbitrator) has not dealt with the claims of the Appellant based on the same understanding. Thus the Ld. Arbitral Tribunal had not committed any error in not giving an item wise award, as the same was agreed upon by the parties.

**34]** The learned counsel for the respondent further submits that Section 37 of the Act sets down the provisions of appeal in relation to arbitrations. He submits that judicial precedents in India have held in that the Appellate Court cannot re-examine and re- appraise the evidence considered during the arbitration proceedings and hold that the conclusion reached by the arbitrator is incorrect and wrong. He submits that if the Trial Court had heard the petition under Section 34 reasonably and in a judicial manner, the Appellate Court may not interfere with the Trial Court's exercise of discretion. It is only in cases where the discretion has been exercised by the Trial Court unreasonably and capriciously or has ignored relevant facts, can the Appellate Court interfere with the Trial Court's exercise of discretion.

The learned counsel for the respondent has referred to the decision of the Hon'ble Supreme Court in the case of **MMTC Ltd v. M/s Vedanta Ltd [(2019) 4 SCC 163]**, while dealing with the scope and ambit of Section 34 and Section 37 of the Act, wherein the Apex court that the court must be extremely cautious in distributing the concurrent findings in a Award .

That an award shall not be set aside merely on the ground of an erroneous

application of the law or by re-appreciation of evidence; The learned counsel has also relied on the decision of the Delhi High Court in **Jhang Cooperative v PT Munshi, [MANU/DE/1282/2013]** wherein the Delhi High Court considered the limited and scope of interference of the appellate court in a proceedings under Section 37 of the Act .

**35]** The learned counsel for the respondent also submits that there is no infirmity with the Order dated 30.04.2013 passed by the Ld. Additional District and Sessions Judge-V. That the Ld. ADJ duly considered the main grievances of the Appellant and came to a reasoned finding vide the Order dated 30.04.2013 wherein he was pleased to hold: (a) the award was not in violation of the Contract or the Act; (b) that there was clear majority in numbers in rendering of the award; and (c) the arbitral award rendered was very much final and binding but for the counter claims which could not have been decided as the work was not completed and the claims of the Petitioner having been dismissed, there was finality to the same.

The learned counsel for the respondent submits that the Appellant had failed to make out any grounds of challenge under Section 34 of the Act. That the onus to prove that the award is vitiated by one of the grounds under Section 34 is on the party asserting it. The Appellant miserably failed to express the ground within the four corners of Section 34 of the Act by virtue of which the award was sought to be set aside and thus there cannot be said to be any incorrect finding with the Order dated 30.04.2013. That nowhere in any of the grounds had the Appellant made any reference to the grounds under Section 34 (2) of the Arbitration and Conciliation Act, 1996 to challenge the award and thus the Petition had been rightly dismissed by the Ld. Additional District Judge wherein

the Award under challenge is a well reasoned award and the Tribunal has examined all aspects of the matter, terms of the contract, law applicable and relevant decisions of the Court and has rendered the Award which does not suffer from any deficiency and hence the alleged Impugned Order being mindful of the same is rightly dismissed the Petition. That the Appellant is once again seeking re-appreciation of the evidence and re-interpretation of documents and of facts to challenge the award, which ought not to be gone into by this Hon'ble Court.

**36]** The learned counsel for the respondent submitted that for filing a Petition for setting aside of an award has to essentially enumerate the grounds as has been provided for in Section 34 of the Arbitration and Conciliation Act to show that the award is vitiated by one or some or all of the limited grounds mentioned under section 34. It is settled law that the Court does not have jurisdiction to set aside an award on any other grounds. The learned counsel has relied on the decision of the Apex court in **J.G. Engineers v Union of India & Ors. [(2011) 5 SCC 758] (para 10)** wherein it was held in clear and unequivocal words:

*"10. A Civil Court examining the validity of an arbitral award under Section 34 of the Act exercises supervisory and not appellate jurisdiction over the awards of an arbitral tribunal."*

The learned counsel for the respondent submitted that nowhere in any of the grounds had the Appellant made any reference to the grounds under Section 34 (2) of the ABC Act. That the Hon'ble Supreme Court of India in **ONGC V Saw Pipes Limited [(2003) 5 SCC 705]** has crystallized the law with regards to the scope of Section 34 and the challenges that may be

mounted under the provisions of the Section 34 . The learned counsel has also relied on the judgment of the Delhi High Court in **R.S. Avtar Singh v NPCC Ltd. [AIR 1993 Del 230]** where it was held that the Court unless come to the conclusion that the award is preposterous or absurd cannot set it aside nor can substitute its own decision in place of the arbitrator. It will be for the arbitrator to interpret the contract between the parties.

**37]** The learned counsel for the respondent submitted that there is a clear majority and valid Award supported by reason and the submission of the Appellant that there was no majority award that can be deciphered from the award dated 19.06.2011 is misconceived and bad in law for the reasons as stated under. Moreover, at Para 61 of the Award, the majority award can be clearly culled out and visible on the face of it. The majority award at Para 61 of the award was quoted herein

*"61. On due consideration of the facts and circumstances of the Arbitration, hearing learned counsel for both the parties' eloquent submissions enunciating the law thereon, and in view of the majority opinion, finding no merits, the Arbitral Award is that the Claim Application is hereby dismissed, without prejudice to rights and obligations of the parties under the contract itself, which crystallized on the completion of the contract Works, as has also been made clear in the Termination Notice itself, i.e*

*"Pursuant to Sub-clause 63.1 the termination shall not release you from any of the obligations or liabilities under the Contract or affect the rights and powers conferred on the Employer or the Engineer by the contract. Pursuant to sub-*

*clause 63.1 the Employer may himself complete the Works or may employ any other contractor to complete the Works" Be it recorded herein that the contract Works have not been reported to have been completed during the hearing of this Arbitration, we pass no order as to costs."*

**38]** The learned counsel for the respondent thus submitted that majority award would only mean majority in terms of number. The learned counsel submitted that under the 1940 Act, the Delhi High Court in the **Fertilizer Corporation of India v. IDI Management Incorporation [AIR 1984 Del 333]** held as under:

*"(21) Section 10(2) of the arbitration Act says that the opinion of the majority will prevail. The majority is a term signifying greater number. Section 10(2) is based on the theory of numbers. It requires counting of heads. If there are arbitrators, two will have the deciding voice because they constitute the majority. The remaining one will be in a minority. The opinion of the minority cannot be looked at for any purpose. The award with which the law is concerned is the award of the majority."*

That the Arbitration and Conciliation Act, 1996, in Section 29 provides as under:

*"(1) Unless otherwise agreed by the parties, in arbitral proceedings with more than one arbitrator, any decision of the arbitral tribunal shall be made by a majority of all its members."*

That in the present case, the majority in numbers is evident wherein, Justice K.N. Saikia and Mr. L.R. Gupta has rightly after considering all submissions gone

on to hold that the termination is valid and hence none of the claims survive and thus the same is reflective of the majority award.

The Arbitration and Conciliation Act, 1996 under Section 2 (1)(c) defines an arbitral award as: "(c) "arbitral award" includes an interim award;". The legislative intent in enacting the aforementioned section was with a view to provide the arbitrators with a flexibility to write an award. It is submitted that the aforesaid argument is also in consonance with the fact that the Legislature in its infinite wisdom has bestowed powers on the Tribunal to determine its own procedure. Therefore, that being the case, the contention of the Appellant that there should have been only one award merits no consideration.

The learned counsel for the respondent has relied on the decision of Bombay High Court in the case **of Axios Navigation v Indian Oil Corporation [MANU/MH/0016/2012]**. He has also cited the Hon'ble Supreme Court's decision in ***Ratan Lal Sharma v. Purshottam Harit (AIR 1974 SC 1066)***, *wherein it was held that award as defined in Section 2(b) of the Arbitration Act, 1940 means an award which can validly be looked into by Court.*

**39]** The learned counsel for the respondent further submitted that a bare perusal of the aforementioned judgments will negate the submission made by the Appellant that an arbitral award in the context of Section 34 has to be only a single award. It is also settled law that the arbitrators need not deal with each issue raised and can pass a consolidated award. It is therefore denied that there is no legal sanctity whatsoever in the argument of the Appellant and the same deserves to be dismissed and the award dated 19.06.2011 be held to be enforceable. In any event it is unheard of that an award/judicial order is set aside simply because two Judges/ Tribunal members have passed their own

individual orders but agreeing on the conclusion. It is an established judicial practice that the Judges sitting in a Bench write individual orders agreeing or disagreeing with each other's view, in so far as the litigator is concerned, the common operative portion of the judgment has to be complied with. The Appellant has unnecessarily been harping on irrelevant and meritless arguments which serve no purpose and such arguments deserve to be rejected.

**40]** The learned counsel for the respondent further submitted that the determination of the disputes in Arbitration by the Arbitral Tribunal was not against the Arbitration Clause 67 contained in the contract as the condition precedent for decision of claims raised before the Arbitral Tribunal was determination at the outset of the validity of termination of the contract. When the termination of contract was found to be valid by the Arbitrators, there arose no occasion of determination of the specific claims raised as these claims would automatically fail if termination was found to be valid. The determination of disputes referred before the Arbitral Tribunal had neither become unnecessary and nor was the determination impossible. Hence, the Award delivered cannot be said to be against Section 32 of the Act. In support of his submission he has cited the judgment delivered by the Hon'ble Bombay High Court in the case of **Maharashtra State Electricity Board V Datar Switchgear Ltd., 2003(2) BomCR81**, has dealt with the meaning of "impossibility" and "unnecessary" contained in Section 32(2) of the Act and the decision of the High Court of Calcutta in the case of **NRP Projects Private Limited & Anr. V Hirak Mukhopadhyay & Anr., (2013) 2CALLT50(HC)**, observed that ;

*“It would, however, be a permissible exercise to harmoniously construe all the relevant provisions to effectuate the object sought to*

*be achieved. Reading section 32 again and again, to the mind of the Court, the words "for any other reason" used in clause (c) of sub-section (2) of section 32 appear to be of immense significance. Plainly read in the context of section 32 only, "for any other reason" would mean reasons other than those mentioned in clauses (a) and (b) of sub-section (2) of section 32. Purposely read in the context of the remedies made available by the Act to an aggrieved party, the said words i.e. "for any other reason" suggest that an arbitral tribunal would be justified in terminating arbitral proceedings for 'necessity' or 'impossibility' arising out of reasons not otherwise specifically mentioned in the Act. Circumstances justifying closure of proceedings under section 32(2)(c) of the Act need not be discussed here in detail. "*

**41]** The learned counsel for the respondent further submitted that the Award is not in violation of the Order dated 22.07.2005 of this Court or the earlier Order of the Arbitral Tribunal dated 04.10.2007 wherein a bare perusal of the Order dated 22.07.2005 passed will show that the Hon'ble Court had only directed the parties to approach the DRB in terms of the provisions of the contract and had refused to entertain any pleadings on merit and even refused to suspend the termination in the interim. In consonance with the Order passed, the dispute being referred, the same took its natural course resulting in the award dated 19.06.2011. That the Order dated 22.07.2005 has no bearing or no implication in the conduct of the arbitration and that the termination being held to be legal and valid, no claims could have arisen in favour of the Appellant and hence the Tribunal rightly dismissed the claims as being without any merit.

The learned counsel for the respondent also submitted that the Award is not

contrary to the earlier Order dated 04.10.2007, since from a bare perusal of the aforesaid order cited by the Appellant, it emerges that the Tribunal had only decided the issue that presently, the argument is on the non maintainability of the counter claims as a whole which is unreasonable and hence rejected. It is submitted that the Tribunal was only deciding as to whether the counter claims filed by the respondents could be adjudicated by the Tribunal or not to be dismissed on this count alone. The Appellant's argument in this regard clearly shows its malafide intentions. The Tribunal in its award has held that the Counter Claims are premature thus partly accepting the contention of the Appellant, in spite of the Tribunal accepting the Appellant's argument, it is difficult to understand the Appellant's grievance.

**42]** I have heard and considered the submissions made by both the parties and perused the documents on record. The instant appeal under section 37 of the Arbitration and Conciliation Act, 1996 is against the order of the Learned Additional District Judge dated 30.04.2017, dismissed the appeal/application filed under sub section 2 of section 34 of the Arbitration and Conciliation Act, wherein the learned Additional District Judge concluded that the present appellant failed to establish that the award does not withstand the test of Section 34 of the Arbitration and Conciliation Act, 1996. This court finds that it is appropriate at this stage to refer to the decision of the Hon'ble Apex court in **J.G Engineers v Union of India &Ors (supra )** has held that

*"10. A Civil Court examining the validity of an arbitral award under Section 34 of the Act exercises supervisory and not appellate jurisdiction over the awards of an arbitral tribunal. A court can set aside an arbitral award, only if any of the grounds mentioned in Sections 34(2)(a)(i) to (v) or Section 34(2)(b)(i) and (ii), or Section 28(1)(a) or 28(3) read with Section 34(2)(b)(ii) of the Act, are made*

out. "

Likewise a number of judicial pronouncements the Hon'ble Supreme Court has time and again observed that scope of judicial intervention with an arbitral award is extremely limited. The Court should not interfere with an arbitral award except in the manner provided by section 34 of the Act. Thus keeping in mind the limited scope of interference with an arbitral award the court has considered the instant appeal.

**43]** I have perused the 'Award' dated 19.06.2011 made by the Arbitrators, Justice K.N. Saikia (Rtd.), Presiding Arbitrator, Justice S.P Rajkhowa (Rtd.) and Shri. L.R. Gupta. This Court has considered the several grounds raised by the learned counsel for the appellant objecting to the award.

**44]** This court finds that the appellant has claimed that the Award" is not an Award for the reasons that instant impugned award was the compilation of the different individual awards made by the arbitrators. It is seen that the learned counsel for the appellant has relied on the decision of the Hon'ble Apex court in **Dakshin Haryana BijliVitrان Nigam Ltd. v. Navigant Technologies (supra)** where it was held that;

*"18. The statute recognizes only one arbitral award being passed by an Arbitral Tribunal, which may either be a unanimous award, or an award passed by a majority in the case of a panel of members."*

This court however finds that the above observation made by the Hon'ble Apex court was in a different context, wherein the issue in the cited case

*was whether the period of limitation for filing the petition under section 34 of the Arbitration Conciliation Act, 1996, would commence from the date on which the draft award was circulated to the parties, or the date on which the signed copy of the award was provided. And that it was also held that, reference to the "arbitral award" in the Act, 1996, includes both, the majority award as well as the minority award in an Arbitral Tribunal if one of the members giving a dissenting opinion, delivered the dissenting contemporaneously on the same date as the final award, but not on a subsequent date, as the Tribunal becomes functus officio upon the passing of the final award. The period for rendering the award and dissenting opinion must be within the period prescribed by Section 29-A of the Act.*

Likewise in **Government of India v. Acome, (supra)** the Delhi High Court, held that "section 31 contemplates a single award and there is no plurality of award and signatures of majority of the members of the minority arbitrator are contained in the majority award itself." However, the context in which the Apex court made this observation was, wherein the minority arbitrator gave his minority award belatedly and the question was whether the date when the Majority award was file or the date when the minority award was filed, was to be counted in calculating the period of limitation.

It is noted that in **Axios Navigation v Indian Oil Corporation(supra )** the Bombay High Court observed that

*“21 In any judicial decision making process, every Judge is entitled to express his views on the subject. Therefore, in case of conflict of view which is not uncommon and in fact it is useful as it provides another dimension to the same issue based upon the same material*

*which is important for any judicial decision making process. "*

An arbitral award as stated in Section 31 of the Act of 1996 is as under :

*“(1) An arbitral award shall be made in writing and shall be signed by the members of the arbitral tribunal.*

*(2) For the purposes of Sub-section (1), in arbitral proceedings with more than one arbitrator, the signatures of the majority of all the members of the arbitral tribunal shall be sufficient so long as the reason for any omitted signature is stated.*

*(3) The arbitral award shall state the reasons upon which it is based unless.-*

*(a) the parties have agreed that no reasons are to be given or*

*(b) the award is an arbitral award on agreed terms under Section 30.*

*(4) The arbitral award shall state its date and the place of arbitration as determined in accordance with Section 20 and the award shall be deemed to have been made at that place.*

*(5) After the arbitral award is made, a signed copy shall be delivered to each party.*

*(6) The arbitral tribunal may, at any time during the arbitral proceedings make an interim arbitral award on any matter with respect to which it may make a final arbitral award.*

*(7) (a) Unless otherwise agreed by the parties where and in so far as a arbitral award is for the payment of money, the arbitral tribunal may include in the sum for which the award is made interest, at such rate as it deems reasonable, on the whole or any part of the money, for the whole or any part of the period*

*between the date on which the cause of action arose and the date on which the award is made."*

Thus, this court finds that there is no bar under section 31 of the Arbitration and Conciliation Act, 1996 from the arbitrators to make individual views on the subject by making an individual award which should however be as per the provisions of section 31 of the Act. In the instant case it is also seen that the Arbitrators have written their individual view and thereafter a common operative portion was reflected at the end, at para 61 of the Award, which was signed by all three arbitrators. The individual award of Hon'ble Justice S.P Rajkhowa formed para 59 of the impugned Award and the individual award of Shri. L.R Gupta formed para 60 of the impugned Award.

**45]** On the issue whether there is a majority or unanimity decision in the impugned arbitral award, section 29 Arbitration and Conciliation Act provides as under:

*"(1) Unless otherwise agreed by the parties, in arbitral proceedings with more than one arbitrator, any decision of the arbitral tribunal shall be made by a majority of all its members."*

It is seen that Ld. Arbitrator Justice K.N. Saikia at para 58 of the award had stated as follows:

*"I have respectfully perused the individual award of Arbitrator Hon'ble Mr. Justice S.P Rajkhowa which forms parra 59 of the award. I have also perused the individual award of Shri. L.R. Gupta who has elaborately discussed and opined on the relevant points of facts and law, and I respectfully agree with his findings that the notice was valid and the Petitioner sub contracted part of the work and the*

*same forms part of this Arbitral award," as Para 60.*

On reading of the individual award of Shri. L.R. Gupta, wherein he held that :  
*"on close examination of clause 63.1 shows that it has used the words 'Upon giving 14 days notice' i.e the termination comes unto effect upon giving 14 days notice i.e in this case on 15.6.2005. The tribunal feels that the Employer has done his obligation in full for terminating the contract."* Shri. L.R. Gupta also held that the second reason for terminating the contract as advanced by the Employer is violation of Clause. 4.1 and held that the Arbitral Tribunal is of the view that sub-letting the work by BEL-ABL(JV) to ABL without the written permission of the Employer is a clear Violation of Clause 4.1 and the Employer has every right to take action against the Contractor who followed the fraudulent practice.

The above view was agreed upon by Ld. Arbitrator Justice Saikia. The third arbitrator Hon'ble Mr. Justice S.P. Rajkhowa (Rtd.) gave his dissenting view which formed Para.59 of the award.

Thereafter it was duly held at Para 61 as follows :

*"61. On due consideration of the facts and circumstances of the Arbitration, hearing learned counsel for both the parties' eloquent submissions enunciating the law thereon, and in view of the majority opinion, finding no merits, the Arbitral Award is that the Claim Application is hereby dismissed, without prejudice to rights and obligations of the parties under the contract itself, which crystallized on the completion of the contract Works, as has also been made clear in the Termination Notice itself, i.e*

*"Pursuant to Sub-clause 63.1 the termination shall not release you from any of the obligations or liabilities under the Contract or affect the rights and powers conferred on the Employer or the Engineer by the contract. Pursuant to sub-*

*clause 63.1 the Employer may himself complete the Works or may employ any other contractor to complete the Works" Be it recorded herein that the contract Works have not been reported to have been completed during the hearing of this Arbitration, we pass no order as to costs."* Thereafter all the three learned arbitrators put their signatures on the Arbitral Award.

Thus, this court finds that when Ld. Arbitrator Justice Saikia has opined that he agreed with the two aforesaid views of Ld. Arbitrator Shri. L.R. Gupta, they have agreed on the said two points and it is not necessary for Ld. Arbitrator Shri. L.R. Gupta also express his agreement when he has already expressed his views, for the aforesaid reasons finds that there is a majority award in the instant case and therefore the authorities duly relied on the learned counsel for the appellant on this aspect are found not appropriately applicable.

**46]** This court also finds that the two points on which the learned arbitrators are of the majority view is with regard to the termination of the contract. At para 58, Ld. Arbitrator Justice K.N Saikia had agreed to para 60 of the award which is a detailed reasoning of Ld. Arbitrator Shri. L.R. Gupta in arriving at his finding that the employer had done his obligation in terms of clause 63.1 of their agreement and that the notice issued to the contractor was valid and that clause 4.1 of the agreement was violated by the contractor by sub-contracting part of the work. Thus, this court find that the detailed reasonings of the learned Arbitrator in his findings is given at para 60 of the arbitral award, in which the Ld. Arbitrator Shri. L.R. Gupta has discussed in length the terms of the agreement entered into by both the parties and the reasons why he found the termination of the contract dated 15.07.2005 valid, which is as stipulated under section 31 (3) of the Arbitration Act. This court thus finds that there is no infirmity in the finding at para 61 of the award as

highlighted above.

**47]** This court also finds that at para 57 of the arbitral award Ld. Arbitrator Justice Saikia had made the following observation with regards to the other claims and counter claims:

*“On the question of claims and counterclaims the following points may be relevant. In case of the termination being found to be valid whether the claimant can still pursue its claims? The solution may be that so long as those claim amounts would enter into the costs and prices of the stipulated contract work, those must await the completion of the contract. No interim costs may be awarded to it. Similarly the respondent may not now make any claim except the costs caused to it by the institution of the arbitration proceedings. However, dismissal of the arbitration proceeding ipso facto will not be a bar to the parties going to appropriate forum will not be a bar to the same grievances.”*

Thus, in view of the above observation, this court finds that when the majority Award has found the termination being valid at para 59 and para 61 of the arbitral award, the Tribunal did not make any award on the 10 claims and 15 counter- claims referred to them, but had terminated the arbitral proceedings, by stating that they cannot decide the disputes referred to them and that the parties could raise the same before a future arbitral tribunal, once the balance works were completed ,that the issue of termination was to be decided first then the consequential relief(s) to follow.

**48]** On a perusal of the summary of Claims claims referred to, which are:

- (1) Refund of performance bank guarantee deposited by the claimant misappropriated by the respondent resorting to encashment of the same Rs, 10,80,00,000.
- (2) Balance payment due for the work done and release of retention money of Rs.2,80,72,123
- (3) Payment due for in fructuous overhead expenditure incurred by the claimant for the work due to delay in executing the works owing to faults attributable to the Respondent
- (4) Payment due for in fructuous overhead expenditure incurred by the claimant due to delay attributable to the respondents;
- (5) Loss of profit denied due to non-execution of the balance work because of illegal termination of the work by the respondent.;
- (6) payment due on account of in fructuous enabling and other expenses for completion of the contract.
- (7) Payment due to underutilization and idling of equipments due to delay in executing the work during the original period of contract work;
- (8) Loss incurred due to idling of equipment sat site after termination of the contract;
- (9) Pre-arbitration, pendent lite and post-arbitration interest payable on the claim amount; and
- (10) Interest payable on the claim amount pre-arbitration and future interest on the claim amount. Total Rs.60,92,23,123 (Rupees sixty crore-ninety two lakh-twenty three thousand-one hundred-twenty three.)

**49]** This court finds that the above claims are subject to whether or not the termination will be held to be illegal. Thus when the termination of the contractor has been held to be legal, this court finds that the plea of the Appellant that the Tribunal in refusing to decide the claims was in violation of the order dated 22.07.2005 found unsustainable. This court finds that the situation that arises in the event the termination order is held to be valid has been aptly dealt with at para 57 and 58 of the Arbitral Award which have been reproduced in the aforesaid paragraphs. This has to be read with the termination clause 63.1 and 63.3 of the agreement, wherein, if the work was not completed and if the Employer terminates the contract, the Contractor however is not relieved from any of his obligations or liabilities under the contract, nor is entitled to any payment till the defect liability period is over, which is after the completion of the project work. Thus this court finds that the learned Tribunal is not bound to decide the claims and counter claims which arises subsequently in the event the termination order was found to be invalid. This court thus finds that the Arbitral Award cannot be said to have violated the stipulations in clause 67.1 and 67.3 of the contract agreement.

The learned Tribunal has further held at para 57 of the award as follows :

*“However, dismissal of the arbitration proceeding ipso facto will not be a bar to the parties going to appropriate forum or not be a bar to the same grievances.”*

Thus, this court finds that the learned Tribunal has not barred the contractor to approach the appropriate forum if so found necessary, after the completion of the project work. It may also be noted that Section 2(1)(c) of the 1996 Act defines “arbitral award” to also include an interim award and thus this court

finds no infirmity with the instant finding of the learned Arbitral Tribunal as noted above.

**50]** This court has also considered whether the Petitioner has challenged the impugned Award within the meaning of Section 34(2) of the Arbitration and Conciliation Act, 1996. Section 34 makes it clear that an award may be set aside only under the limited grounds mentioned in Section 34 (2). It is settled law that the Court does not have jurisdiction to set aside an award on any other grounds. And any interference sought under section 37 of the Act, 1996 cannot travel beyond the restrictions laid down under section 34 of the Act.

The Hon'ble Apex Court in **J.G. Engineers v Union of India &Ors. (Supra)** held that ;

*"A Civil Court examining the validity of an arbitral award under Section 34 of the Act exercises supervisory and not appellate jurisdiction over the awards of an arbitral tribunal. A court can set aside an arbitral award, only if any of the grounds mentioned in Sections 34(2)(a)(i) to (v) or Section 34(2)(b)(i) and (ii), or Section 28(1)(a) or 28(3) read with Section 34(2)(b)(ii) of the Act, are made out."*

The Hon'ble Apex Court in **ONGC V Saw Pipes Limited (Supra)** has also held that the challenges that may be mounted under the provisions of the Section 34 are as follows:

“A. (1) *The Court can set aside the arbitral award under Section 34(2) of the Act if the party making the application furnishes proof that:--*

*(3) The award could be set aside if it is against the public policy of India, that is to say, if it is contrary to:--*

- (a) fundamental policy of Indian law;*
- (b) the interest of India; or*
- (c) justice or morality, or*
- (d) if it is patently illegal.*
- (4) It could be challenged:--*
  - (a) as provided under Section 13(5); and*
  - (b) Section 16(6) of the Act."*

Further in the case of **R.S. Avtar Singh v NPCC Ltd(supra)** the Delhi High Court held as under:

*"It is a well settled principle of law that the award of the arbitrator who is a chosen Judge of facts and of law, between the parties, cannot be set aside unless the error is apparent on the face of the award or from the award it can be inferred that the arbitrator has mis-conducted himself or the proceedings or that he has not applied his mind to the material facts. The court is not sitting in appeal on the award of the arbitrator nor can re-assess and re-examine the material which was adduced before the arbitrator. The Court cannot examine the correctness of the award on merits nor is it obligatory for the arbitrator to give detailed reasons. The Court unless come to the conclusion that the award is preposterous or absurd cannot set it aside nor can substitute its own decision in place of the arbitrator. It will be for the arbitrator to interpret the contract between the parties. If the arbitrator takes a reasonable view on the construction of a clause, the Court will not interfere unless the view is perverse. The award is not open to challenge on the ground that the arbitrator has reached a wrong conclusion or has failed to appreciate the facts. The arbitrator being the final judge of facts and law, the Court will interfere only if the arbitrator arrives at inconsistent conclusion even on his own finding or arrives at*

*a decision ignoring the material document. The Court may differ in arriving at the decision but unless as pointed out above, the Court cannot set aside the award. That being the settled legal position, what we have to see in the facts and circumstances of this case is whether there is any error pointed out by the objector for which the award could be set aside?"*

The Hon'ble Apex Court in the case of **Steel Authority of India Limited v. Gupta Brother Steel Tubes Limited, (supra)** has also held that : "29. *The legal position is no more res integra that the arbitrator having been made the final arbiter of resolution of disputes between the parties, the award is not open to challenge on the ground that arbitrator has reached at a wrong conclusion. The courts do not interfere with the conclusion of the arbitrator even with regard to construction of a contract, if it is a possible view of the matter. The words "no award shall be set aside" in Section 30 mandate the courts not to set, aside the award on the ground other than those specified in Section 30. In a case such as this, where the arbitrator has given elaborate reasons that compensation Clause 7.2 is not attracted for the breaches for which the compensation has been claimed by the respondent and such view of the arbitrator is a possible view, we are afraid in the circumstances, award is not amenable to correction by the court.*"

**51]** Therefore in light of the aforesaid decisions and findings discussed in the aforesaid paragraphs, this court finds that no substantial grounds of challenge under Section 34 of the Act has been raised by the Petitioner to merit any interference by this Court with the impugned Arbitral Award dated 19.06.2011 and subsequently finds no reason to interfere with the decision of the Learned Addl. District Judge in Arb. case no. 3/2011, dated 30.04.2013, who

had rightfully opined that the award was not in violation of the Contract or section 34 of the Act.

Accordingly, the instant Arbitration Appeal No. 1 of 2013 stands dismissed and disposed of.

**52]** No cost imposed.

**53]** LCR to be returned.

**JUDGE**

**Comparing Assistant**